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FEDERAL MORAL RIGHTS FOR VISUAL ARTISTS: CONTRACT THEORY AND ANALYSIS

Russ VerSteeg*

This Article is intended neither as an introduction to contract principles for visual artists nor as a comprehensive analysis or study of art law contracts. Nor is this Article intended as a "how to negotiate a contract" manual for visual artists with annotations and forms. Works such as these already exist and are available for both attorneys and artists. Furthermore, this Article is not an exhaustive treatment of the philosophical, political and sociological forces that shaped the American recognition of moral rights for visual artists under the United States Copyright Act. Instead, this Article looks critically at the immediate, potential effect that the Visual Artists Rights Act can have on visual artists in drafting and negotiating their contracts with printers, co-authors, galleries, auctioneers, museums, consignees, bailies, and other purchasers. In short, the Article concentrates on how artists and those who contract with them can use the Visual Artists Rights Act (Act) intelligently in negotiating and drafting agreements.

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1. This Article does, however, offer a few suggested contract provisions that might prove useful for visual artists and others involved in buying, selling, and otherwise transacting business in art.


In Part I, the Article briefly examines the recognition of moral rights in the United States, summarizes the history and general scope of the Act, probes the subject matter that the Act defines as "work[s] of visual art," and gives an overview of the "moral rights" that the Act makes available to artists.\(^5\) Part II discusses the potential interface between contract law, the Uniform Commercial Code, and the Act. Part II also describes ways that artists and parties who contract with artists can take advantage of the new moral rights during the bargaining and drafting processes.

I. OVERVIEW

A. History

Many European communities, especially those countries that have adopted the Berne Convention,\(^6\) have long recognized the concept of *droit moral*, an artist's right of integrity, attribution, disclosure, and withdrawal.\(^7\) These rights, which, in part, originate in the European

5. The Act actually refers to "authors" not "artists," a term "undoubtedly chosen because it is used in the Copyright Act, of which the Visual Artists Rights Act is an amendment." Damich, \*VARA* 1990, supra note 3, at 964. This Article generally employs the terms "artist" and "artists" to refer to the people whom the Act calls "author" and "authors."

6. The roots of the Berne Convention in Europe can be traced back over one hundred years. In 1878 at the Universal Exposition in Paris, the French Societe des Gens de Lettres invited other nations to participate in an International Literary Congress. The International Literary Association grew from the initial meetings in Paris in the summer of 1878 and continued to hold meetings in major European cities between 1878 and 1885. The Swiss government invited the Association to meet in Berne. R. R. Bowker & Thorvald Solberg, Copyright: Its Law and Its Literature 26 (1986). Additional meetings were held in Berne in 1883 and 1884. Id. On September 9, 1886, at the 1886 Berne meeting, the Association adopted the original Berne Convention. See Basic Documents of International Economic Law 715 (Stephen Zamora & Ronald A. Brand eds., 1990). Since 1886, the Berne Convention has undergone numerous revisions. The major revisions were: (1) in Paris (1896); (2) in Berlin (1908); (3) in Berne (1914); (4) in Rome (1928); (5) in Brussels (1948); (6) in Stockholm (1967); and (7) in Paris (1971). Minor amendments to the 1971 Paris Convention were added in 1979. Id.

7. House Report 514 which accompanied the Visual Artists Rights Act of 1990 emphasizes that the rights afforded by the new law are analogous to those protected by Article 6bis of the Berne Convention, which are commonly known as "moral rights." "The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation." Artists' rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: "To promote the Progress of Science and useful Arts . . . ."


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view that artistic creations are the product of an artist's personality, reflect a recognition that artists are entitled to control their works of art in ways that persons who produce other types of personal property cannot. Simply stated, the theory of droit moral holds that artists have a number of substantive rights that are "personal" but not necessarily "economic." These rights are: 1) the author's right of integrity: the right to insist that her work not be distorted, mutilated, or destroyed; 2) the right of attribution: the author's right to be publicly recognized as the author of her work; 3) the right of disclaimer (the logical counterpart to the right of attribution): the artist's right to disclaim authorship of any work that is not hers; 4) the right of disclosure: the legal recognition that it is the artist who has the prerogative to decide


