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INTRODUCTION

Increased protection of moral rights for American artists has finally come to fruition with the enactment of the Visual Artists Rights Act of 1990, commonly known as "VARA." Signed by President Bush in December of 1990 as an amendment to the Copyright Act of 1976, VARA is the first federal legislation created by Congress explicitly recognizing an artist’s moral rights. One of the moral rights protected under VARA is the right of attribution, where an author of a work of visual art has the right to claim the authorship of a particular work, to prevent his or her name from being attached to a work which he or she did not create, and to prevent his or her name from being attached to a work that has been altered. The other moral right protected under VARA is the right of integrity, where an author has the right to prevent the distortion, mutilation, modification, or destruction of a work of visual art. The enactment of this legislation exemplifies how the embodiment of an artist’s personality in his or her work, and the integrity inherent therein, has gained a greater importance in our society today.

In the recent ruling of Carter v. Helmsley-Spear, the United States District Court for the Southern District of New York became the first federal court to interpret VARA. This Note seeks to show how the concept of moral rights came into existence in the United States in its modern form of VARA. More importantly, the Note will interpret the court’s holding in the Carter case to determine the potential effect that VARA will have on future visual arts cases.

1. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of 17 U.S.C.). Although the terms "author" and "artist" are used interchangeably throughout this Note, they have the same meaning — a creator of a particular work.
3. 17 U.S.C. § 106A(a)(1) and (2), infra note 43.
I. A HISTORY OF MORAL RIGHTS IN THE UNITED STATES

On March 1, 1989, the United States finally became a member of the Berne Convention for the Protection of Literary and Artistic Works.6 Commonly known as the Berne Convention, this treaty is the "highest internationally recognized standard for the protection of works of authorship of all kinds."7 In fact, the Berne Convention has earned the distinction of being the world's foremost multilateral copyright treaty, since it is "the oldest and most comprehensive international treaty governing the protection of copyrights."8 Therefore, U.S. accession into the Berne Convention was considered a great advancement for the United States in its intellectual property relations with other nations of the world.9

After over one hundred years of debate,10 the United States decided to join the Berne Convention for a number of reasons. First, it was in the national interest of the United States to join the Berne Convention because it ensured the U.S. a formidable presence in the global marketplace.11 In addition, membership in


8. Hatch, supra note 6, at 172.


10. For a history of why the U.S. did not join the Berne Convention for over one hundred years, see Hatch, supra note 6, at 177-183 (discussing the reasons why historically U.S. copyright law did not comport with a moral rights doctrine). See also Edward J. Damich, Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status, 12 CARDOZO ARTS & ENT. L.J. 387, 388 (1994) ("The concept that the artist should continue to control the destiny of his or her work even after it was sold conflicted with the traditional reverence for privacy rights"). In addition, see also Roberta Rosenthal Kwall, Copyright and the Moral Right: Is An American Marriage Possible?, 38 VAND. L. REV. 1, 17 (1985), citing Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1042 (1976) ("Professor Merryman on the other hand, is not surprised by the 'underdeveloped state' of American law on this subject [of the adoption of a moral right doctrine], given that American art only recently achieved international recognition, and that the law requires time to respond to social and cultural changes.").

the Berne Convention guaranteed the U.S. the ability to participate in the creation and direction of international copyright policy on a global scale. This is especially important since any revision of the Berne Convention requires a unanimous vote, which the U.S. could prevent, if there is a particular decision detrimental to its own interests. Furthermore, joining the Berne Convention also provided the United States with an opportunity to reduce the impact of widespread international copyright piracy that costs American businesses billions of dollars every year. Most importantly, adherence to the Berne Convention assured the U.S. of the absolute highest level of protection in those countries that use American copyrighted works.

It would be fair to say that the United States' initial interest in joining the Berne Convention was strictly economic. This is the case not only for the aforementioned reasons, but especially because of the fact that even after the United States finally joined the Berne Convention, it was still not willing to expressly recognize the moral rights of attribution and integrity on a federal level. In fact, after its accession into the Berne Convention, the United States did not initially create federal legislation expressly recognizing an artist's moral rights, because Congress believed that U.S. law sufficiently protected the moral rights mentioned in Article 6bis through existing federal and state statutes and common law.

The strong presence in the global marketplace is important for the U.S. because the U.S. exports the most copyrighted material in the world. In fact, this leading status enables the U.S. to achieve a trade surplus regarding copyrighted works. See H.R. Rep. No. 609, supra note 6, at 18 ("American popular culture and information products have become precious export commodities of immense economic value."). Since technological advances allow creative works and ideas to be easily transmitted anywhere in the world, this stronger presence in the global marketplace ensures the U.S. of retaining its positive trade balance. Id. at 17.

U.S. adherence to Berne could only encourage other countries to also join the Berne Convention or at least implement greater levels of copyright protection. See H.R. Rep. No. 609, supra note 6, at 18. U.S. adherence to the Berne Convention is even more logical since the U.S. has become "the arts capital of the world." See 136 Cong. Rec., supra note 9, at H8271.

Piracy has especially increased in recent years due to the technological advances that allow for simple, unauthorized copying of creative works. See H.R. Rep. No. 609, supra note 6, at 17.

Copyright protection under the Berne Convention is extended to all countries that are signatories to the treaty, pursuant to the rule of "national treatment." See text accompanying supra note 6. Thus, by joining the Berne Convention, the U.S. gained formal copyright protection with all of the existing Berne members, twenty-four of which it has no other type of intellectual property agreements before Berne. S. Rep. No. 352, supra note 7, at 19.

Pursuant to the latest revision of the Berne Convention in Paris of 1971, the current form of Article 6bis provides that:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the
However, these causes of action were not satisfactory to fully protect an artist’s moral rights. For example, as a federal statutory cause of action, copyright protection under the federal Copyright Act of 1976 was insufficient to protect moral rights, since the primary objective of the Copyright Act of 1976 is to protect the pecuniary interests of the person who owns the copyright. American courts have also used substitute legal theories pursuant to state laws, such as defamation, invasion of privacy, and contract law, to protect an artist’s said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

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

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised in Paris on July 24, 1971, art. 6bis.

It is important to note that pursuant to paragraph (3) of Article 6bis, the Berne Convention is not self-executing. In other words, whether the Berne Convention is self-executing in a particular member country depends on “the constitution of the country in question: in some it becomes part of the law of the land; in others, parliament must pass laws to give effect to the Convention’s obligations.” H.R. Rep. No. 609, supra note 6, at 29. Thus, each individual member nation of the Berne Convention decides whether the treaty is self-executing. Id. at 32.


An artist must retain the ownership of the copyright of the work in order to invoke any copyright protection at all under the Copyright Act. H.R. Rep. No. 514, 101st Cong., 2d Sess. 8 (1990). Therefore, once a work is sold, the artist may potentially lose all copyright protection, if the artist chose not to retain the ownership of the copyright to the work as well. See Kwall, supra note 10, at 2 (“The 1976 Act does not purport to protect the creator, but rather the copyright owner.”). If the artist does sell the copyright to the work, then the copyright owner reaps the economic benefits and controls over any alterations, while the author accrues no benefits. For an in-depth analysis of the relationship between the doctrine of moral rights and the Copyright Act of 1976, prior to the VARA amendments, see Kwall, supra note 10, at 38-56.

