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Laura Nakashima

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COMMENTS

VISUAL ARTISTS’ MORAL RIGHTS IN THE UNITED STATES: AN ANALYSIS OF THE OVERLOOKED NEED FOR STATES TO TAKE ACTION

Laura Nakashima*

I. INTRODUCTION

Andy Warhol once said, “In the future everyone will be famous for fifteen minutes.”¹ Yet in the case of artists such as Warhol, the fame lingers much longer, for their reputations are directly tied to the works of art they create and share with the world. The doctrine of moral rights recognizes that artists invest a part of themselves in the works they create, and as such, certain acts against the artists or their work jeopardize the artists’ reputation.² The doctrine realizes that allowing such acts to occur produces disincentives for artists to create, which harms the society that is then deprived of the artists’ creations.³

Andy Warhol illustrates the point. One of his most famous paintings depicts nothing more than a can of Campbell’s tomato soup.⁴ Some perceive the painting as a masterful piece of fine art, while others find the painting

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* Comments Editor, Santa Clara Law Review, Volume 41. J.D. candidate, Santa Clara University School of Law; B.A., University of California, Santa Barbara.


4. Titled Campbell’s Soup Can (1964), this painting is located in the Leo Castelli Gallery, New York. Its copyright holder is the Andy Warhol Foundation for the Visual Arts/Artists Rights Society (ARS), New York.
unremarkable. However, for reasons personal to Warhol, he felt compelled to create this painting and craft it in such a way that he was proud enough to share it with the public.

Now suppose this painting was sold, and the new owner decided to alter it by adding the words, "Fat Free." The doctrine of moral rights recognizes that such an alteration would violate the integrity of the artist's work. Thus, the doctrine of moral rights maintains that Warhol, as the artist, should control the portrayal of his work since it is a direct reflection of his personality.

In contrast to copyright laws, which seek to protect economic rights, the doctrine of moral rights seeks to protect the artists' personality rights in their works. Whereas many countries have long protected artists' moral rights in compliance with their membership in the Berne Convention for the Protection of Literary and Artistic Works, the United States only recently joined the Convention on March 1, 1989 because of its longstanding difficulties in recognizing artists' moral rights. The difficulties stemmed from balancing varying interests with Congress trying to protect artists' moral rights without interfering with the American copyright system.

While Congress struggled with this careful balance, some states took the initiative to protect artists' moral rights by passing their own statutes. Nonetheless, some criticized

5. See Roeder, supra note 2.
6. See id.
7. See generally Paul Geller, Comments on Possible U.S. Compliance with Article 6bis of the Berne Convention, 10 COLUM.-VLA J.L. & ARTS 665, 678 (1986) (explaining how U.S. copyright law provides economic incentives to creators to share their works, yet how "once the threshold is crossed" and the work is before the public, it is unclear as to what extent an author's privacy interest in controlling the form in which his work reaches the public should be).
10. See infra notes 34-38 and accompanying text.
these state statutes as inadequate protection for artists and urged Congress to pass a federal law that would provide uniformity in the states' patchwork of protections and better comply with the more protective standards of the Berne Convention.\textsuperscript{12}

Congress passed the Visual Artists Rights Act of 1990 ("VARA") as its supposed answer to these requests.\textsuperscript{13} However, VARA's application is extremely limited and, in many respects, more restricted than some of the state statutes.\textsuperscript{14} In fact, in the more than nine years since VARA's passage, VARA has produced only a single, clear-cut victory for artists.\textsuperscript{15} This leads to the questions: can state statutes better protect artists' moral rights by supplementing VARA, and if so, should more states pass such statutes?

This comment analyzes VARA's narrow application and examines whether it would be better to protect artists' moral rights through state statutes that would supplement the protections granted under VARA. VARA's shortcomings are not highlighted for the purpose of suggesting its outright failure or urging more comprehensive federal protections; rather, they are used to establish that VARA provides artists with a minimum threshold of protection, and to emphasize the importance that state statutes play in strengthening this protection. In Part II, this comment reviews the background of the doctrine of moral rights.\textsuperscript{16} It begins with the history of moral rights and how it evolved in the United States,\textsuperscript{17} continues with an account of the moral rights protections in the United States,\textsuperscript{18} and then summarizes three major cases that have been brought under VARA.\textsuperscript{19} Part III questions whether state statutes can better protect artists' moral rights by supplementing VARA protections, and if so, whether more

\begin{itemize}
  \item \textsuperscript{14} See infra Part IV.
  \item \textsuperscript{15} See Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999).
  \item \textsuperscript{16} See infra Part II.A-C.
  \item \textsuperscript{17} See infra Part II.A.
  \item \textsuperscript{18} See infra Part II.B.
  \item \textsuperscript{19} See infra Part II.C.
\end{itemize}
states should enact such statutes. Part IV uses a hypothetical to compare VARA and the California Art Preservation Act of 1979 in order to demonstrate VARA's limitations, as well as to illustrate how states may offset such limitations and better protect artists' moral rights. Finally, Part V suggests ways in which state statutes may supplement VARA, and Part VI concludes by re-emphasizing the necessity of such state statutes.

II. BACKGROUND

A. History

The doctrine of moral rights originated in France as the civil law doctrine of "droit moral." Droit moral protects artists personality rights in their works of art based on the belief that an artist's personality is embodied in, and inseparable from, her work of art. As an artist creates, "[s]he projects into the world part of [her] personality and subjects it to the ravages of public use." Thus, injuring an artist's work of art also injures her reputation.

Many countries have long protected artists' moral rights in compliance with their membership in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), which has afforded comprehensive moral rights protection to authors since 1928. However, the United States resisted joining the Berne Convention for over a hundred years, in large part due to its difficulties in meeting the requirements of Article 6bis which requires

20. See infra Part III.
22. See infra Part IV.
23. See infra Part V.
24. See infra Part VI.
25. See supra note 2.
26. Because the law analyzed in this comment only protects visual artists, the term "artists" is used throughout. However, note that the doctrine of droit moral protects all authors and creators.
28. Roeder, supra note 2, at 557.
29. See id.
member countries to recognize moral rights. Specifically, Article 6bis provides:

(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiration of the economic rights . . . .

