



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

REQUEST FOR INFORMATION; STUDY ON WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS

The following excerpt is taken from Volume 57, Number 112 of the Federal Register for Wednesday, June 10, 1992 (pp. 24659-24662)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 82-2]

Request for Information; Study on Waiver of Moral Rights in Visual Artworks

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: This Notice of Inquiry is issued to inform the public that the Copyright Office is examining the extent to which authors are waiving moral rights in their visual artworks under the waiver provisions of the Visual Artists Rights Act, which amended the Copyright Act, title 17, U.S. Code by adding section 106A. Section 606 of the Visual Artists Rights Act directs the Copyright Office to prepare a study on waivers of moral rights within five years of enactment. An interim report on the progress of the study is due on December 1, 1992, two years after the effective date of the law. The Office seeks public comments on and information about artists' contracts for the purpose of investigating how the waiver provision is working. We also seek information that will assist the Office in developing a survey of artists' contracts.

DATES: Comments should be received on or before September 8, 1992.

ADDRESSES: Interested persons should submit ten copies of their written comments as follows: If sent by mail: Dorothy Schrader, General Counsel, United States Copyright Office, Library of Congress, Department 17, Washington, DC 20540.

If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, room 407, First Street and Independence Avenue, SE., Washington, DC.

FOR ADDITIONAL INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Department 17, Washington, DC 20540. Telephone: (202) 707-8380.

SUPPLEMENTARY INFORMATION: On December 1, 1990, President Bush signed into law Public Law 101-650. Title VI of this legislation contained provisions according visual artists certain rights of attribution (rights to receive name credit) and integrity (rights against distortion of visual arts works). These rights, also known as moral rights became generally effective on June 1, 1991. The most controversial feature of the legislation was whether or not the bill should provide for waiver of the moral rights, because of a concern that artists would be compelled to waive their rights without receiving fair remuneration. Congress decided, therefore, to continue to monitor this provision to see whether patterns were developing in artist's contracts that^b

routinely provided for waiver of their moral rights. To that end, section 606 (a) of the legislation directs that:

The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of the section 106A of title 17, United States Code, have been waived under subsection (e)(1) of such section.¹

A progress report is to be presented to Congress two years after the date of enactment (December 1, 1992), and a final report is to be submitted not later than five years after the law was enacted (December 1, 1995). The present Notice is designed to assist the Copyright Office in fulfilling this mandate.

1. Impact of Berne Convention Adherence

On March 1, 1989, the United States adhered to the Berne Convention.² The provision for moral rights had long been considered a principal difference between U.S. law and the Berne Convention. Before 1988, the United States had relied for a worldwide copyright treaty on the Universal Copyright Convention (UCC), a multilateral treaty to which the United^d

¹ Visual Artists Rights Act of 1990, Pub L 101-650, 104 Stat 5128, 17 U.S.C. 106A (1990) (hereafter "VARA").

² The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 8, 1886. The United States adhered to the 1971 Paris text of the Convention. See, M. Nimmer, Nimmer on Copyright, App. 8.

^aError; line should read: "James Madison Memorial Building, Room"

^bError; line should read: "developing in artists' contracts that"

^cError; line should read: "by subsection (a) of section 106A of title"

^dError; line should read: "multilateral treaty to which the United"

^eError; line should read: "Visual Artists Rights Act of 1990, Pub.L.101-650,"

^fError; line should read: "104 Stat. 5128, 17 U.S.C. 106A (1990) (hereafter"

^gError; line should read: "Nimmer, Nimmer on Copyright, App. 27."

States adhered as a founding member on September 16, 1955. The UCC does not require moral rights protection.

The Berne Convention's Article 6 *bis* provides that:

Independent of the author's economic^h 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 said work, which would be prejudicial to his honor or reputation.

