1992

The Visual Artists Rights Act: Federal Versus State Moral Rights

Brett Sirota

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation


This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

THE VISUAL ARTISTS RIGHTS ACT: FEDERAL VERSUS STATE MORAL RIGHTS*

Janet Drew is an aspiring New York artist who has met with limited success. Her specialty is sketching city-scapes with colored pencils. As a standard practice, she often makes multiples of her sketches, signing and numbering each one. After an exhibition at a local art gallery she is approached by Sam Worth, mega-millionaire owner of Worth Clothing Stores, a nationwide chain of contemporary clothing stores aimed at a young urban market. He tells her that he has fallen in love with one of her sketches, Autumn in Soho, and would like to use it in his stores, which are all decorated with various knick-knacks and works of art. When he inquires as to the existence of multiples, she replies that this particular sketch intrigued her so much that she has made 223 multiples. He is delighted, since this will enable him to display one in each of his stores. Worth offers Drew a larger sum of money than she has ever contemplated being paid for her work, and she happily accepts his offer. The following week, she receives a contract from Worth’s attorney. Unable to afford an attorney of her own, she simply signs the contract and returns it, understanding that Worth will own the drawings and the copyrights for those drawings. Six months later, long after Worth has purchased the drawings, Drew is in a Worth Clothing Store when she sees her work. She is utterly shocked however when she sees that Val Ewe, the Worth mascot, has been superimposed on her print, which still bears her signature. Upon further investigation, she learns that the mascot has been added to every single one of her prints, and is incapable of removal without damaging the print. Outraged at what she believes to be serious damage to her reputation, she seeks a legal remedy.

Fortunately for Drew, state laws do exist, as does a recently created federal statute, which may provide relief for her. On October

* An earlier version of this Note received an award in the Nathan Burkan Memorial Competition, sponsored by The American Society of Composers, Authors and Publishers.
27, 1990, Congress passed the Visual Artists Rights Act of 1990 ("VARA"). Its passage was hailed by many as a triumph for the American artist. Now, the United States provides a right common in other parts of the world—a federal statute that protects the reputation and honor of authors of works of fine art by giving those authors the right to stop various actions which physically affect their creations, despite the fact that the author may no longer hold the copyright for that particular piece of art. VARA would seem to be the perfect sort of remedy for Drew; but if not, are there other alternatives available? VARA is not particularly innovative—many states have had similar laws in existence for some time.

To state the problem simply, VARA does not cover Drew's situation, since its scope is restricted to works of visual art which are defined, in part, as "a drawing . . . existing . . . in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." Drew has created a limited edition of 223 multiples.
and is therefore not covered by VARA. However, Drew would have a cause of action under the New York Artists Authorship Rights Act ("New York Act"), the scope of which is broader, reaching "limited edition multiples of not more than three hundred copies by that artist." But with a federal statute now in existence which deals with moral rights for works of fine art, is the New York Act (and other similar state laws) still valid, or has it been absolutely preempted by VARA?

This Note examines the Visual Artists Rights Act, the New York Artists Authorship Rights Act, and the preemption doctrine as it applies to these laws, concluding that in Drew's case, the New York Act should not and probably would not be preempted by VARA. Furthermore, state laws dealing with moral rights or any similar rights should not be preempted insofar as they exceed the scope of VARA.

I. VISUAL ARTISTS RIGHTS ACT OF 1990

VARA was passed on the last day of the 101st Congress as part of a larger bill authorizing eighty-five new federal judgeships. Representative Robert Kastenmeier and Senator Edward Kennedy introduced two moral rights bills, H.R. 2690 and S. 1198. Senator Kennedy had been supporting the bill for years, and it had

Copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.


9. See infra text accompanying notes 12-63.

10. See infra text accompanying notes 64-81.

11. See infra text accompanying notes 82-105.


finally been passed by the House of Representatives. Facing opposition in the Senate, the bill was passed primarily due to its linkage with the larger bill creating new judgeships, which the Senate was not about to oppose.\footnote{Smith, supra note 12, at 4.}

The creation of VARA was no doubt made easier in part by the United States' accession to the Berne Convention for the Protection of Literary and Artistic Works on March 1, 1989.\footnote{Id.} Despite the lengthy history of the Berne convention, dating back to 1886,\footnote{Id} the United States chose not to join this international union until recently. One of the most difficult ideas for the United States to accept in acceding to the Berne Convention was the concept of moral rights.\footnote{See, e.g., Glenn Groenewold, Congress in Action; Copyright Legislation, UNIX REVIEW, Aug., 1989, at 28 (referring to moral rights as running "directly counter to Americans' cherished belief in the moral supremacy of the pocketbook" and resistance to joining Berne based upon opposition to the notion of artistic rights); Herbert Mitgang, Old Copyright Treaty: New Shield for U.S. Artists, N.Y. TIMES, Mar. 10, 1989, at 7 ("[O]ne of the issues that prevented the United States from joining Berne was this clause in the treaty that protects the 'moral rights' of authors and artists.").}

