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# **VARA's Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future**

**Christopher R. Mathews\***

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## I. INTRODUCTION

Let us suppose that an artist has created a beautiful fresco entitled "Bird." Further suppose that "Bird" is installed in a local building for all the public to view. Over time, the public comes to cherish this fresco, and "Bird" becomes a treasured source of civic pride. Someday, the citizens become unable to imagine the city without "Bird." However, someday too, the building owner decides that structural renovations call for the destruction of "Bird." Citizens' groups try to raise funds to purchase "Bird" from the building owner, but they are unable to cover the cost of purchase and removal. Unfortunately for "Bird," there is a strong likelihood that the building owner may destroy the fresco without any legal ramifications.

To understand the legal situation that would face the owner of the building in question, one must understand the Visual Artists Rights Act of 1990 ("VARA") and the competition of interests that led to its formation. Historically, the American legal system highly values property rights and often resists protecting more conceptual rights, such as moral rights, if they conflict with the traditional structure of property rights. For this reason the passage of the VARA represents a departure from American legal traditions because it adopts many notions from the French and German *droit moral* laws. These laws provide certain moral rights for artists separable from both their copyright and property rights in the artistic object itself.<sup>1</sup> These moral rights include the rights to attribution and integrity of the piece of art. To ensure passage of the law, Congress needed to create a delicate balance between protecting the traditional notion of property rights and advancing the newer notion that artists ought to maintain a certain level of ownership over the piece of art even after assigning away both the object and its copyright.<sup>2</sup> Crucial to this balance was the inclusion of a waiver provision to prevent the Act from having too dramatic of an impact on the marketplace.<sup>3</sup> This article will analyze the waiver

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<sup>1</sup> Thomas F. Cotter, *Pragmatism, Economics and the Droit Moral*, 76 N.C. L. REV. 1, 20-22 (1997).

<sup>2</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6928.

<sup>3</sup> *Id.*

provision, discuss its initial performance, and attempt to describe some problems that may arise as VARA enters its second decade.

## II. BACKGROUND

In March 1989, the United States joined the Berne Convention.<sup>4</sup> This step brought an end to nearly a century of debate about the United States' possible membership in this international convention.<sup>5</sup> Critics of ratification feared that the requirements of *6bis* of the convention would force the United States to adopt certain moral rights legislation heretofore never written into the federal code.<sup>6</sup> Although several states had drafted their own form of moral rights legislation by 1989,<sup>7</sup> many groups feared the repercussions of a federalized moral rights regime.<sup>8</sup> Perhaps to assuage these concerns, Congress, subsequent to joining the convention, asserted that no further legislation would be required to implement the treaty.<sup>9</sup> Despite this legislative announcement, Congress proceeded to consider drafting moral rights legislation

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<sup>4</sup> *Id.* at 7. The Berne Convention is an international agreement that attempts to standardize intellectual property laws throughout the world.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Thomas J. Davis, Jr., *Fine Arts and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 325-347 (1989). By 1989 there were nine states with various types of moral rights legislation for fine art. *Id.*

<sup>8</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917. Furthermore "[c]ertain proprietary groups were also concerned that even if new laws were not required, the very fact of adherence could work a gradual but substantial change in the American copyright system and the protection accorded authors." *Id.*

<sup>9</sup> *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 1 (1989) [hereinafter *Hearings*]. The fact that VARA followed so closely behind this resolution may imply that, while Congress was willing to publicly claim that federal copyright law provided adequate moral rights legislation as required by Berne, perhaps private concerns lingered as to the United States' compliance with Berne. Passage of VARA would have significantly abated these concerns and the widespread support VARA enjoyed may indicate that such was the case.

shortly thereafter.<sup>10</sup>

In 1987, Congressman Edward J. Markey of Massachusetts submitted H.R. 3221, dubbed the Visual Artists Rights Act of 1987.<sup>11</sup> While this bill preceded the ratification of the Berne Convention, it was nearly identical with VARA, which followed two years later.<sup>12</sup> The two Acts differed only in that the 1987 Act included a system of artist resale royalties.<sup>13</sup> This plan was highly controversial and likely contributed to the eventual failure of the bill.<sup>14</sup> With the failure of the 1987 Act in mind, the drafters of the 1990 Act removed the artist's resale royalties provision and with it, much of the attendant controversy.<sup>15</sup> The bill passed without any major opposition.<sup>16</sup>

### III. LEGISLATIVE INTENT BEHIND WAIVER

The Senate hearings on the bill reflect conflicting concerns: on one hand, a desire to save art from destruction and protect an artist's reputation, on the other, a desire to follow the American legal tradition's strong protection of personal property rights.<sup>17</sup> Congressman Markey's comments before the subcommittee include his disturbed reaction to the story of two Australian entrepreneurs.<sup>18</sup> The two men purchased a Pablo Picasso print entitled "Trois Femmes" and proceeded to cut the work into 500 pieces, selling each piece separately

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 18 (Statement of Representative Edward J. Markey).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Artist's resale royalties would provide qualifying artists with a percentage of all the profits from the resale of their work. The logistics alone of enforcing this provision likely doomed the bill to its demise. If even a viable system were proposed that would eliminate the logistical concerns, it is likely that many still would have objected to the virtual 'tax' that such a royalty system would place on the art resale market; cf. Jeffrey C. Wu, *Art Resale Right And The Art Resale Market: A Follow-Up Study*, 46 THE JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 531 (1999).

<sup>14</sup> *Hearings, supra* note 9, at 17 (Statement of Representative Carlos J. Moorhead).

<sup>15</sup> *Id.*

<sup>16</sup> *Cotter, supra* note 1, at 21.

<sup>17</sup> *Hearings, supra* note 9.

<sup>18</sup> *Id.* at 18 (Statement of Representative Edward J. Markey).

for \$135.<sup>19</sup> Such a blatant destruction of a piece of fine art sparked the push for moral rights legislation.<sup>20</sup> But this campaign conflicted with the very pro-property rights tradition of American law. Others present at the hearings represented the opposing side of this issue. While not condoning the destruction of the Picasso print, pro-property groups asserted that federal regulation would chill the art market and therefore harm the livelihood of professional artists. Professor Jane C. Ginsburg testified on the balance necessary for a successful moral rights law. She commented, “[a]rguably, the best recognition of moral rights would countenance no waivers. This position, however, is probably too extreme for the U.S. system, nor does Berne require it.”<sup>21</sup> Congress attempted to form a compromise between these two groups by drafting a balanced and limited system that allowed for waivers but would discourage such a practice from becoming routine.<sup>22</sup> Fearful that such a balance would not be achieved, Congress mandated that the Copyright Office complete a study on the extent to which waivers clauses were used under the new VARA regime.<sup>23</sup> An initial study was required eighteen months after the passage of the law, and then a final study two years later.<sup>24</sup> The results of this report are discussed below.