8. There are three broad theories that explain why ownership of intangible rights such as those protected by the Copyright Act should be considered private property. Copyright can be considered either (1) a "natural" right, (2) an artificial right created by the legislature and the judiciary, or (3) a personal right integral to an artist's very identity. Linda J. Lacey, Of Bread and Roses and Copyrights, 1989 DUKE L.J. 1532, 1539 (1989) (emphasis added). The natural rights theory originated with the labor theory of property propounded by John Locke. Id. Since its beginnings, legal scholars such as Blackstone and, more recently, the late Professor Melville Nimmer, whose multi-volume treatise on copyright is the standard by which all others are judged, have embraced a natural rights explanation for the underpinnings of copyright. Id. at 1540. The U.S. Supreme Court has apparently adopted the second theory (i.e., that copyright is the product of the legislature and the judiciary), stating that copyright is "the creature of the Federal statute" (i.e., the Copyright Act) and that "Congress did not sanction an existing right but created a new one." Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); see also Lacey, supra this note at 1541. The German philosopher, Hegel, is primarily responsible for the third theory: the view that intangible properties like copyrights are "the embodiment of personality," a view shared and advanced by Imanuel Kant. I. Kant, Of the Injustice in Counterfeiting Books, in 1 Essays and Treatises on Moral, Political, and Various Philosophical Subjects 225, 229–30 (W. Richardson trans., 1798); Lacey, supra, this note at 1541 (citing G. Hegel, Philosophy Of Right 51 (T.M. Knox trans., 1952)); see also Margaret J. Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); Martin A. Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators, 53 HARV. L. REV. 554 (1940).

9. See infra notes 87–102 and accompanying text regarding the characterization of moral rights as "personal" versus the standard "economic" bundle of rights granted through § 106 of the Copyright Act.

10. Also referred to as the right of "paternity." The author has made a conscious decision to use the non-sexist term "attribution."
when, and indeed, whether to unveil her work for others to view; and, 5) the right of withdrawal (the corollary right to the right of disclosure): the artist’s power to determine when and whether to remove a work from the public (or perhaps even from a private individual). These rights are the conventional moral rights that many European countries typically have recognized.11

The United States, on the other hand, has only recently considered federal legislation relating to an artist’s moral rights. An important precursor to the Act was the Berne Convention Implementation Act (BCIA). The initial drafts of the BCIA included moral rights, but the moral rights provisions met with strong opposition from corporate interests who feared that moral rights would impede the production and distribution of copyrighted works. The Motion Picture Association of America, the Information Industry of America, and International Business Machines Corp., for example, advocated adoption of Berne without any moral rights provisions.12 In addition, other notable groups, organizations, and businesses opposed the adoption of moral rights as part of the United States’ adherence to Berne: the Magazine Publishers Association, the American Society of Magazine Editors, the Coalition to Preserve American Copyright Tradition, McGraw-Hill, Playboy, Time, Triangle Publications, and Turner Broadcasting. These entities argued that moral rights for authors would compel editors in the media to check all editorial revisions with both the producers and authors prior to moving forward.13

The BCIA passed only after both the House and Senate Committees concluded that United States law already possessed the kind of moral rights included in Article 6bis of the Berne Convention. House Report 608 stated that “[b]ased on a comparison of its laws with those of Berne member countries, and on the current status of Federal and State protections of the rights of paternity and integrity, the Committee finds that current United States law meets the requirements of Article 6bis.”14 Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization (WIPO) reached similar conclusions regarding the scope of pre-Berne U.S. law.15 Congress took the position that section 106(2) of the Copyright Act, section 43(a) of the Lanham Act16, “artists’ rights” statutes passed by several states, and a

11. See supra notes 7–10 and accompanying text.
13. Id.
15. Id.
number of judicial decisions recognizing rights equivalent to Article 6bis combined to create sufficient moral rights protection for domestic artists.\textsuperscript{17}

The Copyright Act provides that "the owner of copyright . . . has the exclusive right . . . to prepare derivative works based upon the copyrighted work."\textsuperscript{18} At least one commentator has argued that this provision can function as the equivalent of the right of integrity if a derivative work significantly alters the original.\textsuperscript{19} This reasoning is based primarily on \textit{Gilliam v. American Broadcasting, Inc.}\textsuperscript{20} In \textit{Gilliam}, the Second Circuit held that "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."\textsuperscript{21} Thus, when artists own the copyright to their works, as was true in \textit{Gilliam}, they may sue for copyright infringement when a contractually authorized use of the work mutilates or misrepresents the original to the extent that the economic rights of ownership may be harmed. \textit{Gilliam} may be construed as having recognized a right of integrity because the copyright owner (who could be the author) maintains an economic interest in the work. The right of integrity recognized in \textit{Gilliam} may also be construed to extend to authors even after they have transferred ownership of their copyrights because they retain a beneficial interest in the work.\textsuperscript{22} This beneficial right arises, arguably, from 17 U.S.C. § 203 which gives authors, other than authors of works made for hire, the right to terminate the transfer of the copyright after thirty-five years. Although this right is subject to a number of formalities and conditions, authors cannot waive their right of termination.\textsuperscript{23}