The term is a literal translation of the French term droit moral, a right of authors that has existed in many other countries for quite some time.\footnote{Id.} It is a right of personality, separate from economic and property rights.\footnote{See Edward J. Damich, The New York Artists' Authorship Rights Act: A Compara-}
a mere chattel, droit moral is the right of an author to protect a work—essentially a piece of the author—from unauthorized treatment, even after relinquishing economic and property rights.\textsuperscript{22}

While the concept of moral rights has existed in the United States in the form of state statutes for several years,\textsuperscript{23} it is likely that VARA would not have been passed were it not for the Berne Convention.\textsuperscript{24} Implicit in the United States joining the Berne Convention was the notion that the accompanying philosophy of moral rights embodied in article 6bis would be accepted by the United States.\textsuperscript{25} Congress did not change the Copyright Act to comply with article 6bis, but stated that moral rights were already protected in the United States, and thus there already existed adherence to the Berne Convention.\textsuperscript{26} Despite this assertion, moral rights advocates have continued to push for federal laws which provide more thorough compliance with the Berne Convention.\textsuperscript{27} The passage of VARA would suggest that the earlier statement that United States law already provides for full moral rights is not entirely true, otherwise VARA...
would be superfluous. It also suggests that there may be a future of increased federal moral rights protection, perhaps for other classes of works.

For the purpose of analyzing the Drew hypothetical, VARA sections 106A and 301(f) are the most important. Section 106A provides that the author of a work of visual art shall have the right to claim authorship of that work, to prevent the use of his or her name as the author of any work of visual art which he or she did not create, and to prevent the use of his or her name as the author of the work in the event of any modification when to do so would be prejudicial to the author's reputation—this is known more simply as the right of attribution. Section 106A also provides the more controversial right of integrity—the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right." The right of integrity also includes a provision allowing

28. Most probable is that prior to the passage of VARA, there was a minimal level of moral rights protection in this country, but far less than the levels of protection offered in other countries. Between state statutory schemes, common law theories, copyright law, and section 43(a) of the Lanham Act, many remedies are available for limited moral rights violations. The difference is that with VARA, there now exists a nationwide floor for moral rights protection, at least as regards works of visual art. Cf. RECORD, supra note 24, at H3113 (statement of Rep. Kastenmeier) (“While our laws may be sufficient to comply with Berne, this does not necessarily mean that they are sufficient for all purposes.”).

31. The right of attribution is generally more palatable because it does not interfere with private ownership. Cf. Smith, supra note 12 (VARA “imposes an artist’s lien on [works of visual art]—and thereby represents an unprecedented incursion on property rights”).
32. 17 U.S.C. § 106A(a)(3). Unfortunately, this clause is not entirely clear in its meaning. There are two salient interpretations: (1) An author can prevent an intentional alteration before the fact if it will be prejudicial to her honor or reputation, and this right is violated if an intentional alteration has already occurred, regardless of prejudice to honor or reputation (this is what the statute seems to say on its face); or (2) An author can prevent an intentional alteration before the fact if it will be prejudicial to her honor or reputation, and this right is violated if an intentional alteration has already occurred and that alteration is prejudicial to the author's reputation or honor. The latter interpretation, while not as readily apparent on the face of the statute, makes far more sense. If the former interpretation prevails, then one can envision a situation where an author could act against alterations which have already occurred, if those alterations are not prejudicial, but could not stop those same changes before they occur. Furthermore, the former interpretation creates protection for authors in situations where their honor or reputation has not been damaged—a primary consideration in the area of moral rights and under the Berne Convention.

For the purposes of this Note, I will assume that interpretation (2), which requires
an author to prevent any destruction of a work of recognized stature. Of paramount importance to Janet Drew is the definition of a "work of visual art," which includes "a . . . drawing . . . existing . . . in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author . . . ."

To summarize, VARA provides a right of integrity and a right of attribution which apply only to works of visual art. It does not provide equivalent protection to article 6bis of the Berne Convention. Beyond that which VARA provides, article 6bis provides: a right of anonymity—the right to publish a work anonymously and to stop anonymous publication; a right of pseudonymity—the right to publish under a pseudonym and to stop publication under a pseudonym; and moral rights which last as long as economic rights do. Most significantly, article 6bis applies to all works of art produced by any author.

The most fundamentally unique aspect of VARA in the context of the Copyright Act is that it provides protection for the reputation of an author, apart from whatever economic rights that author may or may not possess. Traditionally, the Copyright Act has provided only economic rights, and protection of an author's reputation does not qualify as such. The copyright laws' grant of power is derived from Article I, Section 8, Clause 8 of the United States Constitution. This is significant in that the primary function of the Copyright Act, for works created today, economic rights last for the life of the author plus fifty years, while the moral rights provided by VARA last only for the life of the author.

33. 17 U.S.C. § 106A(a)(3)(B). This sort of provision runs contrary to the concept of moral rights, which are supposed to protect all authors. See Berne Convention art. 3, in GOLSTEIN, supra note 17, at 313; see also Smith, supra note 21, at 173 (courts should not be called upon to determine whether art is of "recognized quality").