Even with the enactment of VARA, the primary objective of the Copyright Act of 1976 is still to protect the pecuniary interests of the person who owns the copyright. VARA simply extends moral rights protection to works of visual art, while still protecting the pecuniary interests of the copyright owner.

19. As a common law cause of action, the tort of defamation requires an injury to an artist’s professional reputation. Kwall, supra note 10, at 22. The injury to the artist’s professional reputation may occur due to showing an artist’s work in a mutilated form, or by falsely attributing authorship to a work in which the artist was not involved. Id. “The key to any successful defamation action, however, is the creator’s showing that the unauthorized acts exposed him to contempt or public ridicule, thus injuring his professional standing.” Id. Therefore, for a greater chance of success under a defamation action, an artist must already have some existing reputation that could be harmed. See Timothy M. Casey, The Visual Artists Rights Act, 14 HASTINGS COMM/ENT L.J. 85, 92 (1991). This potentially leaves unknown artists without a remedy under the tort of defamation.

20. Under the invasion of privacy action, the artist may be granted relief based on an injury to the artist’s feelings. Kwall, supra note 10, at 25. An action under invasion of privacy may include
moral rights. Like the Copyright Act of 1976, these common law causes of action have also been proven to be insufficient to protect an artist’s moral rights.\textsuperscript{22} Furthermore, eleven states currently have some form of moral rights protection, generally due to the shortcomings of the common law and the lack of federal statutory causes of action.\textsuperscript{23} Although these states have some form of moral rights protection, they still do not include all of the protections stipulated in the Berne Convention, and they do not protect artists in all fifty states.\textsuperscript{24}

Therefore, it can be concluded that even though Congress believed federal statutory law and common law sufficiently protected American artists’ moral rights pursuant to Article 6bis, this was obviously not the case. Common law causes of action are not possible in all instances; only a minority of states actual-

false attribution, just like in a defamation action. \textit{Id.} at 23. An invasion of privacy action is especially unsuccessful for prominent artists. Casey, \textit{supra} note 19, at 95. Courts generally refuse to extend the right of privacy to prominent artists since a right of privacy does not easily comport with having “celebrity status.” \textit{Id.} This greater status tends to increase the bargaining power of the artist, thereby making contract law a more adequate cause of action. \textit{Id.} Finally, the right of privacy deals with the right of attribution rather than the right of integrity which artists also need for protection of their moral rights. Damich, \textit{supra} note 10, at 393. The right of integrity, if protected at all in an action, is only protected coincidentally \textit{Id.}

21. Contract law is unsatisfactory as a common law cause of action to protect an artist’s moral rights because of the unequal bargaining power between the parties, with the artist most often being in the weaker position. \textit{See Kwall, supra} note 10, at 27 (“relatively unknown creators face a disparity of bargaining power that frequently results in a loss of valuable protections.”). In addition, an artist may not be not be able to recover due to limits the privity requirement may impose. \textit{Id.} at 26. Moreover, although there is a lack of court enforcement of contract provisions because of the questionable validity of the bargaining positions, courts generally will grant relief to the creator if there is an express contractual provision granting an artist the right of integrity in the work. \textit{Id.} at 19-20. Even if the moral right terms were ambiguous in a contract, many courts still ruled in favor of the creator. \textit{Id.} at 20. Thus, the advantage of contract law is that it is the only common law cause of action that can actually protect the right of integrity independent of the right of attribution, if the provision regarding integrity is expressly provided. Damich, \textit{supra} note 10, at 397. In other words, “under the American copyright system, an artist who transfers a copy of his or her work to another may not, absent a contractual agreement, prevent that person from destroying the copy or collect damages after the fact.” H.R. REP. NO. 514, \textit{supra} note 18, at 8. In addition, even if there is an agreement between an artist and a purchaser stating some express right of integrity, the agreement may not bind subsequent purchasers. Kwall, \textit{supra} note 10, at 14.

22. It has been noted that

American creators typically are at a relative disadvantage compared to creators in moral rights countries. The major difficulty facing American creators is the additional burden of molding moral rights claims into other recognized causes of action. . . The moral right doctrine is concerned with the creator’s personality rights and society’s interest in preserving the integrity of its culture. These interests are not the exclusive, or even the primary, focus of any of the substitute theories, all of which developed in response to completely different social concerns.


24. \textit{Id.} This is an extremely brief comment on the state moral rights statutes. For a more comprehensive understanding of the different state statutes, see Edward J. Damich, \textit{A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?}, 15 HASTINGS COMM/ENT L.J. 953 (1993).
ly deemed moral rights important enough for specific statutory protection; and courts have refused to extend moral rights causes of action through case law.25 As Rep. Robert Kastenmeier of Wisconsin, one of the congressional proponents of moral rights, appropriately stated, "[W]hile our laws may be sufficient to comply with Berne, this does not necessarily mean that they are sufficient for all purposes."26 Therefore, through the concerted efforts of both Rep. Kastenmeier and Rep. Edward Markey of Massachusetts, explicit federal legislation was finally enacted to protect moral rights of American artists as envisioned by Article 6bis of the Berne Convention. This federal legislation, The Visual Artists Rights Act of 1990, or simply VARA, brings the United States more closely into conformance with the Berne Convention and Article 6bis. It also provides a uniform level of protection to those artists whose works fit within the protection of VARA.27

II. THE VISUAL ARTISTS RIGHTS ACT OF 1990

With the enactment of VARA, Congress obviously recognized that works of visual art are worthy of copyright protection as well as moral rights protection. The paramount goals Congress sought to achieve by enacting VARA include: the protection of the honor and reputations of visual artists, the preservation and protection of the works of visual art themselves, and the provision of a nationwide standard for the protection of moral rights.28 With legislation like VARA, Congress wanted to encourage artists to create works of visual art, since the cultural heritage of the nation can only be enhanced through the creation of such art.29

As Rep. Markey stated, VARA "addresses this gap in copyright law by recognizing that, as original expressions of the artists' creativity, works of visual fine art embody intellectual property which can and should be protected by copyright law."30 However, artists are afforded extremely limited protection under VARA, since VARA protects only a narrow category of works under its definition of a "work of visual art."31

25. See Damich, supra note 10, at 387 (citing Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (where the right of an artist to protect his reputation "is not supported by the decisions of our courts") and Vargas v. Esquire, 164 F.2d 522, 526 (7th Cir. 1947), cert. denied, 335 U.S. 813 (1948) (where the concept of moral rights "has not yet received acceptance into the law of the United States"). On the other hand, the court in Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976) actually recognized moral rights as a separate cause of action. However, no other court followed this lead. A more detailed interpretation of Gilliam can be found in Kwall, supra note 10, at 34-36.
27. One national policy is preferable to "a hodge-podge of state statutes." 136 CONG. REC., supra note 9, at H8271.
28. 136 CONG. REC. at 12608.
30. 136 CONG. REC. at 12609.
31. 17 U.S.C. § 101 provides: A "work of visual art" is—
In fact, it was the intent of Congress to create a narrow definition of a "work of visual art."\(^{32}\) Specifically, the works of visual art protected under VARA include irreplaceable works, such as paintings, drawings, prints, and sculptures.\(^{33}\) Although Congress wanted to extend moral rights protection to visual artists and visual art, it did not want to interfere with other copyright owners' and users' exercise of their rights under copyright law.\(^{34}\) As Rep. Fish of New York stated, "[A]s a general proposition, so-called moral or artists rights, with their non[-]economic, subjective underpinnings do not fit neatly within our copyright act."\(^{35}\) Thus, a narrow definition needed to be tailored to balance the inherently different goals of the artists and the industry exploiting the art.

