# Abstract

Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79 (1996)

Eric E. Bensen, *Note: The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996)

In her article, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*,[1] Professor Geri J. Yonover reminds us that art is both evolutionary and revolutionary. It hopefully teaches, inspires and even antagonizes people to create new artwork of their own. Because this process enriches society, copyright law[2] tries to reward artists for their existing works, while encouraging other artists to build upon what has come before and create new art.

Modeled after England's Statute of Anne[3] and rooted in the United States Constitution,[4] our statutory copyright scheme focuses on the economic rights of authors, artists and other copyright owners. It generally ignores the European concept of moral rights, or "droit moral," whereby an artist enjoys certain personal rights over his or her art because he or she is presumed to be intimately linked to the art. These rights may include, *inter alia*, the right not to have one's art partitioned, altered, mutilated or destroyed in a way that prejudices one's honor or reputation (i.e., the right of "integrity"); the right to be publicly associated with one's art (i.e, the right of "attribution"); the right to enjoin sales or public displays of one's art if it is tampered with; and the right to receive royalties from future resales of one's art as it appreciates in value (i.e., "droit de suite").[5]

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[1] 14 CARDOZO ARTS & ENT. L.J. 79 (1996).

[2] 17 U.S.C. §§ 101-1101 (1994).

[3] 8 Anne C. 19 (1710).

[4] "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

[5] Yonover at 88, 93-97.

This conceptual gap in our copyright law[6] was partially closed when Congress passed the Visual Artists Rights Act of 1990 ("VARA"),[7] apparently motivated by the need to strengthen our member status[8] in the Berne Convention, a multilateral treaty of international copyright protections.[9] Effective as of June 1, 1991, VARA established the moral rights of attribution and integrity[10] in the artist of a strictly defined "work of visual art."[11] These moral rights are personal, not economic, so they terminate upon the artist's death.[12]

The right of attribution gives an artist the right to claim authorship in his or her visual work, and the right to prevent being attributed to any visual work that he or she did not create, or which was distorted, mutilated or otherwise modified in a manner prejudicial to his or her

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[6] Professor Yonover points out that before 1990, at least eleven states already had laws protecting the moral rights of "integrity" and "attribution." However, these states' approaches were uneven and problematic because of the difficulty in deciding how to measure a moral right violation: e.g., good taste, artistic worth, political beliefs, moral concepts, etc. Note that aggrieved artists could also seek relief under other state law doctrines such as contract, invasion of privacy, defamation or unfair competition. At the federal level, the Lanham Act also provided for an unfair competition claim where defendant violated the integrity of plaintiff's work, making plaintiff subject to criticism. *Id.* at 94, 97; *see* 15 U.S.C. § 1125(a).

[7] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990), codified in various sections of the 1976 Copyright Act. 17 U.S.C. § 101 *et seq.*

[8] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988), codified at 17 U.S.C. §§ 401, 408, 411-412 (1994). Professor Yonover notes that VARA's legislative history is somewhat ambiguous as to whether Congress enacted it in order to comply with Berne requirements, or as a political compromise to resolve the heated debate over the propriety of "colorizing" old motion pictures. Yonover at 98-99. By contrast, in his Note entitled *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution* (*see infra*), Eric E. Bensen simply assumes that VARA was indeed enacted to comply with Berne. 24 HOFSTRA L. REV. 1127 (1996), pp. 1137-1138.

[9] Berne Convention for the Protection of Literary and Artistic Works (Paris, 1971).

[10] 17 U.S.C. § 106A (1994).

[11] In summary, 17 U.S.C. § 101 defines a "work of visual art" as a painting, drawing, print, photo or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the artist. All other works are excluded from the definition, and thus from VARA.