34. See supra note 7.
35. See Damich, Federal Moral Rights, supra note 2.
36. See GOLSTEIN ET AL., supra note 17, at 315 (article 6bis).
37. Id.
38. Id. Under the Copyright Act, for works created today, economic rights last for the life of the author plus fifty years, while the moral rights provided by VARA last only for the life of the author. 17 U.S.C. §§ 106A(d), 302.
39. See GOLSTEIN ET AL., supra note 17 at 311-13 (articles 2 & 3).
41. See RECORD, supra note 24, at H3115 (statement of Rep. Markey) (moral rights "with their non-economic, subjective underpinnings do not fit neatly within our copyright act").
42. U.S. CONST. art. I, § 8, cl. 8 states that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors
right Act, as dictated by the Constitution, is to promote the sciences and the arts. The United States has traditionally chosen to perform this function, in part, by providing limited economic rights to authors. The protection of authors' rights as individuals is a means to achieve an end—the end being the societal good which is produced by flourishing arts and sciences. Quite the opposite, the purest model of moral rights, the Berne Convention, protects the author first and foremost, without regard for the balance of society. Arguably, by protecting authors—thereby giving them a greater advantage in the marketplace—it would follow that the arts on the whole would improve and society would benefit, but this is by no means either a certainty or a necessity.

VARA is a difficult law to categorize. While it seems to provide moral rights, nowhere in the statute is that term used. Some see VARA as a law intended to protect works of art from physical changes which would essentially cause the loss of a particular work of art—not a moral rights law so much as a preservation law. Others see VARA as a law which primarily protects the personality of the author, a true moral rights law. Whatever Congress' true intention was in passing VARA—to preserve works of art or to

and Inventors the exclusive Right to their respective Writings and Discoveries. Id.  
43. See supra notes 20-25 and accompanying text. Clearly, a pure moral rights statute, which is not intended necessarily to benefit society as a whole, might be perceived by some as an inappropriate law to be included in American copyright law, which is based upon serving the public good.

44. See, e.g., VARA Senate Hearings, supra note 27, at 77 (statement of Robert Gorman, Professor of Law, University of Pennsylvania School of Law) (supports VARA to the extent that it limits or focuses its concern to the destruction or mutilation of singular works of art, which creates the risk of being removed from view in their original form); RECORD, supra note 24, at H3114 (statement of Sen. Moorehead) (stating the purpose of VARA as being to preserve and protect works of visual art without interfering with the rights of copyright owners); id. at H3116 (statement of Rep. Brooks) (VARA "recognizes the influence in our culture of the work of visual artists and the need to protect that work" (emphasis added)).

45. See, e.g., VARA Senate Hearings, supra note 27, at 31 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law) ("The phrase 'honor or reputation,' found in both article 6bis of the Berne Convention and in the Kennedy bill also suggests an American connection to moral rights."); VARA House Hearings, supra note 26, at 32 (statement of Ralph Oman, Register of Copyrights) ("Moral rights are personal to the author and are intended to protect the personality and integrity of the author, not necessarily the work itself."); cf. id. at 80 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law) (recognizing reputation as fundamental concern of VARA, "one may speak of these interests as corresponding to moral rights but they also have important economic consequences").
protect authors' reputations—the result is clear. Authors of works of visual art now enjoy a protection never explicitly provided for in American law, and the best label we have for it is a moral rights law.

Some are troubled with the concept of VARA being at odds with traditional notions of property law. It is argued that forcing the owner of a piece of fine art to respect the integrity and attribution of the author infringes on Constitutional property rights by placing an affirmative duty upon an individual who should be allowed to do whatever he or she wants to do with that piece of property. The right of property and the right of personality may clash, but the latter must prevail. The former involves a mere piece of inanimate matter, while the latter involves a human being. Furthermore, the protection of a person's personality is not a new concept in American law, and is therefore not novel or unusual. A piece of fine art may be a piece of personal property, but more than any other kind of property, that art is inextricably bound up with the personality and reputation of its author. Common sense dictates that when one buys a painting, it is not merely a pretty picture, but an extension—a part—of the author. In effect, one is buying a part of that human being, and certainly that individual is entitled to have their vision and personality preserved, even if it does infringe upon the property rights of the owner. If a newspaper article quotes a statement made by

46. See, e.g., Smith, supra note 12, at 4 (VARA "constitutes one of the most extraordinary realignments of private property rights ever adopted by Congress"). But cf. VARA House Hearings, supra note 26, at 80 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law) ("I believe that the bill's solicitude for the interest of owners is so great that if there is an imbalance, the disfavored parties are the artists").

47. See Smith, supra note 12 at 4.

48. The piece of art itself may merely be inanimate matter, but the reputation and personality embodied within that work concern a human being. See RECORD, supra note 24, at H3115 (statement of Rep. Markey) (noting that: a work of art is too often simply treated as a physical object, rather than as an intellectual work; that title to the soul of an artwork does not pass with the sale of the artwork itself; and, that a work of art is not a utilitarian object like a toaster).

49. See VARA Senate Hearings, supra note 27, at 28 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law) ("The torts of violation of the right of privacy and defamation per se are examples of causes of action that protect the plaintiff's interest in his 'honor,' an aspect of the right of personality.").

50. Just try to imagine someone willingly paying millions of dollars for an exact replica of a Picasso painting. When a collector does pay millions for an authentic Picasso painting, they are clearly not just interested in the "pretty picture" on the canvas, but in the author of that work.