Powerful industry groups, including the motion picture, newspaper and magazine industries, opposed moral rights.\(^{36}\) In general, these industry groups were

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

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

\(^{32}\) Rep. Markey testified, "I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered... [T]his legislation covers only a very select group of artists." H.R. REP. No. 514, supra note 18, at 11. It was additionally noted in the legislative intent that:

The courts 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. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition [of a "work of visual art"] should not depend on the medium or materials used.

Id.

\(^{33}\) VARA recognizes only single copies or limited editions of these protected works of visual art because of the "special value inherent in the original or limited edition copy of a work of art." The original and limited editions "embody the artist's 'personality' far more closely" than reproductions, and consequently, "the original's loss deprives us of something uniquely valuable." See H.R. REP. No. 514, supra note 18, at 12.

\(^{34}\) 136 CONG. REC. at 12608.

"[T]he critical factual and legal differences in the way visual arts and [collaborative] audio-visual works are created and disseminated have important practical consequences." H.R. REP. No. 514, supra note 18, at 9.

In fact, Congress was much more concerned with the works that are collaborative in nature, such as films, than the irreplaceable works which tend to be the product of the creative efforts of a single individual. Congress' concern with works collaborative in nature was greater because of the great number of parties involved in the process of creating such works. The multiple number of people involved made it more difficult to decide the fate of a project, because each party would have their own specific goal regarding the work.

\(^{35}\) 136 CONG. REC. at 12610.

\(^{36}\) One motion picture industry representative believed "[m]oral rights legislation would be unnecessary, unjustified, and an encumbrance on our ability to broadly distribute our copyrighted works." A representative from the newspaper industry felt that the doctrine of moral rights was "not compatible" with the newspaper industry. One publishing group believed that moral rights legislation
concerned that the enactment of moral rights legislation would conflict with the traditional ways in which these groups distributed and marketed their works.\textsuperscript{37} Consequently, industry opposition convinced Congress to limit the subject matter defining a "work of visual art."\textsuperscript{38} Although this list of exclusions may be considered "overkill,"\textsuperscript{39} it was necessary since it reinforced the limited application of the legislation.\textsuperscript{40} Most importantly for Congress is that the limited scope of the legislation "protects the legitimate interests of visual artists without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system."\textsuperscript{41} Although this initial attempt at moral rights in the United States is narrow in its subject matter, it is still a triumph due to the minor political clout of artists as compared to the greater power of those who exploit their works.\textsuperscript{42}

The moral rights provided under VARA include the rights of attribution and integrity.\textsuperscript{43} The right of attribution extends to an author the right to claim own-


As owners of the copyrights, these industry groups have traditionally controlled any alterations to the works, and even accrued the pecuniary rewards relating to the works. However, the industry groups feared that their creative control would be threatened by moral rights legislation, since the concept of moral rights gives an artist, rather than the copyright owner, the ultimate control of granting any alterations to the particular work.

38. 17 U.S.C. § 101 provides:

\begin{itemize}
  \item[(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;
  \item[(ii)] any merchandising item or advertised promotional, descriptive, covering, or packaging material or container;
  \item[(iii)] any portion or part of any item described in clause (i) or (ii); 
  \item[(B)] any work made for hire; or
  \item[(C)] any work not subject to copyright protection under this title.
\end{itemize}

It is important to note, however, that pursuant to legislative intent, "a new and independent work created from snippets of these materials [under the list of exclusions], such as a collage, is of course not excluded from the definition of a "work of visual art]." H.R. Rep. No. 514, supra note 18, at 14. This can help courts determine if a work does indeed fit within the definition of a "work of visual art."


40. The exclusions under 17 U.S.C. § 101, supra note 38, "are self-explanatory and reinforce the premise of the bill to cover only those works described in the definition of a work of visual art and therefore to protect only those works of art." H.R. Rep. No. 514, supra note 18, at 13.


43. 17 U.S.C. § 106A provides:

\begin{itemize}
  \item[(a)] Rights of Attribution and Integrity — Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—
  \item[(1)] shall have the right—
ership of a work,\textsuperscript{44} to prevent his or her name from being attached to a work he or she did not create,\textsuperscript{45} and to prevent his or her name from being attached to a work that has been altered.\textsuperscript{46}

The right of integrity can be divided into two separate prongs. The first prong of the right of integrity extends to an author the right to prevent any intentional distortion, mutilation, or modification of the work that is prejudicial to the author's honor or reputation.\textsuperscript{47} It is important to stress two limits under this prong of the right of integrity. First, any alteration to a work must be prejudicial to an author's honor or reputation.\textsuperscript{48} Second, the alteration must have been done intentionally. In other words, an artist cannot prevent any negligent alterations of a work.\textsuperscript{49}

The second prong of the right of integrity allows an author to prevent the destruction of a work of recognized stature.\textsuperscript{50} Some member states of the Berne Convention believe that the destruction of a work does not qualify for protection under the right of integrity because an artist's honor or reputation cannot be harmed when there is no work in existence.\textsuperscript{51} According to the legislative history, however, "It is clear that the [Berne] Convention simply sets a floor for protection and does not prohibit member countries from providing additional rights."\textsuperscript{52} In the United States' case, Congress felt that the destruction of a work of art can be detrimental to both the artist and to society.\textsuperscript{53} Therefore, in circumstances where there is destruction, Congress has actually added more rights

\begin{itemize}
\item[(A)] to claim authorship of that work, and
\item[(B)] 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;
\item[(2)] shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
\item[(3)] subject to the limitations set forth in section 113(d), shall have the right—
\begin{itemize}
\item[(A)] 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, and
\item[(B)] to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.
\end{itemize}
\end{itemize}

