The Visual Artists Rights Act

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LEGISLATIVE UPDATES

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Introduction

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990. This legislation amends the Copyright Act of 1976 to recognize the moral rights inherent in paintings, drawings, prints, sculptures, and still photographic images produced for exhibition purposes only. The concept of moral rights ("droit moral") was developed in eighteenth-century France and is commonly referred to as an artist's personal right to control his or her creation. Thus, an artist can possess two fundamental rights in an artistic creation: (1) pecuniary; and (2) personality. The pecuniary right invested in a work of art is protected by the Copyright Act and a host of state statutory and common law concepts in property and contract law. The personality right inherent in an artistic creation will now be protected by the Visual Artists Rights Act.

This update will first explore the background of the Visual Artists Rights Act. Additionally, the substance of the legislation and possible ambiguities will be addressed. Finally, the conclusion will set forth the probable impact that this statute will have on our society.

Background of the Visual Artists Rights Act

Congress and state legislatures have debated the enactment of moral rights legislation for over one hundred years. However, the turning point of the moral rights struggle occurred in the midst of congressional debate over the United States' adherence to the terms of the Berne Convention. The main focus of debate was the scope of article 6L of the Berne Convention which states, in part, that "the author shall have the right to authorship of his work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Congress determined that the Berne Convention was not a self-executing treaty and therefore article 6L of the Berne Convention had no legally binding effect in the United States. Thus, for a moral rights doctrine to have any force in the United States, separate legislation needed to be implemented. On December 1, 1990, legislative implementation of the moral rights doctrine began with the enactment of the Visual Artists Rights Act.

Substance of the Visual Artists Rights Act

The Visual Artists Rights Act consists of nine sections which amend the Copyright Act. Three of the most significant additions to the Copyright Act will be discussed: (1) Work of Visual Art Defined; (2) Rights of Attribution and Integrity, including the scope and exercise, duration, and transfer and waiver of these rights; and (3) Preemption.

Work of Visual Art Defined

Section 602 of the Visual Artists Rights Act amends section 101 of the Copyright Act by inserting the definition of "works of visual art." This definition includes still photographic images produced for exhibition purposes only, paintings, drawings, prints, or sculptures. The definition also sets forth a list of visual drawings that are not to be considered "visual art." Moreover, moral rights protection is to be extended to either one of a kind creations, or limited editions of 200 copies or fewer which are signed and consecutively numbered by the author.

Although Congress intended to narrowly define "visual arts," it has left many of the terms illustrated as "visual arts" vague and ambiguous. For example, it is unclear whether the term sculptures includes pottery or furniture; whether paintings include murals on buildings; or whether prints include lithographs, serigraphs, etchings, and the like. Likewise, it is unclear whether Congress intended to treat the term "photographic images used for exhibition purposes only" broadly or narrowly.

Furthermore, Congress neglected to state whether all standards of artistic quality should be protected. The Act does not limit the definition of visual arts to only those visual arts that are famous or that have reached a certain level of recognition. However, it is unsettled whether Congress desires to protect children's drawings or arts and crafts that
are created by “non-artists.” The only hint of what standard of quality might be applied was set forth by Representative Brooks in congressional hearings: “The court should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.” Although this “common sense” standard provides courts with some guidelines, it is hardly definitive enough in considering the scope of objects and drawings that arguably fall within Congress’ definition of “visual arts.”

Scope and Exercise of the Rights of Attribution And Integrity

Once it has been determined that a work falls within the definition of “works of visual art,” the author is entitled to the rights of attribution and integrity. Section 106A(a)(1) creates a right of attribution that extends not only to the right to be identified as the author of a work, or to prevent use of the author’s name when he or she is improperly identified as the author of a work, but also to the right to publish anonymously or under a pseudonym. Similarly, section 106A(a)(2) provides that an author shall have the right to prevent the use of his or her name in connection with a work of visual art that has been modified in a way that would violate the right of integrity stated in section 106A(a)(3). Additionally, section 106A(a)(3) provides for a right of integrity which allows an artist to prevent any intentional or grossly negligent destruction, distortion, mutilation or other modification of a work which would be prejudicial to his or her honor or reputation.

It is clear that an author of a work of visual art may bring a cause of action against anyone, including the owner of the pecuniary copyright of the work, for “any destruction, distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and which is a result of an intentional or negligent act or omission with respect to that work.” However, three questions may be raised regarding this standard: (1) what is meant by “honor or reputation”; (2) what is meant by “intentional or negligent acts”; and (3) what is meant by “any destruction, distortion, mutilation, or other modification”?

Although the term “reputation” has an historical place in American jurisprudence, the term “honor” will be newly born into our legal system as a result of this act. In order to guide courts in determining whether an artists honor or reputation has been prejudiced, the Judiciary Committee commented that the term “honor and reputation” should be construed to focus on:

[T]he artistic or professional honor or reputation of the individual as embodied in the work that is protected. The formulation for determining whether harm to honor or reputation exists must of necessity be flexible. The trier of fact must examine the way in which a work has been modified and the professional reputation of the author of the work. Rules 701-706 of the Federal Rules of Evidence permit expert testimony on the issue of whether the modification affects the artist’s honor or reputation. While no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation.