Under this mandate, members must accord nationals of other member countries rights of paternity and integrity that survive the transfer of copyright. The intent of this requirement is to protect the author from both entrepreneurs and himself, in recognition of the author's economic necessity sometimes to contract against his own interest.⁸

The continental legal system of *droit d'auteur* (literally, "author's rights") encompasses both economic (copyright) and noneconomic (moral) rights. Civil law countries have more experience in dealing with these rights than do systems with origins in English common law. Before 1990, the primary moral rights provision in United States federal law was contained in the Lanham Act. Common law principles such as libel, defamation, misrepresentation, and unfair competition also have been applied by courts to give authors relief for moral rights violations.⁴ The Berne Convention's underlying philosophy promotes greater harmonization among the laws of member states, but the details of moral rights protection are regulated by national law. Member countries are required to provide the means of redress for violation of moral rights in their national laws, but the specific means may take a variety ofⁱ forms, including civil or criminal^j provisions encompassing a diversity of sanctions.⁹

This degree of flexibility with respect to moral rights, coupled with the agreed-upon strategy to change U.S. law only to the extent that it was incompatible with the Berne Convention, allowed Congress to defer consideration of additional

⁸ World Intellectual Property Organization Guide to the Berne Convention (WIPO Guide) 42 (1978).

⁹ S. Rep. No. 352, 100th Cong. 2d Sess. 9-10 (1986).

⁴ Berne Convention Article 6*bis* (3), WIPO Guide, 44.

federal moral rights legislation. The Berne Convention Implementation Act (BCIA),⁶ did not provide additional moral rights for authors. The Berne Convention is not self-executing in the United States. With respect to moral rights, section 3 of the Berne Convention Implementation Act expressly states:

The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligation thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—(1) to claim authorship of the work, or (2) to object to any distortion mutilation, or other^k modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.⁷

This specific language exemplifies the general philosophy that all United States obligations under the Berne Convention are satisfied by domestic law—either federal law or state common or statutory law.

2. The Visual Artists Rights Act of 1990

The Visual Artists Rights Act (VARA) responds to the public interest in protecting works of art against mutilation and destruction. A Picasso oil painting, "Trois Femmes," was cut up in 500 small pieces and sold as original work, with the entrepreneurs threatening to do more of the same with other works of art if the venture proved profitable. A Calder mobile was made stationary and painted to match an airport's color scheme.⁶ These domestic wrongs were the target of the integrity rights granted to artists in the VARA.

Ten states provide some more rights protection for visual artists, which brings U.S. law in closer congruence with the Berne Convention.⁹ Some of the state laws protect an authors' right of

⁶ Berne Convention Implementation Act, Pub. L. 100-568, 102 Stat. 2853, (1988) (hereafter BCIA).

⁷ BCIA, 17 U.S.C. 3(b) note. 1

⁸ Ossola, "Law for Art's Sake", *Legal Times*, Dec. 10, 1990, at 27; Kernan, "The Great Debate Over Artists' Rights," *Washington Post*, May 22, 1988, at F1.

⁹ Cal. Civ. Code, Sec. 987 *et seq.* (West 1989); Conn. C.G.S.A. Sec. 42-116*et seq.* (West 1989); L. Rev. Stat. Ann. R.S. 51-2152 *et seq.* (West 1987); Me. Rev. Stat. Ann. tit. 27, Sec. 303 *et seq.* (1986); Mass. Ann. Laws ch. 231, Sec. 85*et seq.* (1982); N.J. Stat. Ann. Sec. 2A:24A-1 *et seq.* (West 1989); N.M. Stat. Ann. Sec. 13-4B-2 *et seq.* (1989); New York Arts and Cultural Affairs Law Sec. 14.01 *et seq.* (McKinney 1989); Pa. Stat. Ann. tit. 73, Sec. 2101 *et seq.* (Purdon Supp. 1989); R.I. Gen. Laws, Sec. 5-62-2 *et seq.* (1987).

integrity while others have as their principle objective preserving the public's interest in works of art.

The Visual Artists Rights Act harmonized U.S. law with the Berne Convention to a greater degree. The legislation was narrowly crafted to limit visual artists' rights to a single subset of pictorial, graphic and sculptural works, restricted to the life of the author, and to two specific moral rights, paternity (the right of attribution) and integrity (the right against distortion, mutilation, or other modification).

The Visual Artists Rights Act (VARA) covers paintings, drawings, and sculptures that have been produced in an edition of 200 or fewer. It includes photographs produced for exhibition, but specifically excludes motion pictures and other audiovisual works. It does not include works made for hire or applied artworks.¹⁰

The VARA gives artists the following rights of attribution and integrity: (1) The right to be named as author of the work; (2) the right not to be named as author of a work not created by that person; (3) the right not to be named as author of a work that is distorted, mutilated, or otherwise modified in a manner that damages the author's reputation; (4) the right to prevent the intentional distortion or modification of a work in a way that prejudices the author's reputation, including the right to relief for such damage; and (5) the right to prevent the destruction of a work of recognized stature, and the right^m to relief for such destruction.¹¹

Integrity rights are subject to certain limitations when a work of art is incorporated into or otherwise made part of a building. Where such a work cannot be removed without being damaged, the owner of the building may secure written consent to install the work from the artist, including an acknowledgement of the possible damage to the work upon removal. This acknowledgement operates as a waiver for actions that would otherwise infringe the artist's rights of integrity in works installed in building.¹²

3. The Waiver Provisionⁿ

Under the VARA, artists may waive their rights of attribution and integrity with respect to a particular work.