\textsuperscript{44} 17 U.S.C. § 106A(a)(1)(A), \textit{supra} note 43.
\textsuperscript{45} 17 U.S.C. § 106A(a)(1)(B), \textit{supra} note 43.
\textsuperscript{46} 17 U.S.C. § 106A(a)(2), \textit{supra} note 43.
\textsuperscript{48} An author's "honor or reputation" focuses on "the artistic or professional honor or reputation of the individual as embodied in the work that is protected. H.R. REP. NO. 514, \textit{supra} note 18, at 15 (emphasis added). In addition, "an author need not prove a pre-existing standing in the artistic community. The Committee appreciates that less well-known or appreciated artists also have honor and reputations worthy of protection." \textit{Id.}
\textsuperscript{49} One reason why a negligence standard is not applied in this section is because of the potential for "accidental or inadvertent handling of artwork," which had some art traders concerned. Brown, \textit{supra} note 36, at 1022.
\textsuperscript{50} 17 U.S.C. § 106A(a)(3)(B), \textit{supra} note 43.
\textsuperscript{51} H.R. REP. NO. 514, \textit{supra} note 18, at 16.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
than required by the Berne Convention by including this provision in VARA. Since Congress is simply expanding the floor set by the Berne Convention, Congress limits this particular right by stipulating that the only works of visual art worthy of protection are those work of a particular caliber, specifically, one of "recognized stature." 54

Furthermore, this prong of the right of integrity, pertaining to the destruction of a work, contains no mens rea requirement. 55 Thus, the state of mind of the party intending to do the destroying is irrelevant when an artist seeks to enjoin this impending destruction. Again, the work must first qualify as "a work of recognized stature" to merit moral rights protection. 56 On the other hand, in order to receive damages, rather than just an injunction, the destruction that violates the artist's right of integrity must be "intentional" or "grossly negligent." 57 Thus, no damages may be sought until and unless the work of visual art has actually been destroyed.

However, specific exceptions exist where the right of integrity is not violated. If modification results from the passage of time or the inherent nature of the materials, then the modification does not violate the right of integrity. 58 Moreover, if modification of a work is the result of conservation or public presentation, including lighting and placement, then the modification does not affect the right of integrity, unless it is caused by gross negligence. 59

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54. Even though Congress thought it was important for both society and artists to prevent the destruction of a work, the "recognized stature" requirement does go against moral rights doctrine. The fundamental basis of moral rights is that even "an insignificant, unappreciated work is no less an expression of the artist's personality than is a work 'of recognized stature'." Damich, supra note 42, at 955. Therefore, the quality criterion shifts the focus from one of moral rights, protecting an artist's personality as it is embodied in the work, to one of simply preservation alone. Although preservation is one goal of VARA, this protection alone is not sufficient to comport with the underlying rationale behind a policy such as moral rights, where the artist's integrity should take precedence.

However, the requirement of recognized stature is beneficial because of the fact that it can bar "nuisance lawsuits" by weeding out frivolous cases. Id. at 954 (This includes such examples as barring a five-year-old's finger-painting from suit, or barring suits against the destruction of works of "amateurish or pedestrian character.").


56. Id.

57. See 17 U.S.C. § 106A(a)(3)(B), supra note 43 ("... and any intentional or grossly negligent destruction of that work is a violation of that right") (emphasis added).

58. 17 U.S.C. § 106A(c)(1) provides:

The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(a).

59. 17 U.S.C. § 106A(c)(2) provides:

The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

Congress enacted this particular section of VARA to protect galleries and museums, so that the members of these groups could continue to have discretion where to light and place a work of art. H.R. REP. No. 514, supra note 18, at 17. However, to protect the artist, action will be taken against
VARA also establishes special rules, at 17 U.S.C. § 113, concerning the removal of works incorporated in buildings.\textsuperscript{60} The relevance of 17 U.S.C. § 113 is that it distinguishes between a removable and non-removable work. A work cannot be removed from a building if the removal would cause a modification of the work as described in § 106A(a)(3).\textsuperscript{61} However, if the author and the building owner sign a written instrument specifying that the work would be destroyed or modified in some way due to the installation of the work, then the author's rights of integrity and paternity are not protected. Consequently, the building owner may remove the work without any liability. The purpose of this additional stipulation, requiring written consent, is to ensure that the author knowingly allowed the work to be installed in the building, with the understanding that the removal could potentially modify the work.\textsuperscript{62} This is simply one way to protect building owners.

On the other hand, a work may be removed if the removal does not cause any modification to the work that would harm the integrity of the work. However, an author may still potentially lose his moral rights protection in such a case. That is, if the owner made a good faith attempt to notify the author, or did in fact provide notice, and the person notified failed to either remove the work or pay for its removal within ninety days, then the building owner may remove the work without liability.\textsuperscript{63} In other words, if a building owner abides by these aforementioned requirements, then an author cannot consequently sue the build-

\textsuperscript{60} 17 U.S.C. § 113 provides:

\textsuperscript{61} See 17 U.S.C. § 106A(a)(3), supra note 43 ("... any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [the author's] honor or reputation...”). In this hypothetical, it is assumed that the work was installed after the effective date of VARA, since a work created before the effective date is not protected under VARA. See discussion, infra notes 64 and 74.

\textsuperscript{62} H.R. REP. No. 514, supra note 18, at 20.

\textsuperscript{63} See 17 U.S.C. § 113(d)(2), supra note 60.
ing owner for a violation of the author's rights of attribution and integrity. 64

Another important issue regarding moral rights is whether the rights of attribution and integrity can be transferred or waived. Under VARA, the rights of attribution and integrity may be waived, but they may not be transferred. 65 Congress allowed an artist to waive his moral rights because “these rights are personal to the author and that, because of a relatively weak economic position, the author may be required to bargain away those rights.” 66 Although this may weaken the impact of the legislation, Congress did not want to prohibit waivers since they are part of “normal commercial practices.” 67 On the other hand, Congress precludes an artist from transferring moral rights to a third party, because the concept of transferring is “contrary to the personal nature” of moral rights. 68

An artist choosing to waive his or her moral rights must follow specific rules set forth in VARA. 69 The author must expressly agree to waive his moral rights in a signed written instrument. Moreover, this written instrument must specifically identify the work and the uses of the work to which the waiver applies. The waiver will only apply to the work and uses identified in the written instrument. If a work is prepared by two or more authors, the waiver of one author waives the moral rights of all the authors.

A preemption provision is also contained in VARA. 70 “A single Federal sys-

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64. In addition, VARA rights do not extend to works of art installed in buildings before the effective date of VARA, June 1, 1990. Congressional reasoning not to include art already incorporated in buildings was “to protect valid understandings of the law as it existed at the time of those installations.” H.R. REP. No. 514, supra note 18, at 20.
65. 17 U.S.C. § 106A(e)(1) provides:
The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.
66. H.R. REP. No. 514, supra note 18, at 18.
67. Id.
68. Id. at 19.
70. 17 U.S.C. § 301(f) provides:
(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, 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 and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is 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—
(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;
(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; or
(C) activities violating legal or equitable rights which extend beyond the life of the
MORAL RIGHTS PROTECTION

It is preferable to State statutes or municipal ordinances on moral rights because creativity is stimulated more effectively on a uniform, national basis. Any state rights under statute or common law are preempted if they are equivalent to VARA rights. However, VARA does not preempt any state statutory or common law provisions that are not equivalent to the rights under VARA. Moreover, any action filed prior to the enactment of VARA, June 1, 1991, is not affected by the preemption provision.