51. See, e.g., Clemens v. Press Publishing Co., 122 N.Y.S. 206 (Sup. Ct. 1910) (a
some individual, the newspaper presumably holds a copyright to that article and consequently "owns" that quotation. But the paper must still accurately represent those words to the public. The words cannot be intentionally altered so as to change the meaning of the statement and then presented to the public as the words of that individual. Just as the newspaper must accurately quote that individual's statement, so should the owner of a work of art have an obligation to honestly communicate that aspect of an author's personality to the public.

The legislative histories accompanying VARA indicate that Congress had several major themes with which it was concerned. One was a need for uniformity. Congress already had stated that moral rights protection existed to some degree in the United States under various state laws, common law, and federal fair trade law. This left authors with a great deal of uncertainty regarding their rights as they moved from state to state. Indeed, the Copyright Office has made clear that a single federal system is preferable, because creativity is stimulated more effectively on a uniform nationwide basis.

Congress was also interested in the precedential value of VARA, especially in terms of an incremental approach to federal moral rights. Protection of authors who create fine art is a good starting point for federal moral rights legislation for several reasons. Works of visual art usually only involve one individual, not a collaborative buyer of rights to a literary production cannot make as free use of those rights as a buyer of a barrel of pork. In addition, any infringement upon property rights which may exist would be minimal. VARA does not require an owner of art to exercise any extraordinary care or to assume the role of a caretaker. At most, VARA would force an owner of a work of art to restrain himself from altering that work should he desire to do so. VARA only prevents intentional mutilation. 17 U.S.C. § 106A(a)(3).

52. RECORD, supra note 24, at H3113 (statement of Rep. Kastenmeier) (one of the goals of VARA is to provide a nationwide standard for these protections and to provide uniformity and certainty).

53. See supra note 26 and accompanying text.

54. VARA House Hearings, supra note 26, at 28 (statement of Ralph Oman, Register of Copyrights) (visual works of art are not bound to any one location and different laws among states presents questions of conflict of laws, vesting, and more).

55. Id.

56. See RECORD, supra note 24, at H3113 (statement of Rep. Kastenmeier) ("We will continue to consider whether claims arising in the film context meet the same standards as visual artists' claims did."); VARA House Hearings, supra note 26, at 71 (statements of Rep. Kastenmeier and Ralph Oman, Register of Copyrights) (discussing precedential value of VARA). But cf. RECORD, supra note 24, at H3115 (statement of Rep. Fish) ("This legislation should not be viewed as a precedent for the extension of so-called moral rights into other areas.").
team acting under the supervision of a studio or publisher, and are therefore easier to assign to the creative talents of one author, which makes enforcement of VARA far more simple than if these other classes of work were involved. Also, works of visual art typically do not involve the complex contractual matters which are commonplace in other entertainment related industries, such as film or television, and Congress is understandably reluctant to interfere with well established contractual arrangements within the entertainment industry. Finally, the conduct forbidden by VARA has little, if any, redeeming social value. As pointed out by Representative Kastenmeier in the debates over VARA, "No one testified that these practices were legitimate, or that they should continue."57 Ralph Oman, the Register of Copyrights, described VARA as a "trial horse" for possible future legislation protecting authors of other classes of work.58

One of the most powerful reasons for enacting VARA is the special nature of the class of works which it protects. Even opponents to a federal system of comprehensive moral rights protection recognize the merits of VARA: the changes which might be wrought upon a work of fine art, especially works existing in one form only, are essentially destruction and the irrevocable loss of a piece of art.59 For this reason, these sorts of works are at a greater risk of loss than a mass produced piece of art, such as a film, song, or book.60

Above all, VARA was passed (as opposed to any similar statute providing moral rights for other classes of work) because it was the easiest to pass, with the fewest opponents and the most supporters. If preventing the irrevocable loss of a work of art is one of the key motivations behind VARA, why extend protection to multiples of not more than 200 copies, or only to those photographic images produced solely for exhibition purposes? Why not extend protection to books or films before they have been mass produced or published? Perhaps the notion of the struggling artist, eking out an existence at the mercy of the buyer of artwork, engenders more sympathy than a team of collaborators working on a film, or a writer working for a publisher.

57. RECORD, supra note 24, at H3113.
58. See VARA House Hearings, supra note 26, at 71.
59. See VARA Senate Hearings, supra note 27, at 77 (statements of Robert A. Gorman, Professor of Law, University of Pennsylvania School of Law, and Edward Damich, Associate Professor of Law, George Mason University School of Law).
60. See VARA House Hearings, supra note 22 at 27 (statement of Ralph Oman, Register of Copyrights) (works of visual art present special challenges to copyright law because they are neither mass produced nor mass distributed).
If VARA seeks to protect the reputation of the author, why is struggling artist Janet Drew more worthy of protection than the director of a black and white film trying to prevent the colorization of her work? Works of visual art are especially receptive to moral rights legislation for two reasons: 1) the romantic notion of protecting the struggling author of "fine art" as well as the protection of that very work, and 2) a lack of big money opposition to protection of works of visual art. As to the first reason, it is easier to feel a need to protect a lone sculptor or painter than a team of collaborators working on a film, or a writer, who may be alone, but is supervised and supported by a publisher. It may be a bit much to say that the author of fine art is more worthy of pity, but it is certain that our society can sympathize more readily with the single individual who is taken advantage of than with a film studio or publisher. As to the second reason, the likely opponents to moral rights protection in other areas such as film or written works—publishers, film studios, and network and cable television companies—would have far more power and a much greater interest in preserving what they might see as an advantageous position. The likely opponents to VARA—individual citizens, museums, and perhaps a few art magazines—are probably not as fervent in their opposition to this kind of legislation and do not have the lobbying strength which entertainment moguls possess. Simply put, VARA is a palatable moral rights law which serves to appease those who argue that the United States has not done enough