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

As one early scholar of moral rights noted, “[a]gitation to revise our copyright law so as to make the United States eligible for membership [was] constant and powerful.” Congress strained to balance a multitude of different interests, seeking to protect “the legitimate interests of visual artists without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system.” Some argued that moral rights would hinder the production and distribution of copyrighted works, while others feared that moral rights for authors would force editors to obtain prior approval of all revisions by authors. These and other issues spurred extensive debate, which provided an

34. Roeder, supra note 2, at 557.
38. See id.
enlightening backdrop to the circumstances surrounding and leading up to the United States' membership in the Berne Convention. 39

On March 1, 1989, the United States joined the Berne Convention. 40 The Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention 41 reported that the totality of existing United States law sufficiently complied with Article 6bis, even absent a federal statute. 42 The totality of existing law consisted of state statutes that protected moral rights, as well as existing copyright, trademark, contract, and tort law. 43 Congress agreed with the Working Group's report, particularly after comparing its laws with those of other Berne member countries, and entered the United States into the Berne Convention. 44 Some criticized Congress's "minimalist approach," citing Congress's desire to "attain the maximum benefits that adherence to Berne could bring while shouldering the minimum burdens." 45

However, one year later Congress passed the Visual Artists Rights Act of 1990 ("VARA"), 46 despite its earlier conviction that existing federal and state law adequately protected artists' moral rights to the standard of Article 6bis. 47 In enacting VARA, Congress sought to strengthen its commitment to the Berne Convention 48 and to provide uniformity to national copyright laws, believing that a uniform, federal law would more effectively stimulate artists'

40. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.); see also Damich, supra note 12, at 292 (explaining that although the United States' adherence to the Berne Convention made major changes to U.S. copyright law, the United States did not enact federal legislation in order to conform to Article 6bis).
43. See supra note 40.
45. VerSteeg, supra note 37, at 832.
47. See supra notes 39-42 and accompanying text.
creativity.\footnote{49} Consistent with France's rationale underlying droit moral,\footnote{50} Congress recognized the benefit to the general public in protecting artists' moral rights. As stated in the House Reports, "[a]rtists play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly."\footnote{51}

With the passage of VARA, the current issues surrounding moral rights extend past whether the United States should recognize moral rights and instead focus on how to best recognize moral rights and balance the many competing interests.\footnote{52} As one scholar in 1989 recognized in witnessing the United States' adherence to the Berne Convention and the growth of state moral rights statutes, "moral rights protection is an 'idea whose time has come.'"\footnote{53}

B. Moral Rights Protections in the United States

1. Visual Artists Rights Act of 1990 ("VARA")

VARA serves to protect the reputation of certain visual artists and the reputation of their works of art.\footnote{54} Its application is limited to "works of visual art," narrowly defined as:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition
purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.\textsuperscript{55}

It is important to recognize that this definition is not synonymous with any other definition in the Copyright Act,\textsuperscript{56} which is precisely what Congress intended.\textsuperscript{57} As emphasized in the legislative history, "[W]e would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered . . . . [T]his legislation covers only a very select group of artists."\textsuperscript{58}

Works excluded from protection include, among other things, works for hire, posters, charts, motion pictures and other audiovisual works, merchandising items, and advertising or promotional materials.\textsuperscript{59}

VARA grants artists: (1) the right of attribution,\textsuperscript{60} which allows them to claim authorship in their work and to prevent misattribution of their work;\textsuperscript{61} and (2) the right of integrity,\textsuperscript{62} which allows them to protect their works against modifications and destructions that are prejudicial to their honor or reputations.\textsuperscript{63} These rights vest solely in the artist.\textsuperscript{64} They are distinct from the exclusive ownership rights\textsuperscript{65} and may be waived,\textsuperscript{66} but may not be transferred.\textsuperscript{67} A valid waiver must be in writing, specifically identifying the work and the uses of that work, and be signed by the artist.\textsuperscript{68}

Not considered a distortion, mutilation, or other modification protected by VARA, are modifications that result from the passage of time or the inherent nature of the materials.\textsuperscript{69} Further, in respect of the current practices of the

\textsuperscript{56} See id.
\textsuperscript{58} Id. (statement of Representative Markey).
\textsuperscript{60} See id. § 106A(a)(1).
\textsuperscript{61} See id.
\textsuperscript{62} See id. § 106A(a)(2)-(3).
\textsuperscript{63} See id.
\textsuperscript{64} See id. § 106A(b).
\textsuperscript{66} See id. § 106A(e).
\textsuperscript{67} See id.
\textsuperscript{68} See id. § 106A(e)(1).
\textsuperscript{69} See id. § 106A(c)(1).
artistic community, modifications that result from conservation or public presentation of the work, including lighting and placement (unless caused by gross negligence), are also not considered a distortion, mutilation, or other modification.\textsuperscript{70} Finally, any reproduction, depiction, portrayal, or other use of a work is also not deemed a distortion, mutilation, or other modification.\textsuperscript{71}

In contrast to the moral rights in Article 6bis of the Berne Convention that endure after the artist's death at least until the expiration of the economic rights,\textsuperscript{72} the rights granted by VARA only last for the life of the artist.\textsuperscript{73} This is also in contrast to the duration of economic rights granted under the Copyright Act, which last for the life of the artist plus fifty years.\textsuperscript{74} While the House bill extended the duration to the term applied to economic rights, the life of the artist plus fifty years,\textsuperscript{75} the Senate deliberately shortened the duration to the life of the artist.\textsuperscript{76} In doing so, the Senate cited the existence of state statutes that extended the duration of rights to the life of the artist plus fifty years, claiming that these state statutes enabled the United States to comply with the Berne Convention.\textsuperscript{77}