The moral rights extended under VARA are important in that they benefit both the artist and society. Artists are assured that they will be recognized for the works they create, and that their works will be protected against any alterations. The right of integrity "is the author's right to ensure that the work always authentically expresses his vision or concept." Society also benefits since the right of integrity preserves art for everyone to enjoy.

III. CARTER v. HELMSLEY-SPEAR

This Note next seeks to analyze the particular aspects of VARA through an examination of Carter v. Helmsley Spear, Inc., the first interpretation of VARA.

A. FACTS

Plaintiffs, John Carter, John Swing, and John Veronis are all professional artists and sculptors who work as partners creating sculptures and other works of art. One defendant, Helmsley-Spear, is the present managing agent of the building located at 47-44 31st Street in Queens, New York (hereinafter, "the Property"), where the sculpture in question is located. The other defendant is 474431 Associates, the owner of the building.

On December 16, 1991, the plaintiffs contracted with Sig Management Company ("Sig"). The managing agent of the Property at the time the contract was agreed upon. In this contract ("Contract"), the plaintiffs agreed "to design, create

5. In addition, under 610(a) of VARA, VARA was to take effect six months after the date of enactment. Since VARA was enacted on December 1, 1990, the effective date of VARA is June 1, 1991. Thus, under 610(b) of VARA, only works created after June 1, 1991, may be protected under VARA.
6. Id. The term of moral rights protection under VARA lasts for the life of the author. 17 U.S.C § 106A(d)(1) provides that ". . . the rights conferred. . . . shall endure for a term consisting of the life of the author. . . ."
7. Damich, supra note 42, at 949.
8. H.R. REP. NO. 514, supra note 18, at 6 ("Artists in this country play a very important role in capturing the essence of culture and recording it for future generations.").
and install sculpture and other permanent installations” in the lobby (“Lobby”) of the Property. Although the plaintiffs had “full authority in design, color and style” of the art work to be installed, Sig actually retained the authority to direct the location of the installation within the Property. The Contract entitled the plaintiffs to “receive design credit” as well as the ownership of the copyright of their sculptures and installations. However, Sig was entitled to fifty percent of the proceeds from any exploitation of the copyright. On January 20, 1993, Sig and plaintiffs signed an agreement extending the Contract for an additional year. On December 29, 1993, the plaintiffs extended the Contract again, however, this time, with a new managing agent, Corporate Life.

After the defendant, Helmsley-Spear, became the new managing agent on April 6, 1994, they ordered the plaintiffs to leave the Property, and told them they would be considered trespassers if they returned. In addition, Helmsley-Spear made statements to the plaintiffs that led them to believe that the defendants intended to alter or remove the art work installed in the Lobby. Consequently, the plaintiffs brought this action under VARA, seeking a permanent injunction to prevent Helmsley-Spear from altering or destroying the art work in the Lobby.

B. THE CARTER COURT’S OPINION AND ANALYSIS

1. “Work of Visual Art”

The court’s initial inquiry was whether the work in the Lobby was actually a “work of visual art.” In determining whether the work was a work of visual art, the court had to decide whether the sculptural installations in the Lobby constituted a single work of art or several discreet works of art that could be treated separately under VARA.80

The court concluded that the Work in the Lobby was indeed a single work of art.81 In reaching this conclusion, the court took several factors into account. First, the plaintiffs themselves considered the Work to be a single work of art. For example, plaintiff John Carter testified that “all of these pieces are interrelated and to remove one contaminates the meaning of the whole piece. It would be like removing part of a painting or the hands from a portrait because we consider this to be one work.”82 The judge also considered the testimonies of the other plaintiffs as well as expert witnesses, all of whom concluded that the elements of the Work were interrelated. Second, the court took into consideration the method

80. The court had to determine whether the Work was a single work or several discreet works, due to the limitations set forth in 17 U.S.C. § 113(d), supra note 60. This result consequently helped determine whether the Work itself could be removed from the Property.

81. In this particular case, it was important for the Carter court to conclude that the sculpture in the Lobby was actually a single work of art. As a result, the massive sculpture could not be removed from the building without causing some destruction, distortion, mutilation, or other modification to the work. In addition, there was no signed written instrument between the parties. See 17 U.S.C. § 113(d)(1)(B); supra note 60. Thus, trying to move the sculpture would endanger the integrity of the artist and the embodiment of the work that VARA seeks to protect.

by which the plaintiffs created the Work. All three plaintiffs conferred to determine whether a new element would "work well" with the other elements. They wanted to ensure that every element would "mesh together." Third, the various elements were interrelated rather than distinct pieces. The Work was comprised of several structural elements that appeared to form an integrated whole, and the court felt that the Work would lose its meaning if each piece was viewed as an individual piece. Fourth, the Work had a consistent theme, which was a recycling motif. Many of the materials and sculptural elements were created from recycled matter. Finally, the court concluded that the Work was a single work of art, after they went to the Property to inspect the Work for themselves.

The defendants also argued that the Work could not be protected under VARA since the work incorporated elements of "applied art." The Carter court defined applied art as "two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects." Specifically, if a work is defined as "applied art," it is explicitly excluded from protection under VARA.

The court concluded that the Work, whether its elements were examined individually or as a whole, could not reasonably be described as applied art. First, a sculptural element does not automatically become applied art simply because the object to which it is attached is a utilitarian object. According to the court, this result would render VARA "nonsensical," since VARA protects works of visual art permanently installed in buildings, and any part of a building to which a work of visual art is affixed serves some utilitarian purpose. Second, nothing in VARA proscribes protection of a work of visual art that simply incorporates elements of applied art. The court found that according to the legislative history, Congress intended that a work of visual art can incorporate elements of applied art. Finally, the Carter court found that "the courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within scope of the definition of works of visual art. Therefore, the court held that the Work was not proscribed VARA protection, since the Work as a whole was not "applied art."

83. Id.
84. Id.
85. One example cited by the court was a mosaic on the floor of the Lobby with words and phrases that corresponded with elements on the ceiling and wall.
87. See definition of work of visual art in 17 U.S.C. § 101, supra note 38 ("A work of visual art does not include— . . . applied art . . . ").
89. This result is pursuant to legislative history, where "a new and independent work created from snippets of these materials [under the exclusions of 17 U.S.C. § 101, supra note 38], such as a collage, is of course not excluded." Id. at 316 (citing H.R. REP. No. 514, supra note 18, at 14).
90. Id.
91. However, the court does specifically state that certain portions of the building were clearly works of applied art. The strictly utilitarian works excluded from protection included: the building directory, the entrance steps at 31st Street entrance, and the ceiling and wall lighting.
Furthermore, defendants argued that the Work was a "work made for hire." A "work made for hire" is defined as "a work prepared by an employee within the scope of his or her employment." A "work made for hire," like "applied art," is another specific exclusion from the definition of a "work of visual art." Since the "work made for hire" argument was raised, it had to be determined whether the plaintiffs were employees, and if so, whether the Work was created within the scope of their employment.