[12] 17 U.S.C. § 106A(d) (1994). Compare the current federal protections against copyright infringement, which exist for the author's life plus fifty years (for works created after Jan 1, 1978). 17 U.S.C. § 302(a) (1976).

honor or reputation.[13] The right of integrity allows the artist to prevent any such distortion, mutilation or modification, or to prevent any intentional or grossly negligent destruction of a work found to be of "recognized stature."[14]

While many artists vigorously exercise their moral rights in such countries as France, Italy, Germany and Canada, few American artists have brought cases under VARA.[15] This may be because the romantic idea of an artist retaining "moral" rights in his or her art does not fit easily into our Anglo-American copyright scheme, which focuses on economic rights. Our culture has only recently come to revere art, and view artists as popular icons and personalities. Even in Europe, the concept of art as individual expression, closely tied to the artist's honor and reputation, is fairly new.[16] It is also likely that our First Amendment tradition[17] has predisposed Americans to value free expression for all over one particular artist's moral rights, and to routinely assign reputational disputes to defamation law instead.[18]

Professor Yonover argues that the greatest hurdle for American moral rights is that our copyright law also recognizes a "fair use" defense for people who change existing art and build on it.[19] Most other countries protective of artists' moral rights deny such a defense. Professor Yonover illustrates the problem with a hypothetical involving Mr. Da Vinci, who has created a copyrighted work of visual art: a limited edition lithograph based on the Mona Lisa. Mr. Duchamp lawfully buys a copy, then paints a moustache on it and hangs it in a local art gallery. Da Vinci sues Duchamp in federal court for intentionally distorting, mutilating or modifying his work in a way that prejudices his honor or reputation, and violating his moral

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[13] 17 U.S.C. § 106A(a) (1990); *see also* footnote 6, *supra*.

[14] *Id.*

[15] Yonover at 83.

[16] *Id.* at 90-92.

[17] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

[18] Yonover at 92-93.

[19] The "fair use" defense is applicable against both an *economic* claim of copyright infringement and a *personal* claim of a violation of the moral rights of attribution or integrity. 17 U.S.C. § 107 (1990).

right of integrity. Duchamp answers that he did not infringe; but even if he did, his use is a "fair" one, based on parody.[20]

Professor Yonover argues that the current formulation of the fair use doctrine may not immunize Duchamp from this moral rights claim, even though it would likely protect him from economic copyright infringement claims. For this reason, our current law may actually chill Duchamp and other potential defendants from offering valuable commentary or critique by way of parody.[21]

There is a long tradition of parody in the arts. Under the fair use doctrine, federal law exempts parodies from copyright infringement claims because we cannot seriously expect parodists to secure an artist's permission before making fun of his or her art.[22] Nonetheless, until recently federal courts have not applied the doctrine with much consistency. Some courts required that a defendant's parody specifically target plaintiff's work, while others looked for a more general critique of society. Still other courts tried to distinguish between permissible parodies, which use just enough copyrighted expression to "conjure up" plaintiff's work in an audience's mind, and improper uses which take too much and thus infringe.[23]

The Supreme Court cleared up much of this confusion when it decided *Campbell v. Acuff-Rose Music, Inc.*[24] In that case, the copyright owner of Roy Orbison's song, "Oh, Pretty Woman" sued performer Luther Campbell and his bandmates for infringement damages because their rap group, 2 Live Crew had recorded and sold a lewd song parody entitled "Pretty Woman." In applying the fair use doctrine, the Supreme Court focused on four factors: the purpose and character of defendant's use; the nature of plaintiff's copyrighted

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[20] Yonover at 83, 99.

[21] *Id.* at 104.

[22] In fact, it would probably be better for the parodist to be denied permission by the artist. If permission were actually obtained, it could easily defang the nasty bite so crucial to a rebellious parody. A "pre-approved" parody may connote a lack of detachment from its subject and thus seem sanitized and dull, not dangerous.

[23] *Id.* at 104-106.

[24] 114 S. Ct. 1164 (1994).

work; the amount and substantiality of the portion used; and the effect of the use on plaintiff's actual and potential market.[25]

Stating first that a commercial, for-profit use of plaintiff's copyrighted expression is not presumptively "unfair," the Court held that: (1) a parody is a new, transformative work, which furthers copyright's goal of promoting science and the useful arts; (2) a parody may permissibly "conjure up" some recognizable sights or sounds from plaintiff's work; and (3) a parody probably has no effect on plaintiff's actual or potential market, because most artists do not market critical parodies of their own works.[26]

*Acuff-Rose* dealt with traditional, economic claims of copyright infringement, not moral rights claims. While it offers important lessons about applying the fair use defense in VARA cases, it does not ultimately resolve VARA's conceptual dilemma: how to preserve a first artist's art and reputation while permitting a parodist to use the art in unflattering, critical ways. Professor Yonover proposes a simple solution: in VARA cases, parody should be presumed a "fair" use. This approach would shift the burden of proof from the defendant (who must show that his use was "fair") to the plaintiff (who would now have to show that defendant's use was "unfair"). Professor Yonover arrives at this approach to resolving the moral rights/fair use dilemma after testing four other possible solutions.