#### IV. THE WAIVER CLAUSE

The actual waiver provisions as finally drafted are memorialized in sections 106A(e) and 113(d) of the Copyright Code. The first provision allows for waiver of moral rights in any piece of art, while

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* David Robinson, one of the entrepreneurs, stated “If this thing takes off, we may buy other masters as well and give them the chop.” *Id.* It should be noted that VARA would do nothing to protect the invaluable works of artists such as Picasso, as its protection does not reach to deceased artists or artwork transferred before June 1, 1991. 17 U.S.C. §§ 106a(d)(1)-(2); *see also Cotter, supra* note 1, at 22-23.

<sup>21</sup> *Hearings, supra* note 9 (quoting Prof. Jane C. Ginsburg).

<sup>22</sup> *Hearings, supra* note 9, at 29 (Statement of Mr. Ralph Oman, Register of Copyrights).

<sup>23</sup> H.R. 2690, 101st Cong., 2d Sess. § 8 (1990) (enacted).

<sup>24</sup> *Id.* The original bill had called only for the initial study after eighteen months, but following Mr. Oman’s testimony, a final report was due two years after this initial study. *Id.*

the second allows only for waiver of substantive rights from section 106A for an installed piece that cannot be removed without destruction.<sup>25</sup> I will discuss section 106A(e) waiver first.

Section 106A(e) provides the main substantive rights of VARA: the right to attribution and the right to the integrity of the work. It states further that an artist may waive these rights, but such a waiver must be written, signed and specific to both the piece and its described uses.<sup>26</sup> This provision also clearly states that the waiver is not transferable from one owner to another.<sup>27</sup> This regime of specificity was intended to limit the prevalence of the waiver clause in the fine art market by limiting the efficacy of many attempted waivers.<sup>28</sup> By clearly allowing waivers but discouraging the actual effective use of such a clause, Congress forged a middle road between the two paths of classic property rights and moral rights.

The very fact that the waiver must be formed in a written instrument indicates a careful nod to artists' rights. The Copyright Office found that the majority of artists believed oral agreements to be the dominant form of contract in the art world.<sup>29</sup> By requiring a waiver to be in written form in a market dominated by oral contracts, VARA implicitly benefits the artists. This benefit hinges on the ignorance of the buyer. Should a particular buyer be aware of the requirements of an effective section 106A(e) waiver clause, then he or she may gain a stronger bargaining position based upon this knowledge.<sup>30</sup> Therefore,

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<sup>25</sup> VARA defines installed art as "a work of visual art [which] has been incorporated in or [been] made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3)." VARA § 4, 17 U.S.C. § 113(d)(1)(A) (1994).

<sup>26</sup> VARA § 3(a), 17 U.S.C. § 106A(e) (1994).

<sup>27</sup> *Id.*

<sup>28</sup> *Hearings, supra* note 9, at 93 (Statement of Prof. Jane C. Ginsburg).

<sup>29</sup> FINAL REPORT OF THE REGISTER OF COPYRIGHTS ON THE WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS, 135 (1996) [hereinafter *Report*]. The report finds that sixty-one percent of artists surveyed believed that oral contracts are "most common in the art world." Conversely, thirty-nine percent believed written contracts to be most common.

<sup>30</sup> *Cotter, supra* note 1, at 27. Cotter suggests that the benefit accrued to artists by this structure may be illusory because he believes that moveable art is less likely to be subject to mutilation and destruction than installed art. This contention indicates a

a growth of awareness of the actualities and implications of VARA may alter this delicate balance.

Section 113 incorporates by reference the substantive rights of section 106A(e). Section 113 tempers section 106A(e) rights by providing a waiver of those rights for an installed piece of artwork.<sup>31</sup> If an artist signs a written instrument consenting to the installation of his or her work into a building such that the art may be subject to destruction, distortion, mutilation, or other modification, then the artist has effectively waived his or her rights as granted by section 106A.<sup>32</sup> The section 113 waiver differs further from the section 106A waiver in that the written instrument need only indicate the artist's consent to installation, while section 106A requires more specificity as described above.

The question of transferability of a section 113 waiver lingers. The House report indicates that the subcommittee intended that an effective waiver regarding artwork incorporated into buildings should be transferable with the transfer of building ownership,<sup>33</sup> but section 113 does not mention such transferability.<sup>34</sup> Courts will have two choices when interpreting the language of section 113. They may ignore the legislative history and extend the non-transferability of sections 106A to 113. Alternatively, courts could look to the legislative history of section 113. Unfortunately, however, the legislative history contains conflicting messages on this issue. The House report shows that the subcommittee wished to allow transferability of waiver for art installed in buildings,<sup>35</sup> but it also clearly wished "[w]aivers and the

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belief that the market for installed art is more dominated by written contracts.

<sup>31</sup> *Id.* at 22 n.120.

<sup>32</sup> 17 U.S.C. § 113(d) (1994). This subsection further provides that should a building owner wish to remove a work that can actually be removed without destruction, distortion, mutilation or any other modification, then the artist's § 106A rights are held not to be waived regardless of the existence of a valid § 113 waiver. *Id.*

<sup>33</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6930.

<sup>34</sup> 17 U.S.C. § 113 (1994).

<sup>35</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6930.



circumstances surrounding them to be narrowly circumscribed.”<sup>36</sup> How courts will clarify this question has yet to be seen.<sup>37</sup>

While the courts have not yet addressed this transferability question, some courts have addressed VARA claims generally.<sup>38</sup> The most significant case is *Carter v. Helmsley-Spear, Inc.*,<sup>39</sup> in which the district court ruled in favor of the plaintiff artists on their VARA claims.<sup>40</sup> While this case involved art installed in a building, the artists never signed a waiver or any other written instrument acknowledging that the art may be subject to destruction, distortion, mutilation, or other modification.<sup>41</sup> For that reason, the court did not discuss the transferability of a waiver for a piece of art installed in a building. The subsequent decision of the Court of Appeals for the Second Circuit further frustrated the precedential value of *Carter*. The Second Circuit decided that the piece of art in question was actually a work for hire.<sup>42</sup> This decision inherently prohibited the plaintiffs from bringing any possible VARA claims, because, in a work for hire situation, the Copyright Act considers the employer to be the author of the artwork. The artists therefore lacked standing to assert a VARA claim.

While at least one court has used the lower court's analysis as a guide for its own ruling on VARA claims,<sup>43</sup> the lack of any further case law leaves in doubt the full ramifications of section 113 and its possible transferability. Considering this uncertainty, knowledgeable building owners will likely choose moveable rather than installed artwork for their buildings.<sup>44</sup> Therefore, should any subsequent owners

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<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Cotter*, *supra* note 1, at 23 n.120.

<sup>38</sup> *Id.* at 23. By 1997 there had been only two cases decided on the substantive portions of VARA. *Id.*

<sup>39</sup> 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2nd Cir. 1995).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999).

<sup>44</sup> Corinne Shane, *Fine Art For Public Spaces: Guidelines for Prospective Patrons*, No. 39 Vol. 44 REAL ESTATE WEEKLY S24 (April 29, 1998). Building owners will certainly continue to place artwork in their buildings during this period of uncertainty because of the marketability of a furnished building.

decide to remove the artwork, he or she may do so without risking mutilation of the piece and any potential liability that would follow.<sup>45</sup> The unfortunate result of this potential trend is that by avoiding installed artwork, building owners will avoid pieces such as frescoes or murals and restrict their purchases to wall-hung art or small and moveable sculptures.<sup>46</sup> If the courts definitively conclude that a written instrument pursuant to section 113(d)(1)(B) is transferable, then this unfortunate trend will likely not come to pass.