The Carter court relied on the recent Supreme Court decision of Community for Creative Non-Violence v. Reid, where the Supreme Court differentiated between an "employee" and an "independent contractor" to determine whether a work was a "work made for hire." The Reid court lists a number of factors relevant to a consideration of whether a hired party is in fact an employee or an independent contractor. The Carter court relied on the Second Circuit case of Aymes v. Bonelli, in order to elaborate on the weight accorded to the factors that the Supreme Court set out in Reid. The Aymes court found five factors that were deemed to be of particular universal relevance.

were "strictly" utilitarian objects, the court held that the items were not protected under VARA. Id. 92. 17 U.S.C. § 101 provides:

A "work made for hire" is—

1. a work prepared by an employee within the scope of his or her employment; or
2. a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .

The Carter court automatically rejected the second prong of the definition, holding that it does not apply to this case. Carter, 861 F. Supp. at 316. 93. See definition of work of visual art in 17 U.S.C. § 101, supra note 38 ("A work of visual art does not include— . . . any work made for hire . . . "). 94. 490 U.S. 730 (1989).

If the party is an employee, then the work is a work made for hire and receives no VARA protection. However, if the party is deemed to be an independent contractor, that party will overcome the work made for hire obstacle.

These factors, none of which alone is determinative, include: (1) the hiring party's right to control the manner and means by which the product is created; (2) the level of skill necessary to create the work; (3) the source of instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; (13) the tax treatment of the hired party. Carter, 861 F. Supp. at 316 (citing 490 U.S. at 751-52).

In addition, the factors were not intended to simply be tallied, but were to be weighed according to their significance in the particular case at hand.

97. 980 F.2d 857 (2d Cir. 1992).
98. These five factors include: (1) the hiring party's right to control the manner and means of creation; (2) the level of skill required; (3) the provision of benefits to the hired party; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party. Carter, 861 F. Supp. at 317 (citing Aymes, 980 F.2d at 861).
The first critical factor in determining whether a hired party is an employee or independent contractor is the hiring party's right to control the manner and means of creation. The court found that the plaintiffs, the hired party, were independent contractors for several reasons. Pursuant to the Contract, the plaintiffs had "full authority in design, color and style"99 regarding the Work, whereas the defendants, the hiring party, simply retained the authority to direct the location of the Work within the Property. The court also took into consideration one of the plaintiff's testimony where he stated that all three artists had complete artistic freedom regarding the manner and means by which the Work was created.100 Although the plaintiffs adopted suggestions from others, this was in no way a limitation on their artistic freedom. The court concluded that the plaintiffs maintained unfettered discretion in the creation of the Work, even if they adopted some suggestions from other people.

The level of skill required is the second factor relevant to determine whether the hired party is an employee or independent contractor. This factor was also decided in the plaintiffs' favor as independent contractors. The plaintiffs were professional artists and sculptors, and these have been recognized by several courts as highly skilled occupations. The defendants argued that certain elements of the Work did not require great skill to create, and that delegating certain work cannot be considered as having great skill. However, the court found these arguments without merit. Although the plaintiffs may have used some assistants, the conception, creation, and execution of the Work remained in their control.

The third and fourth factors, regarding the provision of benefits to the hired parties and the tax treatment of the hired parties, weighed in favor of the defendants, especially since taxes were withheld during the entire period. However, the court concluded that these two factors were not determinative to the defendants because the plaintiffs continued working even after the provision of benefits ceased.

The fifth and final critical factor is whether the hiring party had the right to assign additional projects to the hired party. The court stated that a hired party is more likely to be an independent contractor if hired to complete a specific task.101 In this case, the court ruled in favor of the plaintiffs because the only task they were hired for was the installation of art in the Lobby of the Property.102

99. Id.
100. Plaintiff Veronis testified that the plaintiffs were retained to "make sculptures and install them in the lobby of the building. And it was our decision as to what these sculptures might look like and might appear to be. And we were at liberties to create them and put them up throughout the lobby area of the building." Id.
101. "Independent contractors are typically hired only for particular projects," whereas a party hired to participate in several unspecified chores at the hiring party's discretion is likely to be an employee. Id. at 319.
102. The Contract provided that the plaintiffs were hired "to design, create and install sculpture and other permanent installations [on the Property] and to render such other related services and duties as may be assigned to [them] from time to time." Id. The court held that even though the plaintiffs created art work on the Property other than the Lobby, this did not undermine the contention that
Three of the remaining factors also weighed in the plaintiffs’ favor as independent contractors. First, the duration of the relationship was only a finite term of engagement since the plaintiffs were not prior employees and would no longer be employed upon completion of the work. Second, the extent of the hired party’s discretion over when and how long to work favored the plaintiffs as independent contractors. The plaintiffs had no set hours, as well as twenty-four hour access to the building, which gave them the option of working at the times of their own choosing. In addition, they received the same pay whether they worked over or under forty hours per week. The final factor weighing in favor of the plaintiffs was whether the Work was the type of work created in the regular course of the hiring party’s business. The court concluded that creating works of visual art was not directly related to the “regular business” of the hiring party.

The court considered an additional factor in its determination of the plaintiffs’ work status: the ownership of the copyright. Under VARA, the purpose of the “work made for hire” analysis is to determine whether a work created by the hired party may be considered a “work of visual art.” Thus, in an analysis of “work made for hire,” copyright ownership can help the court ascertain whether the parties view their relationship as independent contractors or employees. Since the Contract stipulated that the plaintiffs “shall retain copyrights” to the Work, this factor alone helped the court demonstrate the plaintiffs’ status as they were hired solely to install art work on the Property.

The court also cited an example to suggest that neither the plaintiffs nor defendants viewed the plaintiffs as employees. On one occasion, the plaintiffs were told to complete a chore in a different building. Although they refused to complete this task, they were not terminated, penalized, or docked in pay.

103. A finite term of engagement lasts for only the duration of a single project. This finite term of engagement characterizes independent contractor status. Id. at 320.

104. “The purpose of this factor is to determine whether the hired party is performing tasks that directly relate to the objective of the hiring party’s business.” Id. at 321.

105. Id.

The one factor which weighed in the defendant’s favor was the method of payment. The plaintiffs were paid with weekly checks, typical of an employer-employee relationship.

Four factors were not helpful or were inconclusive as applied to this particular case. The source of instrumentalities and tools was inconclusive since both parties provided such items. The location of the Work was not helpful since the work could only be done at that particular Property. The hired party’s role in hiring and paying assistants was not helpful because although the plaintiffs selected all paid and unpaid assistants (an indication of independent contractor status), the paid assistants could not be hired without approval of the managing agent (indicating an employee relationship). Finally, whether the hiring party was in business was not helpful and was given little weight. In fact, this particular factor “will always have very little weight in this analysis.” Id. (citing Aymes, 980 F.2d at 863).

106. On the other hand, under the Copyright Act of 1976, the purpose of determining whether a hired party is an employee or independent contractor is to ascertain copyright ownership in a copyrightable work. In a situation pursuant to the Copyright Act of 1976, the court stated that in an independent contractor relationship, the copyright belongs to the hired party. Conversely, an employer owns the copyright in an employer-employee relationship, since the work that is created in the scope of the employee’s employment is for the employer’s benefit. Id.