First, she considers tinkering with the "liability" phase of VARA cases. She toys with the interesting idea of setting up a "Parody Licensing Clearance Center," to centrally issue compulsory licenses for parodies. She rejects this idea though, after analogizing to the licensing rules for phonorecords, where compulsory licenses are not available to those who fundamentally change the underlying work.[27] This is precisely what most parodies do.[28] Another drawback here

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[25] These factors, first set forth in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) were later codified in the 1976 Copyright Act as a non-exhaustive list of "fair use" factors. 17 U.S.C. § 107 (1994).

[26] Yonover at 107-108, citing 114 S. Ct. at 1171-1176.

[27] *See, e.g.*, 17 U.S.C. §§ 111(c) & (d), 115, 116, 118, 119(b), 1003-1004 (1996).

[28] One possible solution to this problem, suggested by Professor Eugene Volokh of the UCLA School of Law, might be to eliminate this "fundamental change" element from any compulsory licensing scheme for parodies.

is that artists' moral right to protect their honor and reputation would be undercut if they were forced to "approve" parodies through a compulsory license scheme. Anyway, compulsorily licensed parodies might appear to their audience to be "pre-approved," and thus lacking the detachment necessary for their most desirable quality—their irreverent sting.[29]

Another possible way to balance the incentives of artists and parodists is to manipulate the "damage" phase of VARA cases. Assume that a defendant is found liable for prejudicially damaging the plaintiff's visual work, and that defendant has no fair use defense. To preserve plaintiff's honor and reputation while lessening the hit on defendant's purse, why not allow plaintiff injunctive relief, but deny money damages and profits? This would not a graceful solution, according to Professor Yonover. Injunctions are often broadly worded to cover an entire work, regardless of how much non-infringing material that work might also contain. Therefore, injunctions would prevent many worthy parodies from being seen or heard at all. Besides, many injunctions would issue too late to prevent the damage to plaintiff's reputation.

Along similar lines, what if VARA denied injunctive relief to the plaintiff, but allowed a monetary recovery? This might work in those few situations where an injunction would only slightly benefit plaintiff, but would be costly to defendant. Professor Yonover rejects this approach though, because too many parodists would be chilled by the fear of expensive lawsuits, where they still would have to pay for a "fair use" defense. This approach would be equally unhelpful to plaintiffs. Without any injunctive relief available, VARA could not give them what they really need: freedom from prejudicial criticism of their honor or reputation.[30]

How about establishing a *per se* rule of non-liability for parodists? Professor Yonover dismisses this idea without much discussion. Such a rule would practically erase the visual artists' moral rights now

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[29] Yonover at 110-112; *see also* footnote 22, *supra*.

[30] *Id.* at 113-114.

guaranteed under VARA and, arguably, jeopardize our status as a Berne Convention adherent.[31]

Finally, since parody tends to encroach upon "overtly constitutional areas," Professor Yonover analyses the possibility of using a First Amendment, free speech defense in VARA cases. The problem is that courts regularly reject this type of defense, on the grounds that a defendant could have still conveyed his message without resorting to an unfair use of plaintiff's copyrighted expression. Even the Supreme Court sees no inherent conflict between the Copyright Act and the First Amendment. Indeed, free speech may actually be enriched by protecting visual works from the economic exploitation of others; and the First Amendment is not viewed as a license to trammel on someone's legally recognized intellectual property rights.[32]

Moving past these alternatives, Professor Yonover presents her thesis that where an artist sues a parodist for violating his or her moral right of integrity, a helpful way to accommodate both parties' interests might be to presume that defendant's parody is a "fair" use, and shift the burden to plaintiff to prove "unfairness," in terms of the amount and/or substantiality of defendant's use.[33] Courts should be free to tinker with the fair use doctrine in this way, because VARA has presented them with such an odd new bundle of rights. Section 107 of the Copyright Act arguably allows such tinkering by judges. This statute has been interpreted as representing not the "creation of new law," but rather, "a direction to the courts to continue to develop the common law."[34] Another argument is that if a plaintiff suing for defamation of character has the burden of proving damage to his reputation, he should logically have the same burden when he brings a moral rights claim, where he has alleged similar damages. Plaintiffs are usually in a better position than defendants to know about, and to

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[31] *Id.* at 114.