## V. THE COPYRIGHT OFFICE REPORT

While drafting VARA, Congress acknowledged the risk that a waiver provision could undermine the very objective of the legislation.<sup>47</sup> Congress concluded, though, that disallowing the waiver was even riskier. So, as a result, reasonable and restrained use of the waiver provision became crucial to the success of VARA. Congress ordered the Copyright Office to complete two reports on the use of the waiver provision in order to closely monitor its evolution.<sup>48</sup> An initial report was due two years after enactment and the final report was due no later than five years after enactment.<sup>49</sup> The House report explained the proposed goal of these reports: "The Committee intends to ensure that the waiver provisions serve to facilitate current practices while not

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<sup>45</sup> This subsequent owner would still be liable for any § 106A claims since any waiver obtained by the initial owner is clearly not transferable. This potential liability is minimized though, considering that the artwork would be removable without risking mutilation, modification, destruction, or distortion. An interesting dispute arises when the artist asserts that the artwork was site-specific. This argument claims that by simply moving the art, even without damaging the physical integrity, the owner has modified the artwork and should be liable for § 106A. See Eric M. Brooks, Comment, "Tilted" Justice: Site-Specific Art And Moral Rights After U.S. Adherence To The Berne Convention, 77 CAL. L. REV. 1431 (1989).

<sup>46</sup> This is not to say that wall-hung art represents a detriment to the public good but the mere fact that newer building owners may simply have fewer reasonable choices in the decoration of their buildings is unfortunate for both the art world and the general public.

<sup>47</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 22 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6932.

<sup>48</sup> VARA § 8(a).

<sup>49</sup> VARA § 8(a)(2).

eviscerating the protections provided by the proposed law.”<sup>50</sup> The Copyright Office filed the “Waiver of Moral Rights in Visual Artworks, Final Report of the Register of Copyright” (“Report”) on March 1, 1996.<sup>51</sup>

In its final report, the Copyright Office set out to address five general topics: the awareness of the waiver provisions within the art community, the frequency of waiver provisions, how the waiver has affected the bargaining positions of artists and buyers, the effectiveness of attempted waivers, and the comparison of commissioned contracts with ordinary sales contracts.<sup>52</sup> The Office addressed these topics in an attempt to answer the fundamental question: Has the art market successfully incorporated VARA and the waiver provision without seriously altering the balance of power between artist and buyer? The Office answered this question with ambivalence, concluding that public awareness of VARA had not reached a level sufficient for the success of the waiver provision to be judged fully.<sup>53</sup> In fact, the Office hoped that the survey itself would act as an educational tool, which the art world would use to further disseminate knowledge of VARA.<sup>54</sup> The report does, however, venture to put forth certain conclusions about the state of VARA and the growing awareness of the waiver provision five years after its enactment. The report concludes with various predictions about the future of VARA and proposals for modest changes to the law.

#### A. *Awareness of VARA Within the Art Community*

The first goal of the report was to gauge the degree of awareness of VARA and the waiver provision within the arts community. The survey attempted to measure the gradients of awareness within the various categories of artists. A table describing the general awareness of VARA appears as follows:

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<sup>50</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6930.

<sup>51</sup> *Report, supra* note 29, at i.

<sup>52</sup> *Id.* at 130-31.

<sup>53</sup> *Id.* at 194.

<sup>54</sup> *Id.* at 186. The survey went to, *inter alia*, “arts organizations, state art councils, volunteer lawyers for the arts, and art schools.” *Id.*

Category of Respondents	Aware of Moral Rights		Aware Moral Rights Can Be Waived		Aware Waiver Must Be Written & Express	
	%	BASE	%	BASE	%	BASE
Total Respondents	73	1054	41	1046	32	1037
Those with no representative	70	420	41	417	33	414
Those represented by an agent or artists' representative	77	148	48	147	42	147
Those represented by a gallery	75	434	40	430	30	427
Those whose art provides gross income exceeding \$25,000 annually	74	90	56	90	45	89
Those whose art provides gross income less than \$25,000 annually	72	820	39	813	31	797
Those whose art provides their sole income	74	92	48	91	38	89
Those whose art does not provide their sole income	73	822	40	816	31	811
Those who have never been commissioned to create a work of art	74	259	37	259	28	262
Those who are annually commissioned to create works of art	72	647	42	641	34	635
Those who are annually commissioned to create more than fifteen works	72	47	50	46	41	46
Visual artists residing in states with pre-VARA moral rights statutes	76	329	40	326	31	322
Visual artists residing in states with pre-VARA moral rights statutes containing written waiver provisions	75	220	39	218	31	216

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This table reveals that, by 1995, the majority (73%) of artists were aware of their VARA rights, but that their awareness drops precipitously regarding the waiver and the requirements thereof (32%).<sup>56</sup> Awareness of the waiver provision does not seem to rise significantly until the report considers those who receive more than

<sup>55</sup> *Id.* at 133.

<sup>56</sup> *Id.*

\$25,000 annually or those who create more than fifteen commissioned works annually.<sup>57</sup> Even the most aware group, those whose artwork provides over \$25,000 annually, a group that arguably has the most at stake financially, has less than 50% awareness.<sup>58</sup> Such data seems to indicate that the general artistic community was not close to becoming fully aware of the implications and requirements of the waiver clause.

Those looking for a silver lining could possibly regard the high overall awareness of the existence of moral rights as a building block towards full awareness of all the provisions of VARA. One cannot become fully aware of a waiver clause if one does not know what rights one is waiving. Perhaps more artists will become cognizant of the waiver provisions and their requirements after they develop an actual experience with such clauses.

### B. *Frequency and Effectiveness of the Waiver Provision*

The report also describes the frequency of the clauses in the following table:

Category of Respondents	%	Base
Respondents who have seen moral rights waiver clauses	17	1019
Those expressing an opinion who say that waivers are routinely included in artists' contracts	7	489
Those who have seen waivers and say they are routinely included in artists' contracts	13	177
Total respondents who say waivers are routinely included in artists' contracts	3	1017
Respondents who say waivers are included in contracts for sales of existing artwork	20	373
VARA artists who have waived moral rights	8	955
VARA artists who know of other artists that have been asked to waive moral rights	23	955

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<sup>57</sup> *Report, supra* note 29, at 133. These are hardly huge spikes above the average of 33% awareness though. The group with the most awareness of the waiver and its requirements is the one that contains artists who make more than \$25,000 annually who have a 45% awareness. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 134. "VARA artists" are those artists whose work qualifies them for