107. Id. at 322.
independent contractors. Therefore, the court concluded that the Work was not a "work made for hire" in this case since the Reid factors weighed so greatly in favor of the plaintiffs as independent contractors. This determination of plaintiffs as independent contractors was only strengthened by the fact that the plaintiffs owned the copyright of the Work.

Thus, the court concluded that the Work was a single sculpture. In addition, it found that the Work was actually a "work of visual art" by finding that it could not fit into the exceptions of "applied art" or "work made for hire." Moreover, the Work was created and installed after the effective date of VARA, June 1, 1991. (If the Work has been created before the effective date of VARA, the plaintiffs’ moral rights in the Work would not be protected under the law). Since the Work fit the definition of a work of visual art, the court proceeded to determine whether the right of integrity had actually been violated.

2. Prejudice to Honor or Reputation

In the first step of the right of integrity analysis, the court discussed whether there was prejudice to the plaintiffs’ honor or reputations. Pursuant to 17 U.S.C. § 106A(a), the author of a work of visual art has 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 . . ." 108

In determining whether there was any honor or reputation which could be prejudiced, the court began its analysis by defining the terms "prejudicial," "honor," and "reputation." 109 According to the court, in cases involving the construction of a statute, the language of the statute itself must be analyzed by looking at the statute as a whole. The plain meaning of the language itself should control, unless a literal application of the statute is at odds with the legislative intent, in which case the legislative intent would control.

The court concluded that "prejudicial," "honor," and "reputation" all have readily understood meanings that in no way run contrary to the purposes of VARA. "Prejudice" was defined by the court as "injury or damage due to some judgment of another;" 110 "honor" was defined as "good name or public esteem;" 111 and "reputation" was defined as "the condition of being regarded as worthy or meritorious." 112 Thus, in order to determine whether there was any intentional distortion, mutilation, or modification of the Work that would be prejudicial to the plaintiffs’ honor or reputations, the Carter court considered whether such alteration would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community.

110. Id.
111. Id.
112. Id.
It is important to note that the court took into account legislative intent. According to the legislative intent, an author did not need to prove pre-existing standing in the artistic community.\(^\text{113}\) Congress did not want a pre-existing standing standard so that unknown artists can be appreciated as having honor and reputations that are worthy of moral rights protection. In addition, the determination of whether an action is prejudicial to an artist's honor or reputation focuses on the "artistic or professional" honor or reputation of the individual as it is embodied in the work that is protected.\(^\text{114}\) The court further stated that the formulation must be flexible in order to determine the existence of any harm to honor or reputation.\(^\text{115}\)

In order to determine if such damage could occur to the plaintiffs' honor and reputations, the court considered the testimony of expert witnesses, all of whom testified that the honor and reputations of the author of the Work would in fact be prejudiced. It is interesting to note that the court did not give the testimony of the defense's expert witness much weight because that expert, an editor of an art magazine, determined reputation based on his own subjective beliefs. In his view, if he was not familiar with an artist, that artist did not have a reputation. The court concluded that the plaintiffs' honor and reputations were, in fact, worthy of protection under VARA.

### 3. Recognized Stature

The second step of the court's analysis regarding the right of integrity pertained to whether the Work can be defined as being of "recognized stature." The emphasis of this particular section of VARA is on the destruction of a "work of visual art." 17 U.S.C. § 106A(a)(3)(B) provides that the author of a work of visual art shall have the right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."\(^\text{116}\) The court stated that the purpose of this section was to prevent the significant societal loss that accompanies the destruction of a work.\(^\text{117}\)

Since the phrase "recognized stature" is not defined in VARA, the Carter court looked to its plain meaning, interpreting the phrase in light of its goal -- preservation of art work. The court held that in order to be of recognized stature, an artist must make a two-tiered showing.\(^\text{118}\) First, a work of visual art must have "stature,"\(^\text{119}\) such as being viewed as meritorious. Second, the stature must

\(^{113}\) Id. (citing H.R. Rep. No. 514, supra note 18, at 15) ("[A]n author need not prove pre-existing standing in the artistic community. The Committee appreciates that less well-known or appreciated artists also have honor and reputations worthy of protection.").

\(^{114}\) Id. (emphasis added).

\(^{115}\) Id. ("The formulation for determining whether harm to honor or reputation exists must of necessity be flexible.").


\(^{118}\) Id. at 325.

\(^{119}\) Id.
be "recognized" by expert witnesses, including art experts, the art community, or a cross section of society. The Carter court found the Work to be of recognized stature based on the testimony of expert witnesses. Based on the experts' description of the Work, the court felt that the experts' interpretation regarding the value and significance of the Work was sufficient to prove the requisite stature requirement. The Carter court obviously felt that a substantial amount of time was not necessary to conclude that a work has stature. Thus, the Work was entitled protection under 17 U.S.C. § 106A(a)(3)(B).

4. Defendants' Constitutional Arguments

Next, the court considered the defendants' argument that VARA is an unconstitutional violation of the Fifth Amendment, because it gave a third party the right to control the use of defendants' own property. The court stated that the defendants have a great burden because of the presumption that Congress passes statutes that are constitutional. The court found the defendants' constitutional arguments legally and factually without merit.

The defendants' first argument was based on whether VARA's protection of the Work could actually be recognized as an impermissible regulatory taking. The Carter court relied on Penn Central Transportation Co. v. New York City. Four factors from the Penn Central case were considered in determining whether there was actually an impermissible regulatory taking in the case at hand. If these factors are satisfied, the argument against an impermissible taking would fail.

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120. Id.
121. "A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti." Id. In addition, the court added that "nor must the trier of fact personally find the art to be aesthetically pleasing; indeed, courts have persistently shunned the role of art critic." Id.
122. Some of the phrases used to describe the Work include, "an incredible phenomenon;" "a work of art like nothing I've ever seen before;" "very much in the public interest of the City of New York;" "noteworthy;" and "a very exciting piece." Id. at 325-26.
123. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Supreme Court held that "while property law may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.
125. The Penn Central court used four factors to determine that the Landmarks Law did not effect an impermissible taking. The Landmarks Law: (1) implemented a comprehensive scheme designed to further the public interest; (2) did not specifically or disproportionately burden the plaintiff; (3) left much of the commercial value of the property intact and did not interfere with the plaintiff's primary economic use of the property; and (4) included some reciprocity of benefits. Carter, 861 F. Supp. at
taking from occurring is strengthened.\textsuperscript{126}

The first factor, whether the statute implements a comprehensive scheme designed to further a public interest, was satisfied because VARA is a comprehensive scheme created by Congress to protect and preserve art for the sake of public interest as well as artist’s moral rights. The second factor, whether the statute specifically or disproportionately burdens the plaintiff, was satisfied since VARA only protects works installed after the effective date and permits VARA rights to be waived. The third factor, whether much of the commercial value of the property is intact and whether it interferes with the primary economic use of the property, was also satisfied since VARA facially did not diminish property value, and it did not deprive defendant’s primary use of the Property, which was leasing to tenants. The final factor, reciprocity of benefits, was satisfied since artists benefit by having their works preserved in the form in which it was created, and since the public benefits culturally through this preservation of art. Even building owners benefit because art in the building generates public interest in the property. Therefore, the satisfaction of the \textit{Penn Central} factors shows there was not an impermissible regulatory taking by the plaintiffs under VARA.