VARA applies to works created before its effective date of June 1, 1991, so long as the title to such work has not been transferred from the artist as of VARA's effective date.\textsuperscript{78} VARA also applies to works created after its effective date, but does not include any destruction, distortion, mutilation, or other modification of a work that occurred before the effective date.\textsuperscript{79}

VARA preempts all legal or equitable rights that are equivalent to any of its rights.\textsuperscript{80} However, VARA does not preempt: (1) any cause of action commenced before VARA's

\textsuperscript{70} See id. § 106A(c)(2).
\textsuperscript{72} See Berne Convention for the Protection of Literary and Artistic Works, supra note 33, at 5.
\textsuperscript{73} See 17 U.S.C. § 106A(d)(1).
\textsuperscript{74} See id. §§ 302-303.
\textsuperscript{76} See 136 CONG. REC. 36,948 (1990).
\textsuperscript{77} See id.
\textsuperscript{79} See id.
\textsuperscript{80} See 17 U.S.C. § 301(f)(1).
effective date;\textsuperscript{81} (2) rights that are not equivalent to VARA rights;\textsuperscript{82} and (3) rights that extend beyond the artist's life.\textsuperscript{83} It is important to note that the Senate narrowed the reach of VARA's preemption power to ensure that it would not preempt certain portions of state statutes.\textsuperscript{84} Specifically, the Senate believed that in light of its limitation on the duration of rights afforded by VARA, it was "necessary" to restrict the reach of VARA's preemption power in order to ensure compatibility with the Berne Convention.\textsuperscript{85} Simply stated, the Senate sought to ensure that the state and common law rights that survive the death of the artist were not preempted by VARA.\textsuperscript{86} However, the preemption power of VARA has not yet been tested.

Remedies under VARA mirror those provided under the Copyright Act with the sole exception of criminal offenses.\textsuperscript{87} Thus, an artist who wins a VARA claim may generally obtain an injunction,\textsuperscript{88} obtain damages,\textsuperscript{89} and recover costs and attorneys' fees.\textsuperscript{90}

Finally, it is important to recognize that although VARA marks a major advance for American artists, commentators stress that it still does not bring United States law into compliance with Article 6bis of the Berne Convention.\textsuperscript{91} They point to, among other considerations, VARA's limited scope of works protected, the limited artists' rights protected, and the limited duration of the rights granted.\textsuperscript{92}

2. State Statutes

State statutes have played a dualist role in the history of moral rights in the United States. At times they have been criticized for their inability to substantially protect artists' moral rights,\textsuperscript{93} with some going so far as to discourage their

\textsuperscript{81.} See id. § 301(f)(2)(A).
\textsuperscript{82.} See id. § 301(f)(2)(B).
\textsuperscript{83.} See id. § 301(f)(2)(C).
\textsuperscript{84.} See 136 CONG. REC. 36,948 (1990).
\textsuperscript{85.} See id.
\textsuperscript{86.} See id.
\textsuperscript{88.} See id. § 502.
\textsuperscript{89.} See id. § 504.
\textsuperscript{90.} See id. § 505.
\textsuperscript{91.} See Damich, supra note 12, at 292.
\textsuperscript{92.} See id. at 293.
\textsuperscript{93.} See Cline, supra note 12; see also Damich, supra note 12.
enactment altogether. At other times they have played a critical role in recognizing moral rights in the United States, with some lauding them as the strongest protection of United States law in meeting the standards of Article 6bis, which enabled the United States to join the Berne Convention.

Prior to the enactment of VARA, eleven states had already adopted their own laws protecting artists' moral rights. California enacted the California Art Preservation Act of 1979 ("California Act"), making it the first law in the United States that specifically protected artists' moral rights. This and other state laws were seen by some as merely "applying first aid to a wound that needs a Congressional transplant," which explains in part why more states failed to pass moral rights legislation. Other criticisms which explain why a greater number of states failed to pass laws protecting artists' moral rights include: (1) state statutes recognizing moral rights in a limited class of works (only visual & graphic arts); (2) the undermining effect that the qualifications placed on the rights of respect and attribution played; (3) the complete waivability of moral rights defeating the purpose of the statutes; and (4) the question of whether state statutes can exist at all due to preemption. Critics also cited the "predictable failure of state legislation as the source of artist protection" on fundamental questions involving Constitutional attacks and the need for uniformity. These and other criticisms led some to advise states without statutes protecting artists' moral rights to simply "do nothing."

These criticisms must be kept in context, for they were made before VARA's enactment and primarily used to urge the enactment of federal legislation, demonstrating that state

94. See Cline, supra note 12, at 448.
95. Compare VerSteeg, supra note 9, at 833. ("Of the four prongs that were supposed to make United States law equivalent to Article 6bis, the state legislation was probably the strongest.").
96. See supra note 11.
98. Cline, supra note 12, at 448.
99. See generally Damich, supra note 12, at 293.
100. See id.
101. See id.
102. See id.
103. See id.
104. See Cline, supra note 12, at 448-50.
105. Id. at 448.
laws alone were insufficient to protect artists' moral rights.\textsuperscript{106} Thus, despite the criticisms that state statutes have faced, their importance cannot be minimized or overlooked. In asserting its adherence to Article 6bis of the Berne Convention, Congress expressly pointed to state statutes as part of its justification that American law met the standards required by the Article.\textsuperscript{107} As mentioned above, the Senate cited the "necessity" of state statutes in ensuring the United States' compliance with the Berne Convention regarding duration of artists' moral rights in enacting VARA.\textsuperscript{108} Furthermore, state statutes formed the basis for federal legislation, including the bill that eventually became codified into VARA.\textsuperscript{109}