61. It is worth noting that economically, VARA will probably have limited impact on the industries which must deal with it. See RECORD, supra note 24, at H3113 (statement of Rep. Kastenmeier) (state laws already in existence have not disrupted the market for the sale of works of art). Conversely, similar rights for other classes of works, such as motion pictures or magazines, could have a negative impact on important American industries. See id. at H3114 (statement of Rep. Moorehead) (moral rights for works which are collaborative in nature and exist in large numbers would inhibit the dissemination and production of such goods); id. at H3115 (statement of Rep. Fish) (supporting VARA because it does not impact on important activities of highly successful copyright industries, several of which contribute a surplus to the U.S. trade balance, a factor of great importance in this era of staggering U.S. trade deficits).

62. For example, if moral rights existed in other areas such as film, television networks would be unable to edit works without the consent of the author, even though they would hold a copyright for a work (and therefore have the right to prepare derivative works). See generally VARA Senate Hearings, supra note 27, at 51-53 (statement of Robert Gorman, Professor of Law, University of Pennsylvania School of Law) (opposing comprehensive moral rights in the U.S.).

63. See RECORD, supra note 24, at 3113 (statement of Rep. Kastenmeier) (stating that no one in the visual arts community argued that protection of this sort was not necessary).
to comply fully with the tenets of the Berne Convention.

II. THE NEW YORK ARTISTS AUTHORSHIP RIGHTS ACT

The New York Act first went into effect on December 31, 1984. While similar to VARA, it has several key differences. First, and most significantly for Janet Drew, the act protects works of fine art of a limited edition of not more than 300 copies, as opposed to 200 for VARA. The right of integrity contained in the act only prevents alteration, defacement, mutilation, or modification of a work when the work is knowingly displayed publicly or published, and is represented or reasonably regarded as belonging to the author, and if damage to the author's reputation is reasonably likely to result. The right of attribution is essentially the same as in VARA.

Even before VARA was enacted, opinion was divided over whether the New York Act was preempted by the Copyright Act. The eventual existence (before the enactment of VARA) of moral

64. New York Act § 14.03.1.
65. Id; see also 17 U.S.C. § 101. "Fine art" means a painting, sculpture, drawing, or work of graphic art, and print, but not multiples. "Limited edition" means works of art produced from a master, all of which are the same image and bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples, or are otherwise held out as limited to a maximum number of multiples. N.Y. Arts & Cult. Aff. § 11.01.9-10. Both of the above terms are used within the New York Act.
66. New York Act § 14.03.1. This is a somewhat more concrete standard than the ambiguous "prejudicial to his or her honor or reputation" contained in VARA. 17 U.S.C. § 106A(a). Also note that the New York Act does not provide any explicit protection against destruction of a work, which VARA does. 17 U.S.C. § 106A(a)(3)(B).
67. Cf. New York Act § 14.03.2(a); 17 U.S.C. § 106A(a). The only possible significant difference between the two rights of attribution lies in the right to disclaim authorship of a work. Under the New York Act, an author may only disclaim authorship of an altered work when there exists a "just and valid reason." This is roughly equivalent to VARA's requirement that an author may only disclaim authorship of an altered work when failure to do so would be prejudicial to his or her honor or reputation. The semantics of the two acts differ, but the effect is nearly identical.
rights laws in nine other states, would lend support to the notion that these state laws were not preempted. Most persuasive is Congress' assertion that Berne Convention obligations are fulfilled in part by state moral rights statutes. Congress would not have made this assertion if it did not intend for those laws to have effect.

The overriding intent behind the New York act is to protect the reputation of the author, not to protect the work. This is most clearly suggested by the fact that the right of integrity is only invoked when the work of fine art is publicly displayed or published. Under the New York scheme, it is entirely plausible that an owner of a work of fine art could mutilate the work to the point of destruction, but so long as the work was not displayed to the public, this action would not be in violation of New York law. Clearly, this sort of incident does not serve to protect the integrity of the work, but it is in accord with the notion of moral rights set out in article 6bis of the Berne Convention. In the purest sense, moral rights only protect a work insofar as is necessary to protect the reputation of an author. When modification of a work will not harm the reputation or honor of the author, moral rights should not be invoked to preserve the work. Preserving the integrity of a work of art is not the function of moral rights, but an entirely separate concept. Despite the primary intention of protecting authors' reputations, the legislature also realized and intended that the public would benefit, declaring that the welfare of the public "will be promoted by giving further recognition to the arts as a vital aspect of our culture and heritage." The