This table indicates that the artists' actual experience with waiver clauses was minimal up to 1995. Only 8% of the artists believed that they had waived their moral rights. While setting up a balance between conflicting rights, Congress made no attempt to set an acceptable level or desired percentage of waived VARA rights. The stated purpose was only to provide a means by which traditional property rights could be secured without "eviscerating the protections provided by [VARA]."<sup>60</sup> Before deciding whether 8% "eviscerat[es] the protections provided by [VARA],"<sup>61</sup> one must analyze the 8% number itself. Arguably, the actual incidence of waiver use may be even lower than 8%. Inherent in the legislative scheme of VARA was the expectation that a certain percentage of attempted waivers would fail for lack of written agreement or for insufficient specificity. A separate survey reveals that 60% of artists who had encountered waivers had those that specifically identified in writing the work and the intended use.<sup>62</sup> While this number is high, it still indicates that over a third of the artists who believed that they waived their moral rights may not have actually signed a document with the required specificity. Therefore, the 8% figure may be inaccurate because the question that produced this result asked only if the artists had ever waived their moral rights in a written contract.<sup>63</sup> The question does not ask whether the contract was properly specific to the artwork or to the intended use. While the subsequent question regarding specificity may have had retroactive effect on the previous answer, it is not clear whether or not the artists answered the previous question with this proper legal framework in mind or whether the artist fully understood the legal requirements in the first place.<sup>64</sup> Even considering these

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VARA protection. See Jill R. Applebaum, Comment, *The Visual Artists Rights Act Of 1990: An Analysis Based On The French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 191 (1992).

<sup>60</sup> H.R. REP. NO. 514, 101st Cong., 2d Sess. 20 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6930.

<sup>61</sup> *Id.*

<sup>62</sup> *Report, supra* note 29, at 138.

<sup>63</sup> *Id.* at app. 11.

<sup>64</sup> Considering that federal courts themselves can wrestle with a waiver clause, the copyright office may have realized that to ask artists to judge the legal efficacy of

potential statistical errors, the fact still stands that only 8% of VARA artists perceived that they had waived their moral rights at one point. That, at most, only 8% of artists had waived his or her moral rights does not seem to eviscerate the intent of VARA.

A full and proper analysis of the market should attempt to distinguish between the installed art market and the moveable art market. There is a possibility that waiver clauses show up more often in the installed art market than in the moveable art market. To aid in this distinction, the Copyright Office held four panels to discuss VARA and the waiver provisions. The panels focused on the gap between the incidences of waiver for moveable and installed art. Gilbert Edelson, Administrative Vice-President of the Art Dealers Association of America, stressed that waivers are disfavored and not sought by art dealers or art lawyers.<sup>65</sup> He asserted that in the moveable art market written contracts, and implicitly waiver clauses, are rare.<sup>66</sup> With regard to the installed art market, however, Edleson predicted Congressional repeal of the section 113 waiver would have a chilling effect on the market.<sup>67</sup> If building owners were no longer able to obtain valid waivers for installed art, then riskier installed art would no longer find many willing buyers.<sup>68</sup>

Other participants had come to similar conclusions. Many of the artists who spoke stated that Congress should repeal or at least refigure section 106A waivers for moveable art. Interestingly, among these artists were the artists who had created the art at the center of the *Carter* controversy. One of these artists, Johnny Swing believed that the section 106A waiver provision was not even necessary.<sup>69</sup> He stated, "There is no circumstance where a work that is not interrupting a piece of private property should ever be altered, mutilated or destroyed for any reason."<sup>70</sup> Such a policy would discard the traditional property rights view as expressed by Blackstone, which

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their signed waiver clauses would have been unrealistic, and produced potentially highly inaccurate results.

<sup>65</sup> *Report, supra* note 29, at 142.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at app. 37.

<sup>70</sup> *Id.*

asserts that an owner of property may do with that property however he or she sees fit, regardless of the interests of his or her neighbor. Despite Mr. Swing's compelling testimony, Congress is unlikely to go down that road considering the hesitation it demonstrated during the initial passage of the bill. Mr. Swing does consider the section 113 waivers necessary. He expressed a fear that "prohibiting [section 113] waivers would have a chilling effect [because the work] would have to be predetermined, which he found contradictory to the evolutionary nature of creating art."<sup>71</sup>

John J. Veronis, another artist involved in the *Carter* controversy, reiterated many of his colleague's comments. He felt that the section 106A waiver was unnecessary because "most art patrons do not alter or change moveable works, and because it mostly affects less established artists."<sup>72</sup> Mr. Veronis also believed that the section 113 waiver made sense and supported its continuation.<sup>73</sup> He expressed the opinion that better awareness of section 113 and an increase in communication between landowners and the artists are necessary for the future of the art market.<sup>74</sup>

John Koegel, Esq., an arts attorney, discussed the double edge to low VARA awareness. Low awareness benefits artists in that in failing to waive their rights, the artists maintain their moral rights in spite of the intent of the buyer.<sup>75</sup> However, low awareness on the part of the artist also leads to low enforcement on behalf of the artist.<sup>76</sup> He predicted a growth in waiver use for commissioned works, particularly with large works, following the decision in *Carter*.<sup>77</sup> He further hypothesized that museums might begin to seek waivers, since insurance companies were reluctant to indemnify moral rights infringements.<sup>78</sup>

Thomas Schwartz, Vice-President of Helmsley-Spear, Inc., the

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<sup>71</sup> *Report, supra* note 29, at 146.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at app. 37.

<sup>75</sup> *Id.* at 147.

<sup>76</sup> *Id.*

<sup>77</sup> *Report, supra* note 29, at 147.

<sup>78</sup> *Id.* at 148.



defendant in *Carter*, was more adamant in his support of the section 113 waiver.<sup>79</sup> He stated, “[F]or building owners or managers, the issue of moral rights in works installed in buildings is in the same category as having hazardous material.”<sup>80</sup> He especially feared the situation in which a building tenant installed art in the building, thereby obliging the building owner to keep the art because the tenant failed to obtain a waiver.<sup>81</sup> Adrian Zuckerman, Esq., counsel for Helmsley-Spear, echoed this concern when he relayed the real estate industry’s fear that a tenant, a party with limited property interest, could potentially give a third party artist greater rights in the property than the tenant had.<sup>82</sup> Building owners cherish the section 113 waiver because of these and other concerns.

Even though the Copyright Office drew voices from both sides of the debate, the hearings nonetheless produced some consensus about the frequency of use of the VARA waiver. The 1995 survey suggests that the use of the VARA waiver in the moveable art market will continue at low levels. The evidence also indicates that the frequency of the VARA waiver for the installed art market is high and likely to further increase.

### C. *The Waiver’s Effect on Bargaining Positions*

The waiver’s effect on the bargaining positions of artists and art purchasers is arguably more important than the actual frequency of the waiver. If the artists remain consistently powerful in their typical contractual relationships, then the fact that these artists are waiving their VARA rights is not of great concern. The report investigates this issue in another survey, which shows that of all VARA artists, only 17% believed that refusing a waiver would result in a failed sale.<sup>83</sup> Confining the responses to this same question to just those artists who actually expressed an opinion reveals that 55% believed that refusing a waiver would kill the sale.<sup>84</sup> Breaking this number down further

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<sup>79</sup> *Id.* at 146.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Report, supra* note 29, at 137.