Since VARA's enactment in 1990 only three states have subsequently passed moral rights statutes,\textsuperscript{110} bringing the number of states that currently have laws protecting artists' moral rights to fourteen.\textsuperscript{111} While a detailed, comparative analysis of the different state statutes is beyond the scope of this comment,\textsuperscript{112} certain points should be highlighted. A recent article neatly grouped the existing state statutes into three categories.\textsuperscript{113}

The first category includes state statutes aimed at protecting different interests, including the artist's personality interest, the artist's interest in her reputation, and the public's interest in the preservation of art.\textsuperscript{114} Included in this category are the laws of California, Connecticut, Massachusetts, Pennsylvania, and Rhode Island.\textsuperscript{115} For example, under the California Act,\textsuperscript{116} artists' rights endure for the life of the artist plus fifty years and are enforceable by the artists' heirs, legatees, or personal

\textsuperscript{106} See Cline, supra note 12; see also Damich, supra note 12.

\textsuperscript{107} See 136 CONG. REC. 36,948 (1990).

\textsuperscript{108} See id.

\textsuperscript{109} See Cline, supra note 12, at 444 n.90 (statement of Senator Kennedy that the California and Massachusetts moral rights statutes formed the basis for the federal legislation).

\textsuperscript{110} See NEV. REV. STAT. ANN. § 597.720 (Michie 1997); UTAH CODE ANN. § 9-6-409 (1996); S.D. CODIFIED LAWS § 1-22-16 (Michie 1992).

\textsuperscript{111} See supra notes 11, 110.

\textsuperscript{112} For a detailed analysis comparing the state statutes, see Damich, supra note 12, Zlatarski, supra note 35, at 215-19.

\textsuperscript{113} See Zlatarski, supra note 35, at 217-20.

\textsuperscript{114} See id. at 217-18.

\textsuperscript{115} See id. at 218.

Artists may also obtain punitive damages that, if granted, are paid to an organization involved in charitable or educational activities pertaining to fine arts. The Massachusetts statute has been recognized as the most comprehensive in terms of works protected, even protecting motion pictures, which many states do not protect. Accordingly, these state statutes afford the artist and the public greater protections.

The second category includes state statutes with the narrower objective of protecting the artist's reputation. Arguably, these statutes do not provide artists with powerful moral rights protection. For example, the rights protected under the 1983 New York Artists' Authorship Act only endure for the life of the artist. Included in this category are the laws of New York, Louisiana, Maine, and New Jersey.

The last category includes state statutes with even more limited moral rights protection for artists. Included in this category are the laws of Illinois, Nevada, New Mexico, South Dakota, and Utah. Interestingly, the three state statutes passed after VARA's enactment fall into this category.

Perhaps one of the greatest uncertainties now associated with state statutes protecting artists' moral rights deals with the issue of preemption. As mentioned above, VARA's preemption power over state statutes has not yet been tested. In the landmark case of Goldstein v. California, the Court extensively examined the history of federal copyright legislation and found that Congress "evidenced no intent either expressly or implicitly to occupy the entire copyright field and bar the states from exercising concurrent power." Whether this rationale applies to the area of artists' moral

117. See id. § 987(g)(1).
118. See id. § 987(e)(3).
119. See Damich, supra note 12, at 298-99.
120. See Zlatarski, supra note 35, at 218-19.
121. See id.
122. See id. at 218.
123. See id. at 220.
124. See id.
125. See id.
126. See supra note 110.
127. See generally Kwall, supra note 35.
rights remains to be seen. However, the same commentators who have noted VARA's shortcomings have advised that VARA's preemption provision "be given a narrow reading to allow the more expansive protections of state moral rights statutes to continue to bring American law closer to the requirements of Article 6bis."\(^3\)

The legislative history further illustrates this point. Whereas the House supported a strong, uniform Federal law and "the concomitant preemption of State law where appropriate,"\(^3\) the Senate narrowed VARA's preemption power to ensure that state laws were free to extend protection for artists' moral rights beyond those provided for in VARA and thereby ensure the United States' continued compliance with the Berne Convention.\(^3\) In doing so, the Senate expressly stated that, "Congress does not intend to preempt section 989 of the California Civil Code, the 'cultural heritage protection,' or any other similar State code."\(^3\)

3. Other Protections

Particularly before VARA's enactment, artists, attorneys, and judges alike creatively utilized other protections in protecting artists' moral rights.\(^1\) For example, the plaintiffs in Gilliam v. American Broadcasting Co. successfully used section 43 of the Lanham Trademark Act to convince the Court of Appeals for the Second Circuit that they should have their work attributed to them in the form in which they created it.\(^5\) Other grounds used by plaintiffs have included libel\(^6\) and rights of privacy or publicity.\(^7\) However, an analysis of these protections is beyond the scope of this comment.

C. Case Law Under VARA

A number of cases have been brought under VARA. However, the majority of those cases were resolved with little

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133. Id. (emphasis added).
134. See generally Kwall, supra note 35.
136. See generally Kwall, supra note 35.
137. See generally id.
or no interpretation of VARA. In many cases, the courts found VARA inapplicable because the plaintiff's work did not constitute a "work of visual art." These cases provide little insight into the application of VARA, yet they reflect precisely the narrow scope of protection that Congress intended to afford artists in enacting VARA.