69. See supra note 5.
70. See Wojnarowicz, 745 F. Supp. 130 (holding that New York Artists Authorship Rights Act does not conflict with the Copyright Act and is not preempted under the Supremacy Clause).
71. See supra note 26.
72. See Wojnarowicz, 745 F. Supp. at 137 (quoting ASSEMBLY MEMORANDUM ON ASSEMBLY BILL 5052-B); Damich, A Comparative Critique, supra note 21, at 1737, 41.
73. New York Act § 14.03.1. Cf. 17 U.S.C. § 106A(a)(3)(A), where the right of integrity is invoked when there is prejudice to the author's honor or reputation. This is extremely ambiguous and it is entirely possible that a court could determine that a situation could exist where an alteration has not been published or publicly displayed but is still prejudicial to the author's honor or reputation, a broader scope than under the New York Act. In addition, VARA provides for prevention of destruction of works of recognized stature. 17 U.S.C. § 106A(a)(3)(B). Clearly, this has nothing to do with moral rights, since it is impossible for a nonexistent piece of art to reflect upon an author's honor or reputation.
74. See GOLSTEIN ET AL., supra note 17, at 315. This is an excellent example of how the so-called right of integrity, a term descended from the Berne Convention, refers to the integrity of the author's reputation or honor, not the integrity of the piece of work.
75. N.Y. ARTS & CULT. AFF. LAW § 3.01 (McKinney 1984); see also Damich, A
result is somewhat similar to the effect of the Copyright Act. It would seem that the New York law incidentally serves the public good, while the Copyright Act incidentally serves the author. Yet isn’t the end result quite similar, whatever the stated primary purpose of these laws might be? Some argue that state moral rights laws, as well as VARA, will in fact hurt the public. But clearly, the various legislators who have dealt with moral rights and related statutes must have intended the best of both worlds—serving the public good and protecting the honor and reputation of authors. As we have observed of the Copyright Act in its history, it is possible for these two concepts to coexist within one body of law, with great success.

From a pure moral rights standpoint, the New York Act is superior to VARA. First, the New York Act does not protect against destruction of any kind, as VARA does. Protection of the actual work, apart from the author’s reputation, is not the function of moral rights law. Second, the New York Act is less ambiguously connected to reputation on its face. The New York Act requires public viewing or publication plus damage to the author’s reputation. This is far more clear than VARA’s requirement that an alteration be “prejudicial to [an author’s] honor or reputation.”

III. PREEMPTION

The doctrine of preemption draws its authority from the Supremacy Clause of the Constitution. Federal law is always supreme over

Comparative Critique, supra note 21, at 1750-51.

76. By giving limited economic rights to authors, the arts flourish and all of society benefits. The New York Legislature apparently felt that by giving limited moral rights to authors, the arts continue to flourish and all of society benefits.

77. See, e.g., Smith, supra note 12, at 4 (VARA has been applauded by arts advocates but “millions of ordinary Americans whose rights are now restricted are not likely to share the enthusiasm”).

78. See, e.g., RECOR D, supra note 24, at H3113 (statement of Rep. Kastenmeier) (describing VARA as a bill that balances the rights of all interested parties, including authors and copyright holders, and that also promotes the public interest).


80. New York Act § 14.03.1.


82. U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
state law. Reasons for having a doctrine of preemption include a need for uniformity as well as a need for one supreme government which binds the various states together. However, the Supreme Court has made clear that the constitutional grant of power to Congress, upon which the Copyright Act is based, is not exclusive, and thus under the proper circumstances, state laws may coexist with similar federal laws in the area of copyrights. This determination is premised upon the “great diversity of interests in our Nation—the essentially non-uniform character of the appreciation of intellectual achievements in the various States.”

Each state has its own particular attributes which define it. New York, primarily due to the existence of New York City, has evolved as a major cultural center in the United States. As such, the citizens of New York, as compared to those of other states, have different needs and interests in the area of arts and cultural affairs. It is logical to allow each individual state to provide greater protection of those rights which are most vigorously exercised by the citizens of that state. Nonetheless, situations may arise where a state law cannot be permitted to coexist with federal law. State law may be invalidated under the Supremacy Clause in several ways:

---

83. Id.
85. Id. at 479.
86. For most people, the idea of New York (primarily New York City) as the arts and cultural center of the United States is not open to dispute. See, e.g., FAYE HAMIEL, FROMMER'S COMPREHENSIVE TRAVEL GUIDE: NEW YORK '91 201 (1991) ("New York City is, of course, the entertainment capital of the nation."); Amy Hersh, Cultural Affairs Report Shows NYC's Influence Across Country, BACK STAGE, Apr. 10, 1992, at 3 ("[A]rtistic pursuits born in New York City travel the world, impact the world . . . ."); NYNEX YELLOW PAGES (NYNEX Information Resources Co. ed., 1992) (listing 34 Broadway theaters, 43 Off-Broadway theaters, 91 museums, 42 sculptors, and 148 theatrical agencies in New York City).
87. The Supreme Court in the case of Goldstein v. California, 412 U.S. 546 (1973), made a pertinent point regarding the need for the existence of state laws which are similar to federal copyright laws:

[It is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects. Since the subject matter to which the copyright clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to exclusive federal control.