[32] *Id.* at 115, citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

[33] *See* footnote 25, *supra.*

[34] Yonover at 116, fn. 215.

prove damage to their reputations, so shifting the burden this way probably would not unduly burden most plaintiffs.[35]

Having set forth this solution, Professor Yonover goes on to apply it to her Da Vinci v. Duchamp hypothetical, using the four factors of *Acuff-Rose*. (1) Regarding the purpose and character of defendant Duchamp's use, his use could be favored if it were shown to offer some critique of Da Vinci's work. It would be a productive, transformative work, adding something new to science and the useful arts; and the fact that the use might also be commercial would not be crucial. (2) As to the nature of Da Vinci's work, Professor Yonover argues that it should not matter whether Duchamp has copied Da Vinci's creative expression or his fact-based work. Since most art parodies do copy some protected expression, to give this distinction much weight in the analysis would seriously hamper parody as a genre. (3) As to the amount and substantiality of Duchamp's use, *plaintiff* Da Vinci here would have the burden of proving that Duchamp's use was "unfair," i.e., that Duchamp used more of Da Vinci's work than necessary to "conjure up" the work in his audience's mind. Here though, Duchamp parodied a widely known visual icon: the Mona Lisa. Using most of it might be justified, because an outline or sketch might not have the same emotional and visual parodic impact on viewers. (4) Finally, as to the effect of Duchamp's use on Da Vinci's market, the question is not whether Duchamp's use diminished Da Vinci's market (which an unflattering parody certainly could do), but whether it *substituted* Da Vinci's work in the market. Here, Duchamp probably did not displace Da Vinci from his market. Like most artists, Da Vinci probably has no plan to market caustic parodies of his own works.[36]

By shifting the burden of proof in a VARA case this way, Professor Yonover argues that VARA's moral rights can be made to fit into our copyright law scheme of balanced economic[37] interests:

> "In the easiest copyright (economic rights) cases, for example, where defendant's use is productive (parody), but not for profit, it might make

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[35] *Id.* at 119-120.

[36] *Id.* at 116-119.

[37] *Id.* at 120; *see, e.g., Campbell v. Acuff-Rose Music, supra*, 114 S. Ct. 1164.

> little difference who carries the burden of pleading and proving the four fair use factors. But in harder moral rights cases where the parody that strikes at the artist's right of integrity is a commercial use, or even not-for-profit, the potential censoring effect of [VARA] section 106A(a)(3)(A) is mitigated by shifting [the burden of proof] . . . . In 'hard' moral rights cases, doubts should be resolved in favor of the parodist; we should have more art rather than less. [Citations omitted.]"[38]

The claim here is that this procedural tinkering would best balance the first artist's moral rights, the parodist's right to create new expressive works, and the public's interest in fostering progress in science and the useful arts. However, it is not entirely clear how simply shifting the burden of proof would appreciably lower any undesirable chilling effects of copyright law. In theory, it could slightly lower the parodist's legal costs at trial; but this would be hard to quantify. Moreover, the first artist, if sufficiently aggrieved, would probably not be deterred from bringing suit in the first place, which seems to be the main threat that the parodist wants to avoid. For these reasons, Professor Yonover's approach might not be able to comfortably fit VARA into our economic copyright law scheme after all.

In contrast to Professor Yonover, Eric E. Bensen comes out aggressively against the concept of federal moral rights in his note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, [39] arguing that instead of tinkering with VARA, we should simply repeal it. Mr. Bensen sees VARA as an instance of the federal government intruding on private property rights, with bewildering results. In the hypothetical situation described in his note, a property owner has begun renovating his newly acquired commercial building. He orders his workers to dismantle a huge, ugly sculpture attached to the lobby's walls. At that moment, lawyers rush in with a federal court order prohibiting any damage to the sculpture. They explain that it is a work of "stature" and the moral rights in it belong to the artist, even though he already sold it long ago.[40] Tearing the sculpture down

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[38] *Id.* at 120, 122.