VARA was first applied in *Carter v. Helmsley-Spear, Inc.* The district court enjoined removal or destruction of the plaintiff's sculpture that was in the lobby of defendants' commercial building. The court rejected the defendants' claim that the sculpture was a work-for-hire, excluded under VARA, and instead found that the plaintiffs were independent contractors. Finding the sculpture to be of "recognized stature," the court prohibited its destruction during the lifetime of the plaintiffs. The district court also upheld VARA against the defendant's arguments that it was unconstitutional under the takings clause and that it substantially diminished the value of defendant's property. However, the Court of Appeals for the Second Circuit found that the plaintiff's sculpture was a work-for-hire and that, therefore, VARA could not apply. Nonetheless, the court of appeals upheld all other holdings of the district court, so although the plaintiffs in *Carter* did not fall under the

138. See, e.g., Shaw v. Rizzoli Int'l. Publications, Inc., No. 96 CIV. 4259 (JGK), 1999 WL 160084 (S.D.N.Y. Mar. 23, 1999) (VARA was one of the plaintiff's ten claims filed and this claim was dismissed); English v. BFC & R East 11th Street, No. 97 CIV. 7446 (HB), 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997) (finding VARA inapplicable to artworks that are illegally placed on another's property without consent when that artwork cannot be removed from the site in question); Kaplan v. Lily of France, No. 95 CIV. 1046 (SHS) (THK), 1996 WL 297088 (S.D.N.Y. June 4, 1996) (resolving issues on the state claims because the plaintiff inadequately pleaded a VARA claim); Gegenhuber v. Hystopolis Prods., Inc., No. 92 C 1055, 1992 WL 168836 (N.D. Ill. Jul. 13, 1992) (using VARA to remove the case to federal court in an attempt to preempt the plaintiff's state claims).


140. 71 F.3d 77 (2d Cir. 1995).

141. See id. at 77.

142. See id.

143. See id.

144. See id.

146. See id. at 88.

146. See *Carter*, 71 F.3d at 80.

147. See id. at 77.

148. See id.
umbrella of VARA's protection, the case was important in establishing several tests that have been subsequently applied in cases brought under VARA.149

The plaintiff in Pavia v. 1120 Avenue of the Americas Associates150 asked the Southern District Court of New York to again consider VARA. The plaintiff, a professional artist and sculptor, brought an action against the defendants for improperly displaying and mutilating his artwork in violation of VARA and the New York Arts and Cultural Affairs Law.151 The plaintiff claimed that the improper display of his sculpture damaged his honor and reputation as an artist.162

The court found that the plaintiff's sculpture fell within the category of works protected under VARA and the New York Arts and Cultural Affairs Law.153 Citing section 610(b)(2) of VARA, the district court also found that the plaintiff's sculpture was not excluded from VARA's protection because it was created prior to VARA's effective date and the plaintiff had retained title to the sculpture.164 However, the court barred the plaintiff's VARA claims because the defendant's improper display occurred before VARA's effective date.155

The district court recognized that the improper display of the plaintiff's sculpture could be interpreted as occurring after VARA's effective date since the improper display was continuous.166 In examining the legislative history, the court concluded that "distortion, mutilation, and modification", regardless of any possible broader meaning in the general context of the statute, does not arise from continued display for the purposes of applying section 610(b)(2), and the acts alleged by [plaintiff] do not give rise to any rights under VARA."157

Since the court barred the VARA claims, it did not need to reach the issue of whether VARA preempted the New York

149. This case analyzed, in detail, the work-for-hire test and established a two-prong test to determine whether a work of visual art is one of "recognized stature." See id.
151. See id.
152. See id. at 624.
153. See id. at 624-25, 627.
154. See id. at 626-27.
155. See id. at 628-29.
157. Id. at 629 (emphasis added).
Arts and Cultural Affairs Law. It did, however, note that “whether the rights conferred by VARA are equivalent to those of [the New York Arts and Cultural Affairs Law] ‘will occupy courts for years to come . . .”

Despite his VARA claims being dismissed, the plaintiff’s claims under the New York Arts and Cultural Affairs Law were upheld. The court found that a new cause of action accrued each day that the piece was improperly displayed.

Martin v. City of Indianapolis, the most recent application of VARA, marks the “first clear-cut winner under VARA, resulting in summary judgment [for the artist].” The plaintiff, Jan Martin, created a steel sculpture on a plot of land that was later sold to the defendant, the City of Indianapolis, as part of an urban renewal plan. Before Martin began creating the sculpture he obtained approval from the City, at which time he signed a project agreement. The project agreement provided that if the sculpture was determined to no longer be compatible with the surrounding land use or if the property was acquired as part of the urban renewal plan, Martin would receive a written notice giving him ninety days to remove the sculpture. However, without giving Martin any prior notice, the City demolished the sculpture, and Martin brought suit.

Using the test established in Carter v. Helmsley-Spear, Inc., the Court of Appeals for the Seventh Circuit determined that the plaintiff’s work was a work of “recognized stature.” The court also dismissed the City’s claim that Martin had waived his VARA rights in the project agreement. The Court of Appeals for the Seventh Circuit confirmed the district court’s summary judgment in favor of

158. See id. at 626-27.
159. Id. at 626 (citing Charles Ossola, Law for Art’s Sake, THE RECORDER, Jan. 8, 1991, at 6).
160. See id. at 620.
161. See id. at 625-26.
162. 192 F.3d 608 (7th Cir. 1999).
164. See Martin, 192 F.3d at 610-11.
165. See id.
166. See id.
167. See id.
168. 71 F.3d 77 (2d Cir. 1995).
169. See Martin, 192 F.3d at 612-13.
170. See id. at 613-14.
III. IDENTIFICATION OF THE PROBLEM

For many years there was pressure for Congress to enact federal law protecting artists' moral rights. When Congress finally did enact such a law, VARA, it purposely narrowed its application in order to balance the many competing interests surrounding the recognition of moral rights. Yet in over nine years since its enactment, VARA has produced only a single, clear-cut victory for artists, and in that case, it was brought only after the artist's work had already been destroyed. Thus, case law confirms VARA's constricted application and raises the questions: can state statutes better protect artists' moral rights by supplementing VARA, and if so, should more states pass such statutes?