412 U.S. at 557-78.
88. See, e.g., Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 713
First, Congress may in express terms declare its intention to preclude state regulation in a given area. Second, in the absence of an express declaration, preemption may be implied when the federal law is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementing state regulation." Finally, state law may be preempted "to the extent that it actually conflicts with a valid federal statute."

Since there is already good authority that the New York Act is not preempted by the general preemption provision of the Copyright Act, it is only necessary to consider possible preemption under the newly amended preemption provision of VARA. That section reads in pertinent part:

(1) . . . all legal or equitable rights that are equivalent to any of the 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 . . . . Thereafter, no person is

---


90. See supra notes 68-71 and accompanying text; see also Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 135-36 n.1 (S.D.N.Y. 1990) (finding claims under New York Act (prior to VARA) not preempted by Copyright Act); Mayer v. Josiah Wedgwood & Sons, 601 F. Supp. 1523, 1532 n.16 (S.D.N.Y. 1985) (holding that federal law does not protect ideas, so state laws that protect ideas, as opposed to their expression, are not preempted by (pre-VARA) Copyright Act); Damich, A Comparative Critique, supra note 21, at 1739 (noting the qualitative difference between New York and federal law, since state statute aims at protecting reputation, a species of tort law traditionally reserved to the states). But cf. Davis, supra note 21, at 351 (suggesting prohibition on alteration of work appears to be equivalent to derivative work right and is therefore preempted).

91. The task of determining whether state law is preempted by VARA in situations other than those similar to Janet Drew's situation will undoubtedly be no easy job. See Charles Ossola, Law For Art's Sake; Copyrights on the Integrity of Artists' Works will Prevent Mutilation or Denigration of Their Creation, THE RECORDER, Jan. 8, 1991, at 6 (VARA's preemption provision "will occupy courts for years to come . . . judges will be writing the law on preemption case by case").
entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

... (B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art ... . 92

This then, is Congress, "in express terms declar[ing] its intention to preclude state regulation in a given area."93 Technically, the New York Act, as applied to Drew’s situation, is not preempted in this respect. The New York Act does provide a legal or equitable right equivalent to the rights conferred by section 106A.94 However, section 301(f) of VARA speaks in terms of "works of visual art" and the rights which affect them. Referring to the definition section of the Copyright Act, a "work of visual art" is "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author ... ."95 Under federal copyright law, Drew’s multiple edition drawing is not a work of visual art.96 The preemption provision only forbids states from creating equivalent rights to those granted in section 106A for works of visual art. Technically, the New York Act is not creating an equivalent right for a work protected by VARA. The preemption provision of VARA should be construed just as narrowly as it is plainly intended. Congress has clearly demonstrated in other areas of the law that it is well aware of how to draft broad preemption statutes.97

The analysis does not end here, however. Congress has not ex-

93. Association of Am. Medical Colleges, 928 F.2d at 522.
94. It is important to remember, however, that a state created right need not be exactly identical to the federal right in order to be preempted. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B] (1992).
95. 17 U.S.C. § 101 (emphasis added); see also supra note 7.
96. Simply because Drew’s work may be considered "visual art" does not place it within the scope of VARA. See Gegenhuber v. Hystopolis Prod., Inc., No. 92 C 1055, 1992 U.S. Dist. LEXIS 10156, at *11 (N.D. Ill. July 10, 1992) (holding VARA does not include puppets, costumes or sets, which arguably might be considered "visual art").
explicitly declared that the New York Act is preempted by VARA in Drew's case, but preemption may also be implied. The question now is whether the federal law is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementing state regulation."98 The answer would seem to be no. First, VARA, unlike the Copyright Act as a whole, covers a very narrow class of works—works of visual art.99 The precise issue is whether Congress, by enacting VARA, intended for the states to have no authority in the realm of moral rights as concerns all authors and all works of art, not just authors of works of visual art; whether Congress intended that all legislating concerning moral rights be exclusively vested in Congress. It would be illogical for VARA, a narrow law addressing a minute fraction of all works of art, to preempt similar state laws which protect works other than those of visual art. As stated earlier, Drew's work does not fall within the federal definition of a work of visual art.100 At the same time, it could be argued that Congress has decided which works of art are entitled to moral rights protection, and that to extend similar protection to other works of art defeats Congress' intent to protect only a specific class of works. This analysis would be similar to instances where state attempts to extend protection equivalent to patent law protection to useful works which do not meet federal patent guidelines have been held to be preempted under the Supremacy Clause.101 Nonetheless, given the limited nature of VARA versus either the Copyright Act as a whole or the Patent Act, Congress has not clearly occupied the entire field of moral rights protection for the arts.102