¹⁰ VARA, at 17 U.S.C. 107 ("work of visual arts").^o

¹¹ VARA, at 17 U.S.C. 106A(a).^p

¹² VARA, at 17 U.S.C. 113(d)(1).^q

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"Independent of the author's economic"

ⁱError; line should read:
"specific means may take a variety of"

^jError; line should read:
"forms, including civil or criminal"

^kError; line should read:
"object to any distortion, mutilation, or other"

^lError; line should read:
"7 BCIA, 17 U.S.C. Sec. 3(b) note."

^mError; line should read:
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ⁿError; line should read:
"3. The Waiver Provision"

^oError; line should read:
"10 VARA, at 17 U.S.C. §101 ("work of visual arts")."

^pError; line should read:
"VARA, at 17 U.S.C. §106A(a)."

^qError; line should read:
"12 VARA, at 17 U.S.C. §113(d)(1)."

The VARA states that these rights may not be transferred, but [they] 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 right for all authors.¹³

The fact that one joint author may waive rights in the work for all joint authors follows traditional United States copyright law, in that one coauthor may license a work without agreement with the other coauthors, subject to an obligation to account for profits generated from licensing the work.

The legislative history of the VARA emphasizes that waivers and the circumstances surrounding them must be narrowly circumscribed. Waivers will be valid only if the parties follow the rules set forth in subsection (e)(1) of section 106A. Noting that the bill in essence permits the author to hold harmless activity that would otherwise violate the law, the House Judiciary Committee further stated that:

A waiver applies only to the specific person to whom waiver is made. That person may not subsequently transfer the waiver to a third party. Any third parties must obtain waivers directly from the author.¹⁴

To further evidence the specificity of the waiver provision, the Committee reemphasized that blanket waivers are prohibited and that waivers apply only to a specifically identified work and a particular use. Additionally, waivers may not be implied from the transfer of copyright ownership or transfers of material objects.

Discussion during deliberations on the bill centered around whether providing for waiver might lead to a boiler-plate clause for waiver of moral rights in every contract for sale or other transfer of copyright.¹⁵ Doubts were expressed about whether the artists would be able to contract at arms length. Some critics said the waiver provision eviscerates the moral rights otherwise conferred by the VARA.

Although the laws of member countries of the Berne Convention adopt varying measures to protect moral rights, they are generally broader than those granted by U.S. law. The laws of France provide that moral rights are inalienable and non-waivable. Under French law, for example, an American motion picture director ultimately prevailed in an action to prevent the performance of a motion picture colorized without the director's consent.¹⁶

On the other end of the spectrum is the United Kingdom's moral rights law of 1988,¹⁷ which grants such rights to authors of literary, musical and artistic works, including motion pictures. The Copyright, Designs and Patents Act makes the rights of attribution subject to waiver and consent (oral). A further limitation is that the British law requires the author affirmatively to assert his right of attribution.

4. Freedom of Contract vs. Unwaivable Protection

Precisely because of varying degrees of overall uncertainty about the long-term validity of the waiver provision, Congress directed the Copyright Office to report on artists' experience in a national legal environment where waivers are freely available to a transferor.

Two fundamental questions about any waiver are: (1) Whether the author made an intentional relinquishment or abandonment of a known right or privilege, and (2) whether the right was voluntarily and intelligently waived. The argument in favor of artists' freedom to contract away moral rights is that authors can benefit for licensing their rights in a free market; the opposing argument is that most authors lack the bargaining power to negotiate at arm's length—publishers can compel waivers on an "accept this or get nothing" basis.¹⁸ In weighing these two conflicting concepts—contractual freedom or paternalistic safeguards for authors, the public policy of maintaining the integrity of artwork's provenance must also be considered. The copyright law protects the author's economic interest despite the reality of his or her

bargaining positions in the renewal and termination provisions, for example, by providing that these rights cannot be irretrievably transferred before the interest vests.¹⁹