IV. ANALYSIS

Recall that the artist in Pavia v. 1120 Avenue of the Americas Associates brought suit under the New York Arts and Cultural Affairs Law and VARA, yet because the improper display of the artist's work occurred before VARA's effective date, VARA could not apply. The artist recovered solely under New York's statute protecting artists' moral rights. Had the events of Pavia occurred in a state without a statute protecting artists' moral rights, such as Indiana, the artist would have had no valid claim or recompense for the improper display of his sculpture. Alternatively, the artist in Martin v. City of Indianapolis brought suit and recovered solely under VARA because the state of Indiana had no law protecting artists' moral rights. Had the demolition of the artist's sculpture in Martin occurred in a state with a statute protecting artists' moral rights, such as California, the artist

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171. See id. at 609.
172. See supra note 33.
174. See Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999).
175. See supra Part II.C.
177. See id.
178. See id.
179. See id.
180. 192 F.3d 608 (7th Cir. 1999).
181. See id.
would have recovered greater damages than those allowed by VARA. Together these cases illustrate the importance that state statutes play and can further play, respectively, in protecting artists' moral rights in connection with VARA. To further demonstrate this point, consider the following hypothetical.

It is the year 2000 and Artist Anne is a struggling painter who is making a name for herself in the art community. She sells her paintings at local art fairs throughout the state of California and believes that one of her paintings, entitled, “The Sea,” will be well-received, so she creates 225 copies. She signs them, but does not consecutively number them. As expected, Artist Anne immediately sells all 225 copies. In fact, “The Sea” brings Artist Anne critical acclaim and success.

A local university purchases and displays one copy of “The Sea,” which after many years of public display is badly dirtied. In the process of cleaning the painting, the university negligently punctures and rips it. However, due to the popularity of “The Sea” and the publicity associated with displaying a piece by Artist Anne, the university decides to display the painting in its damaged state. Artist Anne has since died and her heirs seek to enjoin the university's continued display of “The Sea” and to recover damages. They file suit in federal court under a VARA claim and a claim under the California Act.

A. Duration and Standing

The rights granted under VARA vest solely in the artist and terminate upon the artist's death. In limiting the duration of VARA's protected rights to the life of the artist, Congress cited the existence of state statutes that extended the duration of rights to the life of the artist plus fifty years, and claimed that these state statutes enabled the United States to comply with the Berne Convention. In doing so, Congress conceded VARA's lack of compliance with the Berne Convention in the area of duration of rights and also recognized the necessity of state statutes. Congress further asserted that states may extend the duration of moral rights

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183. See supra notes 84-86 and accompanying text.
184. See id.
protection beyond that granted in VARA, and that such provisions of state statutes would not be preempted. This is particularly important to recognize in light of case law that demonstrates defendants utilizing VARA as a means of preempting and defeating artists’ state-based claims.

The California Act is one of the state statutes that extends the duration of its rights granted until the fiftieth anniversary of the artist’s death. It also expressly provides that if the artist is deceased, her heir, beneficiary, devisee, or personal representative may enforce the artist’s moral rights. Some states, such as Massachusetts and New Mexico, allow even greater protection by allowing organizations and the attorney general to exercise the artist’s rights in certain circumstances.

Based on the above, Artist Anne’s heirs would fail as proper claimants in their VARA suit and would be prohibited from defending her moral rights. Yet Artist Anne’s heirs would qualify as proper claimants under the California Act. While the university may argue that VARA preempts the California Act, Artist Anne’s heirs are ensured that her rights under the California Act will sustain a preemption attack and will be preserved until the fiftieth anniversary of her death. This demonstrates one of the disparate results that a VARA claim and a state claim may bring.

Martin v. City of Indianapolis also illustrates the difference between VARA and state statutes. In that case, had the City of Indianapolis demolished Martin’s sculpture even one day after his death, Martin’s heirs would have lacked standing to bring suit against the City, despite the fact that all other facts of the case supported a clear-cut win under VARA.

188. See id.
189. See Damich, supra note 12, at 319-20 n.140.
190. See supra note 182.
191. See supra note 187.
192. See supra notes 182-183 and accompanying text.
193. See Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999).
194. See supra note 181 and accompanying text.
195. See Martin, 192 F.3d at 608.
B. Subject Matter Protected

For purposes of this analysis, assume that Artist Anne's heirs have standing to bring a suit under VARA. Their next task is establishing that the university's copy of "The Sea" is a work covered under VARA. Case law indicates that courts strictly construe the subject matter protected by VARA and are wary of attributing new meaning to it. The facts surrounding Pavia v. 1120 Avenue of the Americas Associates support this point. Thus, a court here would likely find that "The Sea" falls outside of a "work of visual art" protected by VARA because it was produced in a number of copies exceeding two hundred and was not consecutively numbered as required for protection.

Artist Anne's heirs have a greater likelihood of establishing that "The Sea" is a work protected by the California Act. The California Act protects "fine art," which includes "an original painting . . . of recognized quality, and of substantial public interest." Unlike VARA, it does not place restrictions upon the number of copies that may qualify a work as "original" or require consecutive numbering. Artist Anne's heirs may establish that "The Sea" is of "recognized quality" and "substantial public interest" based on any opinions of those in the art community.