<sup>84</sup> *Id.*

reveals that only 43% of those artists who had actually seen a waiver clause believed that refusing a waiver clause would kill the deal.<sup>85</sup> The discrepancy between those artists who formed their opinion based on actual experience and those who had no such experience may suggest that as artists gain actual experience with waiver provisions, they will feel less pressure to accept the waiver and will begin to exert bargaining power to strike offensive waivers from contracts. Another possibility is that the artists simply may not find the waivers to be objectionable provisions and ultimately would not refuse a sale that contained a reasonable waiver clause. The survey may reflect this conclusion when it shows that only 24% of those artists who had seen a waiver clause in their contracts had felt pressured or coerced into accepting the waiver.<sup>86</sup> This means that of the 43% of artists who had seen waiver provisions and felt that rejecting the waiver provision would kill the deal, 44% felt no coercion or pressure to actually accept the waiver.<sup>87</sup>

This debate is slightly overshadowed by the fact that in 1995 a full 69% of the artists had not formed an opinion as to the effect on their bargaining positions.<sup>88</sup> Until the majority of the art world figures out for itself what effect VARA and the waiver provisions have on the market's bargaining positions, it will be difficult for outside researchers to develop accurate conclusions. We can, at the very least, conclude that since a full 69% of the artists had not formed an opinion on this effect by 1995, no dramatic change in the market had yet occurred.

#### D. *Report's Conclusions*

All of these results offer insight into the way in which the art community has incorporated VARA. Moreover, they highlight the dichotomy, which had already become clear by 1995, between installed and moveable art. While a healthy debate over the value of the section

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> The 44% percent number comes from the fact that there is a nineteen-point difference between 43% and 24%. Nineteen is 44% of 43.

<sup>88</sup> *Report, supra* note 29, at 137.

106A waiver persisted, a general consensus over the necessity of a section 113 waiver had coalesced. The artists sensed the potential repercussions on market demand should the section 113 waiver be revoked, and the building owners were convinced that revocation of the section 113 waiver would be nearly disastrous.

The overall situation, as described by the report, seems to lead to two important conclusions. The first is that the section 106A waiver for moveable works appears to be working roughly in the manner that Congress intended. Usage of the waiver provision was seemingly low as of 1995 and the anecdotal evidence of the artists and the art lawyers indicates that both artists and art dealers discourage the use of waivers. Uncertainty does remain though as to whether waivers have subsequently become routine, and the survey shows that a significant portion of the art community did in fact fear the oncoming prevalence of waivers. These responses, however, may simply be the result of an alarmist reaction within the community, a conclusion supported by their calls for an outright repeal of the waiver and the moralistic arguments they made.<sup>89</sup> In response, the Copyright Office produced several situations where a party obtained a waiver for well-intentioned and valid reasons.<sup>90</sup> For example, the report discusses how Campbell's Soup held an art contest in which they required a waiver of section 106A rights for purely practical and reasonable grounds.<sup>91</sup> Situations such as this will probably represent the bulk of the usage of section 106A for moveable art, as it is likely that a buyer will obtain a waiver only when he or she has a specific reason for obtaining one. Otherwise, the purchaser will likely be unaware of the provision or be unwilling to pay for an unnecessary right. The delicate balance for moveable artwork will probably be sustained for the bulk of the traditional art market.

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<sup>89</sup> *Id.* at 158. The artists and the artists' lawyers could not comprehend of a situation where an art buyer would have any valid reason to intentionally mutilate artwork. This logic ignores the situation where a well-intentioned buyer simply needs for some particular reason to alter or mutilate the artwork.

<sup>90</sup> *Id.* at 168-171.

<sup>91</sup> *Id.* at 168-69. It is not clear how exactly Campbell's intended to alter the art, but most likely the winning artwork would be incorporated into a special edition soup can or advertisement. Such incorporation would risk "altering" the artwork. Therefore, obtaining a waiver was a perfectly reasonable and well-intentioned act.

The situation of installed artwork is very different. The report indicates a trend towards routine waivers for installed artwork, and subsequent evidence suggests that this tendency has continued. Several articles in relevant trade magazines have appeared in recent years informing building owners of section 113 and its implications. For example, *Commercial Leasing Law and Strategy* published an article in January 1998 educating its readers on the potential liability under VARA and the importance of either obtaining art that does not qualify for VARA protection or obtaining a valid waiver of all VARA rights.<sup>92</sup> Furthermore, Dale Lanzone, Director of the Cultural and Environmental Affairs Division of the General Service Administration and manager of the federal government's Art and Architecture, testified that the government insists on obtaining a section 113 waiver before contracting with an artist to create an installed artwork.<sup>93</sup> Considering that both the government and the private sector were either already requiring a section 113 waiver or moving towards it by 1995, the likeliness that section 113 waivers have become routine by 2003 is high.

## VI. THE RETURN OF "BIRD"

This situation is not necessarily a bad one for either the landlords or the artists. Wise landlords obtain a waiver that protects them from lawsuits should they have to destroy an artwork in the removal process. Alternatively, artists have full protection should they sell to a naïve landlord. Even if an artist sells to an informed landlord, he or

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<sup>92</sup> Stephen W. Snively, *How Artists' Rights Can Affect Landlords And Tenants* COM. LEASING L. & STRATEGY, Jan. 1998, at 8. The article includes a brief mention of the lower court ruling in *Carter*, perhaps as evidence that artists are capable of bringing at least somewhat successful VARA claims against landlords; see also Corinne Shane, *Fine Arts For Public Spaces: Guidelines For Prospective Patrons; Corporate Artworks For Public Office Buildings; Focus On: Property Management* NO. 39 VOL. 44 REAL ESTATE WEEKLY s24 (April 29, 1998) (discussing the value that fine art can add to a building but warning that VARA liability may arise should the owner not obtain a VARA waiver); *Risks Of Installing Artwork In Your Building; Focus On: Building Management* 9 VOL. 43 REAL ESTATE WEEKLY s10.

<sup>93</sup> *Report, supra* note 29, at 144. Mr. Lanzone further testified that as of 1995 the GSA had 63 commissions underway and 21 in progress. *Id.*

she still has the limited protections that section 113 provides despite a valid waiver.<sup>94</sup>

It is possible that a situation may arise which sections 113 and 106A do not address. Let us return to "Bird." Assume that "Bird" has been installed in a local building and that the public has become deeply attached to the artwork. Further suppose that the landlord of this building reads *Real Estate Weekly* and wisely obtained both a section 113 and a section 106A waiver before installation. By obtaining both waivers, the building owner would be well protected from potential liability. Despite the public's affinity, no legal protection of the artwork exists that would prevent any intentional destruction by the owner. This creates a dilemma for public policy: as the use of waivers for artwork installed in public buildings increases, the protections of artwork, which may become valuable to the community, are steadily eroding.

## VII. STATE LAW TO THE RESCUE

Much of the impetus behind VARA included considerations of the public welfare in general.<sup>95</sup> In balancing the two extremes, however, Congress never seriously considered the possibility of actually recognizing either third party or community rights in the artwork.<sup>96</sup> California and Massachusetts state law may offer a method of protection that does specifically consider public interest in a piece of art.