[39] 24 HOFSTRA L. REV. 1127 (1996).

[40] *Id.* at 1128; 17 U.S.C. § 106A(a)(3), (b), (e)(1) (1990).

would prejudice the artist's honor and reputation, so it must stay up. The property owner cannot believe that the federal government would presume to tell him what to do with his own sculpture in his own lobby—but under VARA, it can.

Aside from the moral rights of integrity and attribution, VARA also demands special handling of a "work of visual art" that has been incorporated in or made part of a building in such a way that removing it would destroy, distort, mutilate or otherwise modify the work. If the artist has consented to installing the artwork after June 1, 1991 and has never waived his or her moral rights, then before the property owner may remove the work, he or she must make a diligent, good faith effort to notify the artist in writing. If the notice is received, the artist has 90 days to either remove the work or pay for its removal. After that, the property owner can apparently tear it down with impunity.[41] Mr. Bensen argues that this protection of moral rights by VARA (1) lacks constitutional authority; (2) violates the First Amendment in several ways; and (3) is bad public policy because it impairs the free market's natural determination of which artworks should survive or perish.[42]

His first argument is that VARA is unconstitutional because there is no express provision in the Constitution for federal regulation of moral rights.[43] However, one could possibly argue that Congress' exclusive constitutional power to grant artists the "exclusive Right to their respective Writings and Discoveries" does not specifically refer to either economic or moral rights, so it may reasonably be interpreted to include moral rights.[44] One could also try to argue that since Congress has the exclusive power to enter into treaties[45] and the ability to make all laws necessary and proper for carrying out that

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[41] Bensen at 1127; 17 U.S.C. § 113 (1990).

[42] Bensen at 1127.

[43] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; *also see* Bensen at 1131-1134.

[44] U.S. CONST. art. I, § 8, cl. 8; *see* footnote 4, *supra*.

[45] The Constitution gives the President the ". . . power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . ." U.S. CONST. art II, § 2, cl. 2. Further, the Constitution provides that "[n]o state shall enter into any treaty, alliance, or confederation . . ." U.S. CONST. art I, § 10, cl. 1.

power,[46] it therefore has the authority to regulate moral rights as a condition of our membership in the Berne Convention.[47]

To argue against VARA, Mr. Bensen tries to make use of the distinction between owning a tangible work of art and owning the copyright in it. By his interpretation, VARA regulates the right to alter or destroy a piece of property, which is a long recognized property right, but not a copyright. Copyright law only regulates physical activities such as reproduction, distribution or performance of a work.[48] It does not extend to the regulation of personal property rights.[49] Therefore the copyright power in the Constitution does not authorize VARA. While this may sound plausible at first, it is not entirely correct. In fact, copyright law does offer several remedies which affect personal property rights, such as injunctions against activities involving infringing copies or phonorecords, and the seizure, forfeiture and destruction of such items.[50] Like these remedies, VARA's regulation of moral rights is just one more way that Congress has acted to strengthen our copyright law's protections.

Mr. Bensen examines the Commerce Clause[51] as another potential constitutional justification for VARA, but he argues that it does not authorize VARA either. His reasoning is that VARA purports to regulate personal property rights (e.g., distorting, mutilating or modifying visual works of art) which are actually governed by state law, so the federal Commerce Clause cannot apply. He has a point there. However, he also argues that since VARA's moral right of integrity terminates upon an artist's death, VARA's real purpose is merely to protect living artists' reputations, and not to protect tangible property. Therefore it cannot be addressing any interstate commerce

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[46] Congress may ". . . make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18.

[47] *See* footnotes 8 & 9, *supra*.

[48] 17 U.S.C. § 106 (1992).

[49] Bensen at 1134.

[50] 17 U.S.C. §§ 502, 506, 509, 602, 603 (1996).

[51] "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

purpose.[52] But the fact that VARA's protections are not descendible does not mean that VARA has no intention of protecting tangible property.