While some have criticized the requirements placed on the subject matter protected by states, such requirements are arguably needed in order to avoid actions being brought for what has been called "schlock" art. As one commentator asked, "Should there be a cause of action for the destruction of a painting of Elvis Presley on black velvet?" It should also be pointed out that while some states, such as California,

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196. See, e.g., Gegenhuber v. Hystropolis Prods., Inc., 1992 WL 168836, at *4 (N.D. Ill., July 13, 1992) ("We will not read into VARA that which Congress has evidently chosen to leave out, for, having included extensive categories of works that do or do not constitute 'visual art,' Congress could have included works such as puppets, costumes and sets if it desired to afford them the protections of Section 106A.").
200. See id.
201. See id. § 987(f).
202. See Damich, supra note 12, at 297.
203. See id.
204. See id.
are much more specific about what types of art are eligible for moral rights' protection,\textsuperscript{205} other states opt for a more general definition of the visual and graphic arts protected.\textsuperscript{206} Such states allow even greater flexibility into determining what types of art may be protected. For example, Massachusetts has been recognized as providing the most comprehensive coverage of subject matter, which includes its protection of motion pictures that VARA expressly excludes from protection.\textsuperscript{207}

C. Rights Granted

For the purposes of this analysis, further assume that Artist Anne's heirs have standing to bring a suit under VARA and that the university's copy of "The Sea" falls under the subject matter covered by VARA. VARA still requires that Artist Anne's heirs establish that the university violated one of her moral rights.\textsuperscript{208} They would either have to show that the university intentionally modified their copy of "The Sea" in violation of Artist Anne's right of integrity,\textsuperscript{209} or qualify the damage to "The Sea" as "destruction," which would require them to show that the university was grossly negligent.\textsuperscript{210} Although the facts of the hypothetical are limited, it will likely be difficult for Artist Anne's heirs to prove that the university intentionally modified "The Sea" because the university may claim mere negligence in their attempts to restore the painting.\textsuperscript{211} Likewise, it may be difficult for Artist Anne's heirs to establish that the damage to "The Sea" constituted "destruction," particularly since the university still sought to display the painting.

Artist Anne's heirs have a greater chance of establishing a violation of Artist Anne's right of integrity under the California Act. The California Act prohibits those who restore a work of fine art from mutilating or altering the work by any act constituting gross negligence,\textsuperscript{212} which it defines as

\textsuperscript{205} See id. at 298.
\textsuperscript{206} See id.
\textsuperscript{207} See id. at 298 n.38.
\textsuperscript{209} See supra notes 62-63 and accompanying text.
\textsuperscript{210} See Damich, supra note 12, at 313-17.
\textsuperscript{211} The university would make this argument because even by conceding negligence, the "grossly negligent" standard required for a violation would not be satisfied. See Damich, supra note 12, at 313-17.
\textsuperscript{212} See CAL. CIV. CODE § 987(c)(2) (West 1982 & Supp. 1999).
the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art. Based on this standard, Artist Anne’s heirs would arguably have an easier time establishing that the university was grossly negligent in restoring “The Sea.”

It is important to note that preemption is a particular concern in the area of rights granted. Although the Senate narrowed the reach of VARA’s preemption, the House stated that “if a State attempts to grant an author the rights of attribution or integrity for works of visual art as defined in [VARA], those laws will be preempted.” This demonstrates the importance of states carefully defining the moral rights sought to be protected in order to avoid duplicating the definitions contained in VARA.

It is also important to note that states may grant rights that are beyond those protected in VARA. Specifically, Congress stated that sections such as § 989 of the California Act, which grants rights beyond those provided by VARA aimed at art preservation, will not be preempted.

D. Remedies

Finally, assuming that Artist Anne’s heirs have satisfied the elements of a successful VARA claim, their remedies will likely be limited. Although VARA provides for actual damages, it is often difficult for artists to establish actual damage to their reputation. And while Artist Anne’s heirs may recover statutory damages as provided by VARA, which is limited to a maximum amount of $20,000, they may not recover enhanced damages without proving that the university’s act was “willful.” Establishing “willful” conduct brings its own host of difficulties since the artist must produce evidence that the defendant knew or had reason to
know that the work was protected by copyright law.\textsuperscript{222}

Artist Anne’s heirs may be able to recover attorneys’ fees and costs under VARA,\textsuperscript{223} yet in the one case that has granted such a remedy, the court felt compelled to justify its award.\textsuperscript{224} It further justified granting the fees in order to “encourage artists to assert their VARA rights in court and to deter . . . destroying works of art in future [situations].”\textsuperscript{225}

While Artist Anne’s heirs may face the same problems in recovering remedies under the California Act, the California Act grants damages not provided for in VARA, namely, punitive damages.\textsuperscript{226} The California Act provides that if punitive damages are awarded, the court shall “select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive any punitive damages.”\textsuperscript{227} Although the punitive damages are allocated to a charitable organization rather than to the artist herself, it can be argued that the granting of punitive damages itself sends a message to would-be violators of artists’ moral rights that the state recognizes such violations as seriously worthy of protection. If one accepts the logic that granting attorneys’ fees and costs encourages other artists to assert their rights and sends a message that works of art deserve preservation and respect,\textsuperscript{228} then granting punitive rights can only further drive home this message.

\textit{Martin v. City of Indianapolis} again helpfully demonstrates the difference between VARA and state statutes.\textsuperscript{229} Had the facts of \textit{Martin} occurred in California and a concurrent claim was brought under the California Act, the artist in \textit{Martin} would have recovered an amount greater than the statutory damages and attorneys fees awarded to him. Nevertheless, Indiana had no law protecting artists’ moral rights and Martin’s recovery was limited to those granted under VARA.\textsuperscript{230}

\begin{footnotesize}
\textsuperscript{222} See id.
\textsuperscript{224} Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999) (citing the statutory damages award as insufficient compensation for the loss of the artist’s work and explaining that the issues involved were neither new nor complex).
\textsuperscript{227} Id.
\textsuperscript{228} See supra note 223.
\textsuperscript{229} Martin, 192 F.3d 608 (7th Cir. 1999).
\textsuperscript{230} See id.
\end{footnotesize}
E. Summary of Comparison

In sum, the VARA claim brought by Artist Anne's heirs would have been dismissed for several reasons. Not only would Artist Anne's heirs have failed to satisfy standing to sue based on the duration of rights terminating with the life of the author, but they would have failed to establish that "The Sea" was a "work of visual art" protected under VARA. Artist Anne's heirs would have also likely failed to convince the court that the university's act of damaging "The Sea" violated any rights under VARA. Finally, even if Artist Anne's heirs had succeeded in their VARA claim, their remedies would have been limited.