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<sup>94</sup> 17 U.S.C. § 113 (1994). Section 113 waiver provides only that the landlord escapes § 106A liability should removal require destruction, distortion, mutilation or modification. *Id.* If the owner can remove the installed artwork without such harms then the owner must do so. *Id.*

<sup>95</sup> *Hearings, supra* note 9, at 18. While Representative Markey certainly considers such acts as those of the Australian entrepreneurs to be an affront to the artists reputation, he also considers the protection of the integrity of artwork to be vitally important to the "very integrity of our culture." *Id.*

<sup>96</sup> This choice is especially interesting considering that VARA specifically protects works of "recognized stature" which inherently includes an analysis of the public's interest in the artwork. 17 U.S.C. § 106A(a)(3)(B) (1994).

### A. *California State Moral Rights Code*

California Civil Code (“California Code”) sections 987 and 989 provide a protection of artists’ moral rights very similar to VARA.<sup>97</sup> While some technical differences in the substance of the protection exist,<sup>98</sup> the waiver clause is comparable to that of VARA.<sup>99</sup> Interestingly, there is no requirement of specificity in California, as the section 987 waiver requires only a written and signed waiver that expressly waives the moral rights.<sup>100</sup> Most important for this discussion is section 989, which provides that a public interest corporation may enforce the artist’s moral rights as granted in section 987.<sup>101</sup> Such a corporation must be one that existed at least three years before the claim, and a “major purpose” of the corporation must be to “stage, display or otherwise present works of art to the public or to promote the interests of the arts or artists.”<sup>102</sup> Potentially, this interest may even exist in perpetuity,<sup>103</sup> as section 989 uses section 987 as reference to what rights a public interest corporation may enforce. However, no consensus exists as to whether the author’s life-plus-fifty-years statute of limitations, which restricts the heirs and legatees of the artist from bringing a section 987 claim, applies to a public interest corporation’s section 989 claim.<sup>104</sup> More importantly, section 989 does not clearly indicate whether a waiver pursuant to section 987(g)(1) applies to a public interest corporation’s section 989 claim.<sup>105</sup> So, if

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<sup>97</sup> CAL. CIV. CODE § 987(g)(3) (West Supp. 1991).

<sup>98</sup> Some of the differences are purely stylistic while others are more substantive. For one, VARA rights conclude with the artist’s death while § 989 continues to apply until fifty years after the artist’s death. Secondly, while § 106A(a)(3)(A) of VARA bars distortion, etc. which would be “prejudicial to [the artist’s] honor or reputation,” § 987 bars any distortion, etc. without any consideration of the effect on the artist’s honor or reputation.

<sup>99</sup> CAL. CIV. CODE § 987(g)(3) (West Supp. 1991).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* § 989(c).

<sup>102</sup> *Id.*

<sup>103</sup> Joseph Zuber, *The Visual Artists Rights Act of 1990: What It Does and What It Preempts*, 23 PAC. L.J. 445, 456 (1992).

<sup>104</sup> *Id.*

<sup>105</sup> CAL. CIV. CODE § 987(g)(3) (West Supp. 1991). The moral rights cannot be

courts rule that a section 987 waiver does not apply to public interest corporations, then section 989 may provide a method of protecting publicly valued art to which the artist has waived all moral rights.

This power may enable public interest corporations to protect "Bird." California law limits the application of section 989 to artwork that a person can remove without "substantial physical defacement, mutilation, alteration, or destruction."<sup>106</sup> The law tempers this limitation by allowing the public interest corporation to offer "evidence giving rise to a reasonable likelihood that a work of art can be removed from the real property without substantial physical defacement . . . ."<sup>107</sup> This section further requires that the corporation be willing and able to provide for the funding of the removal.<sup>108</sup> Under this regime, a public interest corporation with the means to provide for a method of removal can protect virtually any piece of artwork despite any waivers of section 987 rights. Such a system would protect "Bird," provided that removal without "substantial" damage is at all possible<sup>109</sup> and within the financial means of a public interest corporation.

This last assumption may be too bold. Even if the particular piece is highly popular, raising funds for an often extremely expensive removal may be quite difficult within the necessary time frame. This task becomes nearly impossible when the public does not particularly cherish the artwork yet a public interest corporation sees artistic value

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waived "except by an instrument in writing expressly so providing which is signed by the author." *Id.*

<sup>106</sup> CAL. CIV. CODE § 989(e)(1) (West Supp. 1991). This provision reads in full: [I]f a work of fine art cannot be removed from real property without substantial physical defacement, mutilation, alteration, or destruction of such work, no such action to preserve the integrity of the work of fine art may be brought under this section. However, if an organization offers some evidence giving rise to a reasonable likelihood that a work of art can be removed from the real property without substantial physical defacement, mutilation, alteration, or destruction of the work, and is prepared to pay the cost of removal of the work, it may bring legal action for a determination of this issue.

*Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> The use of the word "substantial" in the statute may indicate that any remotely feasible plan of removal that will preserve any significant portion of the artwork will be acceptable.

in its protection.

This may represent a crucial failure of the California Code. A public interest organization with deep coffers may use section 989 effectively, but such an organization might not even need section 989. If this group can apply public pressure and provide the means to remove the piece of artwork that the building owner would otherwise destroy, then a state code is probably redundant.<sup>110</sup> Such groups, however, are few and far between. The more likely scenario is that a public interest corporation may identify a piece of artwork worthy of protection but fail in providing the necessary funds to safely remove it. Therefore, even if section 989 applies, unless a public interest corporation can raise the funds in time, the building owner may destroy "Bird" without any legal ramifications.

#### B. *Massachusetts State Moral Rights Code*

Looking east to Massachusetts offers another suggestion for a legislative scheme. Massachusetts offers a form of moral rights for artists very similar to California in Chapter 23 section 85s of the Code of Massachusetts Regulations ("Massachusetts Code").<sup>111</sup> One significant difference between the Massachusetts Code and the California Code is that the Massachusetts Code has no mention of public interest corporations. Like the California Code, Massachusetts does allow heirs, legatees and personal representatives to exert the moral rights for fifty years after the artist's death. The major innovation of the Massachusetts Code is to permit the State Attorney General to bring a posthumous claim "with respect to any work of art

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<sup>110</sup> Potentially a building owner could harbor animosity toward an installed piece of art within the building and desire to destroy the artwork in spite of public pressure and outside funding. In such a situation, a well-funded public interest corporation could then use § 989 to save the artwork. Such a situation though, is highly unlikely. While a building owner may always change tastes and may desire to remove an installed piece of art, he or she is unlikely to change tastes so much so that he or she would be satisfied with nothing short of total destruction of the artwork. A building owner is not likely to purchase a building with an installed piece of art that he or she had a motive to destroy. Furthermore this discussion begins to implicate shades of the First Amendment.