Mr. Bensen's strongest arguments focus on how the VARA provision protecting visual works of "recognized stature" violates the First Amendment. He first argues that VARA impermissibly regulates expressive conduct (the distortion, mutilation or modification of art) on the basis of that conduct's communicative element, e.g., the denunciation of the artist's honor or reputation.[53] He also argues that by forcing an art owner to display a piece of art in order to protect the artist's reputation, VARA inadvertently forces that art owner to convey a positive opinion about the artist. This violates his First Amendment freedom of speech, which includes the freedom not to convey any opinion at all. Further, VARA's goal of protecting an individual's reputation is not a compelling government interest that could save the regulation.[54]

Another First Amendment issue raised by Mr. Bensen is that by only protecting works deemed to be of "recognized stature," VARA impermissibly leads to unequal treatment of different artists' speech, as embodied in their art. The "recognized stature" standard is unconstitutionally vague, and requires courts to decide which works have enough "stature" to be worthy of protection. As a result, some speech will be protected while other speech will not.[55]

Mr. Bensen finally argues that VARA is bad public policy. He claims that it paternalistically protects art from free market competition, implying that artists need special government help to maintain their reputations. This in turn raises the suspicion that the artists' works would fail on their own merits, and therefore must be of inferior quality. "For this reason," he says, "VARA should prove to be much more popular among untalented artists than talented ones."[56] In addition, government protection of certain works is elitist, and elitism engenders unhealthy hostility toward the arts.

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[52] Bensen at 1136.
[53] *Id.* at 1139-1140.
[54] Bensen at 1140-1141.
[55] *Id.* at 1138, 1141-1142.
[56] *Id.* at 1144-1145.

Perhaps people are "'suspicious of anything that smacks of too much elitism.'"[57] Mr. Bensen cites to a study conducted by the National Endowment for the Arts, which apparently found that "many [baby boomers] simply [had] no interest in [the] arts [and] others [had] a real hostility toward them."[58]

While these last arguments seem plausible, they are certainly difficult to verify. Even if they are true, they may not conclusively point us towards a unified public policy. Baby boomers are only one important segment of the American art audience. What do other Americans think about the current state of the arts? Many people might actually cherish "elite" works of art, for the inspirational dreams and ideals which they represent. It is also fair to say that the art world has always been open to charges of elitism, so this may not be a pressing new concern.

Despite these quibbles, Mr. Bensen's note generally sets forth sound arguments against VARA's establishment of moral rights for American artists. However, his closing statement about VARA strains the limits of credulity, and practically begs for a response. He says that "[w]hat may be most troubling about VARA is suggested in the title itself; The Visual Artists' Rights Act of 1990. The very notion that a particular group of people has 'rights' not shared by all is abhorrent to our system of justice . . . To the degree that artists have a special right to have their reputation protected, they have that right at the expense of everyone else's right to free speech . . . The days of granting special privileges to classes of citizens, so they would not live under the same rules as everyone else, are gone. The United States does not grant titles of nobility."[59]

This fiery rhetoric makes for a dramatic conclusion, but it does not really make much sense. VARA has not bestowed knighthoods or fiefdoms upon visual artists. It has simply given them another way to safeguard one of their most marketable commodities, their honor and reputation. Furthermore, VARA's selective establishment of moral rights in "visual" artists is not abhorrent to our system of justice. A

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[57] *Id.* at 1146-1147.

[58] *Id.*

[59] *Id.* at 1148-1149.

law may legitimately result from one group's political lobbying efforts; and the law is not invalid merely because Congress has chosen to deal with a problem "one step at a time."[60] If the VARA experiment succeeds, then perhaps these moral rights can later be extended to other artists and authors. The real troubling question here though, is whether the Visual Artists' Rights Act of 1990 really appreciably furthers the creation and preservation of visual works of art—and, if so, at what cost to the integrity of our copyright law scheme?

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[60] Railway Express Agency v. New York, 336 U.S. 106 (1949).

[61] Abstracts Editor, *UCLA Entertainment Law Review*. J.D., UCLA School of Law, 1997; B.A., University of California at Los Angeles, 1993. I would like to thank Professor Eugene Volokh for offering his helpful perspectives on Copyright Law and Constitutional Law during the writing of this abstract.