In passing the VARA, Congress decided to follow the common law rule favoring freedom of contract and made moral rights waivable in the face of substantial concern that detrimental practices are difficult to dislodge once in place. The basic task for the Office will be to report on whether, in the short period since the VARA became law (June 1, 1991), Congress's purpose has been realized or frustrated. To monitor contractual developments, Congress has directed the Office to submit an interim report in a relatively short time, eighteen months after the effective date, followed by a full report in 1995—on the effectiveness of the waiver provision in achieving the desired goals—to protect the bond between the artist and his or her work, while facilitating marketing of the work.

In order to assist the Copyright Office in preparing these reports, public comment on the subject of moral rights waivers in contracts with artists is invited. The Office especially seeks objective factual information on contracts and contract offers for the purpose of preparing its final report. We also seek comment of an advisory nature on a proposed method of gathering factual information. For example:

1. How can information be gathered on contracts with individual artists who are out of touch with national organizations? Should the Office hold public hearings on artist waivers? Should the Office engage an independent research firm to conduct a survey of artists (assuming funds are authorized by Congress)?

2. Should the Office conduct surveys of artists' rights in foreign countries, particularly France, Germany, and Great Britain?

3. Are there any other methods of gathering factual information about waiver of moral rights?

In addition, we specifically request comment on the following questions:

1. What constitutes relative equivalence of bargaining power? Do even well-known artists inherently have unequal bargaining power in dealing with established museums and other organizations?

2. Are waivers of moral rights regularly included in artists' contracts? Are the parties

¹³ 17 U.S.C. 106A(e)(1).

¹⁴ The Visual Artists Rights Act of 1990, H.R. Rep. No. 514, 101st Cong. 2d Sess., 18-19 (1990).

¹⁵ See, Damich, Edward, *The Visual Artists Rights Act of 1990*, 39 Cath. U.L. Rev. 945, 998 (Summer, 1990).

¹⁶ *Turner Entertainment Co. v. Huston*, Case Civ. No. 89-19,822 (May 28, 1991).

¹⁷ Copyright, Designs and Patents Act, 1988, ch. 48.

¹⁸ See, *Gonzales v. County of Hidalgo, Texas* 420 F.2d 1043, 1061 (5th Cir. 1973).

¹⁹ See, 17 U.S.C. 203(b)(4), 304(c)(6)(D).^u

^fError; line should read:

"17 U.S.C. §106A(e)(1)."

^gError; line should read:

"authors can benefit from licensing their"

^hError; line should read:

"power in dealing with established museums"

ⁱError; line should read:

"See, 17 U.S.C. Secs. 203(b)(4), 304(c)(6)(D)."

to contracts generally aware of the provisions of the law granting integrity and attribution rights to authors? To what extent is any failure of contract language to mention waivers due to lack of knowledge about the new law?

3. How specific are the contracts? Are the works sufficiently identified? Are the uses particularly identified?

4. Do those who secure waivers exercise them or are waivers secured simply as "insurance policies"?

5. What is the ratio of attribution waivers to waivers of the right of integrity? Are waivers given for artistic work to be incorporated in buildings proportionately greater than waivers for other works?

6. In what kinds of contracts are waivers included—contracts for sale of the work of

art; for copyright ownership; to commission a work of art; stand alone waivers? Are the waivers limited in time? Do artists find any particular offers for waiver disturbing?

7. What is the economic effect of the inclusion of a waiver in a contract? Does the waiver bring a separate price? Is the price of the work or other thing exchanged for value significantly lower than the market price when waiver is not included?

8. Does the artist's experience or renown^v have any effect on the presence, absence, or nature of a waiver in a contract? What effect?

9. Do the same factors that influence artists' decisions to waive rights of attribution and integrity influence their decisions to enter into other contracts?

10. Might constitutional problems be created by a new provision prohibiting

authors from waiving their artists' rights?

11. Do public contracts differ in the extent or nature of waivers offered in contracts with artists?

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, in room 401, James Madison Memorial Building, Library of Congress, First Street and Independence Avenue SE., Washington, DC.

Dated: June 4, 1992.

Ralph Oman,

Register of Copyrights.

[FR Doc. 92-13544 Filed 6-9-92; 8:45am]

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^vError; line should read:

"8. Does the artist's experience or renown"