Quite differently, the California Act claim brought by Artist Anne's heirs would have been allowed. First, Artist Anne's heirs could satisfy standing based on the survivorship rights that the California Act provides. They could then establish that "The Sea" was a work of "fine art" protected under the California Act and that the university's act of harming the painting and then improperly displaying it constituted violations of Artist Anne's right of integrity. And finally, Artist Anne's heirs would have been eligible to recover greater damages than those provided by VARA, possibly including punitive damages.

Finally, this analysis would not be complete without addressing the argument that these state statutes create an uneven patchwork of varying rules and protections that defeat the uniformity that VARA sought to establish. However, this argument is easily addressed by pointing to case law brought under VARA, which indicates that because VARA is so narrowly applied, it fails to establish a comprehensive set of uniform standards and protections. Rather, as some commentators have already pointed out, VARA acts as a minimum threshold of protection, which is

231. See supra Part IV.A.
232. See supra Part IV.B.
233. See supra Part IV.C.
234. See supra Part IV.D.
235. See supra Part IV.A.
236. See supra Part IV.B.
237. See supra Part IV.C.
238. See supra Part IV.D.
239. See Cline, supra note 12; see also Damich, supra note 12.
240. See supra Part II.C.
241. See Zlatarski, supra note 35, at 222.
consistent with Congress's "minimalist approach" to recognizing moral rights even prior to VARA's enactment. 242

V. PROPOSAL

Despite the fact that both VARA and the California Act serve to protect artists' moral rights, the results of the hypothetical are largely disparate. Yet, one begins to quickly understand the differences that a VARA claim and a claim under a state statute may produce. One also begins to understand the need for states to pass statutes that protect artists' moral rights. For without state protection, artists are left with the minimum threshold of protection that VARA provides. Thus, this comment urges states to pass legislation that protects artists' moral rights in order to supplement the protections afforded by VARA.

In the area of duration, states should consider complying with the Berne Convention by extending the duration of protections to the life of the artist plus fifty years, 243 and allowing an artist's heirs, legatees or personal representatives standing to bring suit. 244 California, Connecticut, Massachusetts, and New Mexico are all examples of such coverage. 245 The policy supporting this duration of protections is strong in that it is expressly backed by Congress. 246 While Congress was safe in saying that it did not require states to extend moral rights past the death of the artist, 247 it did provide that VARA would allow states to provide such extended coverage. 248 An additional policy argument lies behind the argument that often artists' works are not recognized by the public until after their death, or perhaps even gain an elevated status after their death. Thus, the ability of an artist's heirs or personal representatives to preserve the artist's integrity in the work of art after his or her death becomes even more important.

242. See VerSteeg, supra note 37, at 832.
244. See id.
246. See supra Part IV.A.
248. See id.
Another way in which states may supplement VARA's protections is by protecting as broad a scope of work as possible. This would not only better protect artists in compliance with the Berne Convention, but also act as a net in "catching" those cases that are exempt from VARA's narrow subject matter protected. Massachusetts is a good role model, as it has been recognized as providing the most comprehensive coverage of subject matter, which includes its protection of motion pictures that VARA expressly excludes from protection.\textsuperscript{249}

States must be cautious in creating the moral rights to be protected, especially so as to avoid preemption by VARA. Here, the California Act is a good role model for the right of integrity, as it has been praised for allowing artists to object to any modification of their work, including those that enhanced her reputation or those that were not attributed to her.\textsuperscript{250}

Finally, states may supplement the protections of VARA by expanding the remedies to include punitive damages. The California Act is a good example of one of the ways that states may allow for such damages.\textsuperscript{251} The same policy behind the \textit{Martin} court's rationale for granting attorneys' fees and costs to the artist lies behind allowing punitive damages, namely, to encourage artists to assert their moral rights in court and to deter modifications and destruction of works of art in the future.\textsuperscript{252}

With the passage of VARA, many of the states' justifications for withholding from enacting statutes no longer exist. While state statutes would ideally conform to the standards detailed above, artists would likely benefit from any state statutes as opposed to no state statutes at all. Even those states with existing statutes protecting artists' moral rights should consider the above modifications in order to better protect their artists by supplementing the protections of VARA.

\textsuperscript{249} See Damich, supra note 12, at 298 n.38.
\textsuperscript{251} See supra Part IV.D.
\textsuperscript{252} See supra note 223.
VI. CONCLUSION

The doctrine of moral rights serves the noble purpose of protecting artists’ personality rights in their works of art that they share with the world.\textsuperscript{253} For example, when one sees a painting of a can of Campbell’s tomato soup, one is instantly reminded of Andy Warhol. However, if one were to see a painting of a can of Campbell’s tomato soup with the words “Fat Free,” one would likely become confused and question why Andy Warhol would alter his work in such a way. By allowing artists to protect their personality rights embodied in their works of art, the doctrine of moral rights stimulates artists’ creativity, which then benefits the public who enjoys the artists’ works.\textsuperscript{254}

The doctrine of moral rights is finally coming of age in the United States. Congress’s decision to enact VARA was a step in the right direction, yet as case law has shown its limitations and narrow application prohibit it from more substantially protecting artists’ moral rights.\textsuperscript{255} In comparison, some state statutes fare more favorably because they can protect artists in ways that VARA does not.\textsuperscript{256} They not only better protect artists’ moral rights, but also have the added flexibility of being able to further protect such rights.\textsuperscript{257} Accordingly, this comment urges states to enact such statutes as a means of better protecting artists by supplementing the limited protections of VARA.

\textsuperscript{253} See Roeder, supra note 2.
\textsuperscript{254} See id.
\textsuperscript{255} See supra Part IV.A-D.
\textsuperscript{256} See supra Part IV.A-D.
\textsuperscript{257} See supra Part IV.A-D.