<sup>111</sup> MASS. ANN. LAWS ch. 231, § 85S(g) (LEXIS 2001).



which is in the public view.”<sup>112</sup> There are several curious features about this provision. The whole subsection reads as follows:

(g) The provisions of this section shall, with respect to the artist, or if any artist is deceased, his heir, legatee, or personal representative, continue until the fiftieth anniversary of the death of such artist, continue in addition to any other rights and duties which may now or in the future be applicable, and except as provided in paragraph (1) of subdivision (h) may not be waived except by an instrument in writing expressly so providing which is signed by the artist and refers to specific works with identification and such waiver shall only apply to work so identified.

The Attorney General may, if the artist is deceased, assert the rights of the artist on the artist's behalf and commence an action for injunctive relief with respect to any work of art which is in public view.<sup>113</sup>

The first paragraph contains the waiver provision. An effective waiver limits the artist's and the heirs', legatees', and personal representatives' ability to enforce the artist's moral rights. Interestingly, the legislators placed the sentence regarding the Attorney General into a new paragraph. This may indicate that neither an effective waiver nor the artist's-life-plus-fifty-years statute of limitations will bar an Attorney General from bringing a claim. This subsection may do what section 989 of the California Code may also do, which is to give a particular third party a perpetual right to enforce an artist's moral right.

The other curious part of this provision is the “public view” requirement. The California Code has no mention of such a requirement for the public interest corporations. That a State Attorney General can protect only art within the “public view” seems logical since allowing a public figure to enforce an ordinarily private right should be reasonably connected to the general public's interest. Yet the definition of what art is within the “public view” is itself in need of further explication. The Code defines “art which is in the public view” to be artwork “on the exterior of a public owned building, or in an interior area of a public building.”<sup>114</sup> The justification for this distinction between the exterior of a publicly owned building and the interior of a public building is not explained in the statute.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> MASS. ANN. LAWS ch. 231, § 85S(b) (LEXIS 2001).

Furthermore, the definition of a “public building” requires additional explanation, which the legislative history fails to offer. A court could look to *Black's Law Dictionary*, which defines a “public building” to be a building

of which the possession and use, as well as the property in it, are in the public. Any building held, used, or controlled exclusively for public purposes by any branch of government . . . without reference to the ownership of the building or of the realty upon which it is situated. A building belonging to or used by the public for the transaction of public or quasi public business.<sup>115</sup>

This definition seems to limit the definition of “public building” to buildings that serve some sort of governmental or civic purpose. Should a court use this definition then the ability of the State Attorney General to protect art will be greatly limited. Considering though that the statutory definition carries the dyad of “public-owned building” and simply “public building,” then the restrictive definition of *Black's Law Dictionary* may not be appropriate. Vance R. Koven addresses this issue in his article, “Observations on the Massachusetts Art Preservation Act.”<sup>116</sup> Koven argues that

[s]ince they are worded differently from one another, we may assume that they mean different things. It seems reasonable to conclude that a “public-owned” building refers not only to a government building, but also to a building acquired by the government through condemnation, levy on a tax lien or otherwise. A “public” building, however would appear to be a broader category, including any commercial structure to which the public normally has access, and possibly also “public” areas of residential buildings.<sup>117</sup>

There is no judicial clarification on this point, but other Massachusetts regulations may provide further guidance. For the purposes of handicap access, the Massachusetts Code section 521-5.62 defines a “public building” as “a building privately or publicly financed that is open to and used by the public, including but not limited to . . .

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<sup>115</sup> BLACK'S LAW DICTIONARY 1228 (6th ed. 1990).

<sup>116</sup> Vance R. Koven, *Observations On The Massachusetts Art Preservation Act*, 71 MASS. LAW REV. 101 (1986).

<sup>117</sup> *Id.* at 106.

commercial buildings.”<sup>118</sup> This definition may be intentionally broad so as to promote access for handicapped persons to as many places as possible. Regardless, the definition may still lend weight to an argument that says that a privately owned building without any overt government or civic function can still be a “public building” for the purposes of the Act.

Neither the narrow nor the broad definition of “public building” account for the odd differentiation between the exterior of a “public owned” and the interior areas of a “public building.” No matter how a court interprets “public building,” it will create a situation where the Attorney General can protect artwork on the interior of such a building but not artwork on the exterior. Such artwork could include outdoor mosaics, sculptures, or murals. It is particularly odd that somehow artwork that a citizen will view on the way into a building is somehow less in the “public view” than artwork this same citizen will see after entering the building. Also confusing is the notion that the Attorney General can only protect artwork on the exterior of a “public owned” building but not artwork in the interior areas of this same building. That this government official, entrusted with protecting artists’ moral rights, cannot protect the artwork located on the interior of a building that the government itself owns is quite bizarre. Perhaps the definitions are not mutually exclusive and a “public owned building” may also qualify as a “public building.” Should this be the case then the Attorney General could be able to protect artwork both on the exterior and in the interior areas of a “public-owned building.” Unfortunately, no legislative history exists that accounts for this peculiar legislative construction.

While the California Code explicitly lays the cost of removal on the public interest corporation,<sup>119</sup> the Massachusetts Code makes no such specification. Like the California Code, the Massachusetts Code requires that the artist, heirs, legatees, or personal representatives pay for the removal of the artwork if such removal is possible.<sup>120</sup> The Massachusetts Code, however, specifies no such financial arrangement should the Attorney General attempt to protect the artwork. The

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<sup>118</sup> 521 MASS. REGS. CODE 521 § 5.62 (1987).

<sup>119</sup> CAL. CIV. CODE § 989(e)(1) (West Supp. 1991).

<sup>120</sup> MASS. ANN. LAWS ch. 231, §85S(h)(2) (LEXIS 2001).

limitation of the Attorney General's action to an injunctive relief claim<sup>121</sup> may imply that, should the Attorney General prevail on the claim, then the building owner must either keep the artwork or pay for removal himself. Considering the potential for very high removal costs, many building owners would have to alter their construction plans so as to avoid destroying the artwork that they cannot afford to remove. This system seems unfair to the building owner, especially if the building owner obtained a valid waiver to prevent this very event from occurring. A more reasonable system in which the state pays for removal would be more consistent with the rest of the Code. Whenever an artist, heir, legatee, or personal representative demands removal, he or she must bear the costs. Similarly, if the Attorney General believes preservation of artwork within the "public view" is in the best interest of the general public, then logic and equity demand that the general public bear the costs of removal. Such a system would restrict the Attorney General to protecting only the artwork that the general public would tolerate paying to preserve.

### *C. What to Draw from These State Laws*

The California and Massachusetts laws each contain both legislative gems and pitfalls. The California law creates a unique system where valid public interest corporations police the art world and can step in to protect artwork for which the artist had waived all moral rights. Unfortunately, these corporations may run into severe funding problems and may not be able to fully exercise their statutory role. The Massachusetts law potentially may solve the funding problem by spreading the costs across the general public. However, this statutory provision is fraught with uncertainties, allowing a court potentially to interpret the provision into virtual nullity. For these reasons, neither the California nor the Massachusetts laws are perfect, but a combination of the two may prove quite useful. Perhaps a legislature could enact a system whereby California-style public interest corporations police the art market for pieces of worthy artwork, to which the artist had waived his or her moral rights that are destined for

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<sup>121</sup> MASS. ANN. LAWS ch. 231, §85S(g) (LEXIS 2001).

destruction. Instead of forcing the public interest corporation to always pay for removal, the legislation could permit that, should the piece of art be within the “public view,” the corporation may petition the Attorney General to evaluate the merits of its claim. If the claim were worthy, the state government would provide funding for the proper removal. Such legislation would have to clarify issues that the Massachusetts law only confuses. For one, it would have to clearly state that the funding would come from the government. Secondly, it would have to clarify exactly what type of artwork is within “public view.” A definition close to that within the Massachusetts Code, one which reaches most buildings with general public access, would provide broad coverage while barring the Attorney General from spending the public’s money on wholly private matters.