100. See supra text accompanying notes 94-97.
101. See Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). But cf. Goldstein v. California, 412 U.S. 546, 571 (1973) ("Sears and Compco . . . have no application in the present case, since Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances."). Just as in Goldstein, Congress has indicated neither that it wishes to protect, nor to free from protection, the moral rights associated with works of art other than works of visual art. In addition, Sears and Compco deal with patent law, while Goldstein deals with copyright law. Since VARA is part of copyright law, Goldstein is a more persuasive case, as well as being on point to a greater degree.
102. This is borne out by that portion of the VARA preemption statute which explicitly preserves certain rights or remedies under the common law or statutes of any state. 17 U.S.C. § 301(f)(2)(B). In addition, the view that VARA may serve as part of a federal incremental approach to moral rights would support the concept that state laws which do not conflict
The third type of state law preemption, conflict preemption, occurs either when "compliance with both federal and state regulations is a physical impossibility,"\textsuperscript{103} or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{104} It does not seem impossible for one to comply with both VARA and the New York Act. Quite the opposite, the New York Act, utilized by Drew, would in no way run afoul of VARA, but can more reasonably be considered as supplemental protection. The second prong of this manner of preemption inquires into the purposes and objectives of Congress. VARA's purposes, in the most basic sense, are to protect the reputations of authors and to preserve works of visual art. The New York Act in no way frustrates these purposes, but merely expands upon them. The only way a state statute would be an obstacle to VARA would be if it were to cut back on the protections created in VARA, which the New York Act does not do.

To summarize, technically there is no explicit preemption of the New York Act by VARA as regards the Drew situation. Nor is it likely that a court would find any implicit preemption of the New York Act, or any conflict between it and VARA. If Congress ever intends to extend moral rights protection to other classes of works, it is essential for state laws dealing with these classes to be preserved. New York state has chosen a broader definition of fine art. Just because Drew's work is awfully close to the federal definition of a work of visual art does not take away from the fact that it is not covered by VARA, and any state law which protects it is in no way usurping VARA's objectives. The New York Act does overlap with VARA, but this does not render it void under the plain meaning of the preemption provision of VARA.\textsuperscript{105}

\textsuperscript{103} Darling v. Mobil Oil Corp., 864 F.2d 981, 986 (2d Cir. 1989) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

\textsuperscript{104} Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

\textsuperscript{105} Many scholars have argued that the preemption provision of VARA should be interpreted narrowly. See, e.g., Damich, \textit{Federal Moral Rights}, supra note 2, at 947-48, 972-73 (arguing that incrementalism and lack of generalized language as in § 301 justify a narrow interpretation of the preemption provision); \textit{VARA House Hearings}, supra note 26, at
IV. CONCLUSIONS AND RECOMMENDATIONS

Janet Drew’s use of the New York Act should not, and probably would not, be preempted by VARA. New York State, being more concerned with the needs of authors than most other states, has chosen to protect the reputations of authors of certain works of fine art. Congress also has decided that authors of certain works of fine art are in need of protection. Drew has created a limited edition series of 223 multiples, a work of art not protected by the federal law—in fact, not a work of visual art as far as VARA is concerned. New York is protecting another class of work of art—a work of art unprotected by federal law. Any state is free to do this.

Simply because the New York Act is preempted and void when a plaintiff has a situation which fits within the scope of VARA does not mean that the New York Act is preempted absolutely for all purposes. In Goldstein v. California, the Supreme Court held valid a state law which created equivalent rights to those provided in the Copyright Act for material which was not copyrightable. The defendants had violated this law by pirating musical recordings and contended that they could not be convicted under this state law because it was preempted by the Copyright Act. While the case was pending, Congress amended the Copyright Act to provide those same protections for those same materials, but it did not apply retroactively, so the defendants could not be convicted of violating the new amendments. The result was a state law which would be preempted by the Copyright Act if it were to be applied to works covered by the amendments, but not preempted, as was the case in Goldstein, if the work was not covered by the amendments. Similarly, the New York Act may be preempted in certain situations, but remain valid for others.

The reasons for not preempting the New York Act when the

28 (statement of Ralph Oman, Register of Copyrights) (“If a State decides to grant greater protection, it would not be preempted by this act. H.R. 2690 provides only a minimum threshold of protection and permits States to enact more expansive protection.”).

107. See supra notes 84-87 and accompanying text.
108. For example, if Janet Drew had created a limited edition of 195 multiples, she would have relief under VARA and could not sue under the New York Act because it would be providing equivalent rights for a piece of art specifically covered by VARA, and therefore preempted as directed under 17 U.S.C. § 301(f).
110. Id. at 548-49.
111. Id. at 551-52.
work in question is not covered by VARA or when the rights provided by the state law differ from those provided by VARA are equally forceful when applied to other state laws which create moral rights for authors.112 Courts must take care to apply the preemption provision of VARA narrowly, as it is written. Only in this manner will the individual states be free to enact the sorts of laws involving moral rights which they deem important to their citizenry. If Congress is indeed concerned with engendering more thorough and complete compliance with the principles contained within the Berne Convention, courts should not take a step backwards by cutting off some of the best methods available for obtaining relief for violations of moral rights by making state moral rights laws obsolete. States which desire to enact laws providing moral rights for authors of other classes of works, such as film or literature, should be encouraged to do so, so that Congress, by observing the effects of these laws, can determine whether to create such rights at the federal level.

Brett Sirota

112. This applies to a greater degree in those states that have created laws which really act more as preservation laws than as moral rights laws. The California law is a good example of such a statute: "No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art." CAL. CIV. CODE § 987(c)(1) (West Supp. 1992). Notice that this statute does not involve any consideration of an author's reputation, and also protects against destruction of all works of fine art. Id. Other states which have followed the California model include Connecticut, Massachusetts, and Pennsylvania. For these states, the arguments against preemption are stronger because the laws involved are simply not as similar.