Once an author establishes harm to honor or reputation, he or she must then prove injury by a negligent or intentional act or omission. Legislative history of the Act indicates that a particular state of mind is not required. Therefore, actions such as unintentionally and unknowingly leaving an oil painting in a humid room might be considered a negligent act.

A determination of what is meant by “any destruction, distortion, mutilation, or other modification” is equally perplexing. Although the Visual Artists Rights Act affords a broad reading of the right of integrity, the Act provides for exceptions which might undermine the force of this right. Modifications of a work of visual art which are the result of the passage of time, the inherent nature of the materials involved, conservation, or public presentation, unless caused by gross negligence, are not considered a destruction, distortion, mutilation, or other modification.

Duration of the Rights of Attribution and Integrity

The Visual Artists Rights Act sets forth two standards regarding the duration of the rights to attribution and integrity. First, artists who will create works on or after June 1, 1991 will possess the rights of attribution and integrity for a term consisting of the life of the author. Second, artists who have created works of visual art before June 1, 1991 and who have not transferred title to those works will enjoy moral rights protection for the length of their life plus fifty years. In the case of a jointly authored work, the rights of attribution and integrity will endure through the life of the last surviving author. The distinction between the duration of rights afforded to works created before and after
June 1, 1991 is significant because artists who created a work of art before the effective date of the Visual Artists Rights Act are granted 50 additional years of moral rights protection. It is likely that this separation will be the subject of confusion and dispute as courts begin to hear cases involving moral rights claims.

Transfer and Waiver of the Rights of Attribution and Integrity

Although an author may waive his or her moral rights under the Visual Artists Rights Act, he or she may not transfer them. The waiver provision allows the artist to disregard specific actions by a third party that, in the absence of the waiver, would violate the law.41 However, a waiver applies only to the specific person to whom the waiver is made.42 That person may not subsequently transfer the waiver to a third party.43 If a party wishes to obtain a waiver, he or she must do so directly from the author.44 Further, if a work is created by two or more authors, the consent to waive by one author will waive the moral rights of the other authors as well.45

The effect of allowing moral rights to be waived may be significant. A waiver provision creates the possibility that an author may be forced to forfeit his or her newly granted moral rights. Thus, “given the bargaining power of most authors, the waiver or transfer of moral rights would soon appear as boilerplate in all contracts.”46 At the very least, a waiver provision may lessen the effect of the author’s moral rights. At the most, it could completely destroy the moral rights that Congress has so vigorously fought to acquire.

Preemption

Section 605 of The Visual Artists Rights Act amends section 301 of the Copyright Act by setting forth that, after June 1, 1991, the newly created section 106A, which outlines the right of attribution and integrity, preempts all state moral rights laws.47 For preemption to occur, two criteria must be met. First, the original work sought to be vindicated under state law must be fixed in a tangible medium of expression and fall within the definition of “visual art.” Second, the rights must be equivalent to the legal or equitable rights embodied in section 106A.48 As the Register of Copyrights stated, “a single Federal system is preferable to State statutes or municipal ordinances on moral rights because creativity is stimulated more effectively on a uniform, national basis.”49

The preemption clause in the Visual Artists Rights Act states that the Act preempts all “common law or statutes of any State.”50 However, the Act also provides that “[n]othing...annuls or limits any rights or remedies under the common law or statutes of any State with respect to...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.”51 The language of the Act seems ambiguous as to the scope of what common law and statutes it intends to include. Some states which have enacted moral rights legislation provide protection to more than just photographic images, sculptures, paintings, and drawings.52 Thus, although it is clear that the Visual Artists Rights Act preempts state law that protects photographic images, sculptures, paintings, and drawings, it is not entirely clear whether the Act preempts state laws that protect “crafts, objects, photographs, audio or video tape, film, or holograms.”53

Conclusion

The enactment of the Visual Artists Rights Act of 1990 will enable American artists to direct and control the destiny of their reputation and will ensure that the children of the next generation will have something by which to judge and understand our current culture. Although the Act has been purposefully drafted to effect only a small portion of the art world (i.e. only works of “visual art” as defined in the statute), and contains some loopholes and ambiguities, it is nonetheless a step in the right direction. Hopefully, Congress will eventually recognize the need to preserve books, films, and computerized art technology as well.

Zena Shuber

5. Although many states have considered implementing state moral rights legislation, only 11 states have enacted statutes adopting the moral rights doctrine. See CAL. CIV. CODE §§ 980-989 (West Supp. 1991); CONN. GEN. STAT. ANN. §§ 42-116a to 42-116f (West Supp. 1990); ILL. ANN. STAT. ch. 121 1/2, para. 1401-1408 (Smith-Hurd Supp. 1990); LA. REV. STAT. ANN. §§ 51:2151-51:2156 (West 1988); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. LAWS ANN. ch. 231, § 85s (West Supp. 1990); N.J. STAT. ANN. §§ 2A:24A-1 to 2A:24-8 (West 1976); N.M. STAT. ANN. §§ 56-11-1 to 56-11-3 (1986); N.Y. ARTS & CULT. AFF. LAW §§ 11.01-16.01 (McKinney Supp. 1991); PA. STAT. ANN. tit. 73, §§