The defendants also argued that VARA allows an impermissible physical taking by allowing third party plaintiffs to permanently occupy the defendants’ building. In \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{127} the Supreme Court held that “a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve.”\textsuperscript{128} However, the \textit{Carter} court ruled that VARA did not permit a permanent physical occupation either on its face or as applied. On its face, VARA rights last for only a limited time, the life of the author.\textsuperscript{129} Furthermore, VARA rights are not permanent since only art installed after the effective date is protected.\textsuperscript{130}

In addition, as applied to the facts of this case, VARA did not permit a permanent physical taking. Defendants’ agents were all aware that the Work was being installed, because it was easily noticeable and could not be overlooked by anyone visiting the Property. Therefore, the court concluded that if Helmsley-Spear, the present managing agent of the Property, believed that the former managing agents’ actions were impermissible, then Helmsley-Spear may file a suit.

\textsuperscript{327} (citing \textit{Penn Central}, 438 U.S. at 133-35).

\textsuperscript{126} The \textit{Carter} court also added the \textit{Penn Central} court’s emphasis that “not every law which affects a property owner’s right to control his property is a taking because ‘government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law’.” \textit{Id.} at 327 (citing \textit{Penn Central}, 438 U.S. at 124).

\textsuperscript{127} 458 U.S. 419 (1982).

\textsuperscript{128} \textit{Id.} at 426.

\textsuperscript{129} “The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking... [T]emporary limitations are subject to a much more complex balancing process to determine whether they are a taking... [because] they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property. \textit{Id.} at 435.

\textsuperscript{129} See text accompanying \textit{supra} note 76.

\textsuperscript{130} See text accompanying \textit{supra} note 74.
for damages against them. However, no constitutional argument can help the defendants to move or destroy the plaintiffs' Work.

5. The Scope of Protection and Relief in Carter

The Carter court first analyzed the injunctive relief available to the plaintiffs. In doing so, the court granted the plaintiffs an injunction prohibiting the defendants from distorting, mutilating, or modifying the Work. In addition, plaintiffs were entitled to an injunction prohibiting defendants from destroying the Work. However, no showing was made by the plaintiffs that would allow the plaintiffs to complete the Work. The court held that although VARA protected plaintiffs' visual art, it did not mandate any further creation in order to complete the Work. 132

Next, the court analyzed whether damages could be recovered. Since plaintiffs have only shown that defendants intended to violate their VARA rights, but that no VARA rights were actually violated, the plaintiffs were not entitled to recover any actual or statutory damages. 134

Finally, the court analyzed whether costs and attorney's fees were appropriate. Since this court is the first district court in the country to interpret and apply VARA, the court felt it would be inappropriate to award costs and attorney's fees. In addition, the court found that since both parties vigorously contested each other's claims, and since there was no direct precedence as guid-

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131. 17 U.S.C. § 502(a) provides that "any court having jurisdiction of a civil action arising under [the Copyright Act of 1976] may... grant temporary or final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 501(a) includes violations of an author's rights under 17 U.S.C. § 106A(a) as actions infringing a copyright. In addition, the Carter court held that it had broad powers to issue an injunction when the need dictated, and had great discretion in framing the terms of the injunction. Carter, 861 F. Supp. at 329.

132. The court found that the defendants' refusal to permit the plaintiffs from finishing the Work was not a "distortion, mutilation, or modification" under 17 U.S.C. § 106A(a)(3)(A), supra note 43. Carter, 861 F. Supp. at 329.

133. "When an infringement of the author's moral rights has been shown, the author may recover, inter alia, either actual damages, 17 U.S.C. § 504(a) & (b), or at his or her election, statutory damages, 17 U.S.C. § 504(a) & (c)." Id. at 329-330.

134. The court found that any alterations made the defendants or the defendants' agents were quickly remedied. In addition, the plaintiffs failed to prove that the alterations were prejudicial to their honor or reputations, or had the effect of destroying the Work.

135. 17 U.S.C. § 505 provides that "in any civil action under [the Copyright Act], the court in its discretion may allow the recovery of full costs by or against the party... Except as otherwise provided in [the Copyright Act], the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." Carter, 861 F. Supp. at 330.

Moreover, pursuant to 17 U.S.C. §§ 411 and 412, the work in question need not be registered with the Register of Copyrights in order to have costs and attorney's fees awarded to the prevailing party. Id.

136. However, the court does stipulate the proper rule for determining an award of costs and attorney's fees by following the recent United States Supreme Court decision of Fogerty v. Fantasy, Inc., 114 S. Ct. 1023 (1994). Exercising its own discretion, the factors the court may take into account include the frivolousness of the action, the motivation of the parties, the objective unreasonableness, and the need to advance considerations of compensation and deterrence. 114 S. Ct. at 1033.
ANCE to interpret VARA, costs and fees would not be awarded.

CONCLUSION

VARA was created to protect an artist's moral rights, and the court's holding in *Carter* validates the fact that VARA can actually protect artists. By ruling in favor of the plaintiffs, the court reaffirmed the significant cultural and social importance that art can embody for our nation as a whole. With its holding, the *Carter* court became the first federal court to interpret VARA. Basing much of its interpretation on legislative history, the court elaborated specific factors to be used in determining whether a work could be protected under VARA. It is important, at least for this first "test" of VARA, that the effect of VARA can actually help save visual artists' moral rights by preserving the work of visual art itself. This is an accomplishment never before achieved by a federal statute in the United States.

The passage of VARA is a significant breakthrough for American artists. Although VARA protects only a limited class of works, and is still much narrower than the standards set forth in Article 6bis of the Berne Convention, VARA's importance should not be underestimated. In time, as more courts interpret VARA and its effects, any problems with VARA may be amended by Congress as it sees fit. This will create an evolving, and possibly expanded, form of protection for artists in the future. Today, just the fact that Congress finally chose to protect works of visual art as well as artists themselves puts art and artists on a more appreciated level in the United States. A "work of visual art" is no longer viewed as an ordinary piece of property under a traditional notion of property rights, where ownership and economic control dictate the fate of the work. Instead, an artist's work may now be protected from any alterations or destruction even after it leaves the artist's hands, because the work is a reflection of the artist's own personality. Simply because another person may own the work of art, this does not give the owner the right to alter it in any way. Allowing a work of art to remain in the form that it was created will not only allow for the artist's own integrity and the integrity of the work to remain intact, but it will give future generations an accurate picture of the lives of past generations.

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137. Rep. Fish of New York stated that "this legislation should not be viewed as a precedent for the extension of so-called moral rights into other areas. This legislation addresses a very special situation in a very careful and deliberate way." 136 CONG. REC. at 12610.

If this statement is indicative of Congress' intent as a whole, then it would seem unlikely that VARA will have any hope of expanding its scope of protection in the future.