Such a theoretical statute could act to mitigate the ongoing trend of routine waiver in the installed art market. This system could tolerate high levels of waiver but would provide safeguards for especially worthy artwork. Furthermore, it places the costs on the group that will hopefully benefit the most—the general public. Finally, this system could provide yet another benefit. In the California and Massachusetts Codes, should the artist or a third party pay for removal, the title then passes to that party. This theoretical statute could provide a similar provision. Therefore, should the Attorney General approve the funding of removal, the title of the artwork would pass to the state, which then could offer this valuable piece of art to a public museum.

#### VIII. THE PREEMPTION PROBLEM

Such a theoretical statute may work perfectly, but even if a state passed such a law, it might very well not provide one ounce of protection. The reason for this is the doctrine of preemption. The Supremacy Clause of the United States Constitution requires that any conflicts between state and federal law must be decided in the favor of federal law.<sup>122</sup> A court could decide that this theoretical state law conflicts with VARA and therefore could rule that whatever regime it attempts to create will not be recognized under law.

VARA specifically deals with the preemption question in section 5,

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<sup>122</sup> U.S. CONST. art. VI.

which states that

all legal or equitable rights that are equivalent to any rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections.<sup>123</sup>

This provision lays down the method of deciding what state laws conflict with VARA. According to section 301(f), in the matter of artists' moral rights, only those state rights that "are equivalent" to VARA rights are preempted.<sup>124</sup> Therefore, the courts must decide exactly what state rights are "equivalent" and subsequently preempted by VARA.<sup>125</sup> While the California courts have dealt with the issue of preemption of moral rights in *Lubner v. City of Los Angeles*,<sup>126</sup> no court has ruled on the possible preemption of section 989 rights in public interest corporations. The Massachusetts courts have addressed the retroactivity of the Massachusetts Act<sup>127</sup> but have not yet addressed any other issue, including preemption.

Joseph Zuber has asserted that, under the California Act, a public interest corporation's attempt to enforce an artist's section 987 rights after the death of the artist will most likely not be preempted by VARA.<sup>128</sup> Zuber reasons that since VARA rights explicitly extinguish upon the death of the author, then the posthumous rights provided by the California Code should remain available.<sup>129</sup> Such logic applies to

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<sup>123</sup> 17 U.S.C. § 301(f)(1) (1994).

<sup>124</sup> *Id.*

<sup>125</sup> *Zuber, supra* note 103, at 492-503.

<sup>126</sup> 45 Cal. App. 4th 525 (1996). This case ruled that § 106A of VARA preempted § 987 of the California Code on the issue of negligent destruction versus intentional or grossly negligent destruction. *Id.* The plaintiff was attempting to recover against the city because a municipal truck negligently crashed into a building and destroyed a piece of visual artwork. *Id.*

<sup>127</sup> *Moakley v. Eastwick*, 423 Mass. 52 (1996). The Massachusetts Supreme Court ruled that the Art Preservation Act did not protect artwork created before passage of the Act. *Id.* The court did not address the preemption issue because VARA clearly did not protect the artwork which the artist created in 1971. *Id.*

<sup>128</sup> *Zuber, supra* note 103, at 500.

<sup>129</sup> *Id.*

the Massachusetts law as well. If the courts follow this reasoning,<sup>130</sup> then the public interest corporation's actions to save the theoretical artwork may survive preemption provided that the artist has died. Inevitably, the question now falls to whether or not a California or a Massachusetts claim survives preemption should the artist still be alive. Zuber predicts that courts will not allow such a claim to survive preemption,<sup>131</sup> arguing that since Congress was looking to protect both the public's interest in the integrity of the arts as well as the artist's own professional integrity, VARA will likely preempt any attempt by a state to achieve the same goal with its own legislation.<sup>132</sup> The issue remains undecided.

## IX. RECOMMENDATIONS

Even if a court were to decide that the third party actions envisioned by this theoretical statute were allowed during the life of an artist, the decision could only affect art in that state. Any art not located in that state would have only VARA to protect it. The Copyright Office report seems to indicate that the market for moveable artwork is moving towards reasonable waiver usage and that, therefore, such artwork will likely receive adequate protection under a purely VARA regime. However, the report, along with subsequent evidence, indicates that waivers are becoming routine in the market for installed artwork. If the installed art market reaches a point where the majority of installed art has no VARA protection, then public policy may demand action. Two options would be potentially available. Firstly, the various states could incorporate the theoretical provision as outlined above. While a court may allow some state claims pursuant to this provision's third party rights, the availability of these claims remains in doubt because of the preemption issue. Furthermore, only eleven states have any form of artists' moral rights legislation in the first place.<sup>133</sup> A more efficient way to achieve third party rights of

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<sup>130</sup> Zuber's logic may have already become influential considering that the judge in *Lubner* used his article as guidance for the decision. *Lubner*, 45 Cal. App. 4th at 531.

<sup>131</sup> *Zuber*, *supra* note 103, at 500-01.

<sup>132</sup> *Id.*

<sup>133</sup> *Zuber*, *supra* note 103, at 468-9.

action would be for Congress to investigate a potential amendment to sections 106A and 113. By creating a federal right in qualified public interest groups to identify pieces of art worthy of protection in spite of any previous waiver and by providing supervised funding, Congress could ensure that when an artist waives his or her moral rights in his or her work and the work then becomes invaluable to the public, the artwork could remain protected from pointless destruction.

## X. CONCLUSION

VARA represents a dramatic step in American law. It protects a form of property right that federal law had not previously recognized. The legislative process resulted in the delicate balancing of two conflicting interests: the traditional property rights of the owner and the desire of the artist that his or her work be protected after sale. To achieve this balance, Congress included two waiver provisions in sections 106A and 113. Congress intended that these waivers enable the smooth incorporation of VARA into the art world and provide reasonable limitation of artists' moral rights. All of the available evidence implies that for the moveable art market, the reality is meeting Congress's goals. Further evidence suggests that in the market for installed art, the usage of waivers may obviate the statute's intent. While waivers appear to be the best way to protect landlords from suit and therefore encourage them to buy and install art, perhaps a safety valve may become necessary. Should waivers become completely dominant, artwork of potential social value, such as "Bird," may lose all VARA protections. By adopting a method of unwaiveable third party standing, Congress would then protect these valuable pieces of art. Certainly, very careful drafting would be necessary so as to moderate the use of these third party suits. But considering that Congress already pulled off a remarkable balancing act, perhaps a little over a decade later it should try once again.