Section 43(a) of the Lanham Act provides that

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce,

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20. & 538 F.2d 14 (2d Cir. 1976).
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21. & \textit{Id.} at 24.
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23. & See \textit{id.} § 203(3) (West 1977); Kwall, \textit{supra} note 19, at 47–56.
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and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.24

Courts have applied section 43(a) to situations where parties have incorrectly attributed authorship,25 and also to situations of "reverse palming off," when authorship is not attributed to one of the authors of a jointly authored work.26

Congress' willingness to equate Article 6bis with the totality of applicable law in the United States must be taken with a grain of salt. One important purpose of the BCIA was to give U.S. copyright owners greater protection in the world market. The BCIA was also intended to give U.S. interests a more powerful role in shaping international copyright law. Congress' "minimalist approach" shows clearly that Congress wanted to attain the maximum benefits that adherence to Berne could bring while shouldering the minimum burdens. If there had been equivalence to Berne, in fact, then Congress had no valid reason to avoid adopting any of Berne's moral rights provisions. In reality, when the United States adopted Berne, only a speculative construction of U.S. law brought U.S. authors within the ambit of Berne's moral rights protections. Authors had no express right of attribution unless they contracted for it.27 Interestingly enough, the Ad Hoc Working Group on U.S. Adherence to the Berne Convention argued that authors may have had a cause of action based on an implied covenant of good faith and fair dealing when their rights of attribution were denied.28 No U.S. court, however, had ever so found. At the time of the BCIA, the only plausible cause of action was for a misleading attribution of the type found in Lamothe v. Atlantic Recording Corp.29 United States law also failed to recognize a right of integrity absent a valid contractual provision. Even the Gilliam decision—oft-quoted for the protection it offers the right of integrity—

29. 847 F.2d 1403, 1407–08 (9th Cir. 1988).
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states that "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."\(^\text{30}\)

Of the four prongs of protections that were supposed to make United States law equivalent to Article 6bis, the state legislation was probably the strongest. However, states enacted those statutes precisely because they perceived a void in federal protection. Congressional reliance on the state statutes, moreover, was inapposite for two reasons. First, only eight states had enacted moral rights statutes. Second, Article 6bis(3) requires that "[t]he means of redress for safeguarding the rights granted by this Article (i.e., moral rights) shall be governed by the legislation of the country where protection is claimed."\(^\text{31}\) The comment to Article 6bis(3) refers to "legislation of the country" as "national law," thereby making it clear that the moral rights protections of Article 6bis ought to be embodied in federal law not a patchwork of state laws. The extraordinarily tenuous nature of Congress' conclusion that United States authors already possessed rights equivalent to Article 6bis when it adopted the BCIA made the passage of the Visual Artists Rights Act highly desirable for United States artists.\(^\text{32}\)

U.S. federal law did not overtly grant any moral rights to artists in America until June 1, 1991.\(^\text{33}\) The Act was the product of several years of congressional debate.\(^\text{34}\) In specific circumstances, the Act

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\(^{31}\) Article 6bis(3) (emphasis added).

\(^{32}\) See also Damich, \textit{VARA} 1990, supra note 3, at 946 n.5.

\(^{33}\) Of the state and federal decisions that Congress believed granted moral rights, the \textit{Gilliam} case is probably the best known. However, the Ad Hoc Working Group also cited Geisel v. Poynter Prods., 295 F. Supp. 331 (S.D.N.Y. 1968), for the proposition that courts have denied that moral rights exist under U.S. law. See Ad Hoc Report, supra note 28 at 39. At the time of BCIA passage, at least eight states had enacted some form of artists' rights laws. See CAL. CIV. CODE § 987 (West Supp. 1988); LA. REV. STAT. ANN. §§ 51:2151-56 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1988); N.J. STAT. ANN. §§ 2A:24A-1 to 2A:24A-8 (West 1987); N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59 (McKinney 1984); PA. STAT. ANN. tit. 73, §§ 2101-10 (Purdon Supp. 1987); R.I. GEN. LAWS §§ 5-62-2 to 5-62-6 (1987). Congress also noted that some Berne member countries had even less moral rights protection than the United States. See Ad Hoc Report, supra note 28, at 44.

confers certain rights on artists (the section 106A rights). Initially, then, since Congress made the Act part of the Copyright Act (i.e., title 17 of the United States Code), the remedies available are remedies provided under the United States Copyright Act. Those who take part in art transactions, however, have the opportunity to enlarge or dimin-

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Much of the initial debate over the BCIA revolved around whether moral rights should be included. The Berne Convention expressly recognizes both the right of attribution and integrity in Article 6bis. Paragraph (1) of Article 6bis states:

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 said work, which would be prejudicial to his honor or reputation.


The issue of whether the copyright owner of film was entitled to colorize it with impunity advanced to the forefront. In one sense, this issue illustrates the American preference for economic rights at the expense of an artist’s moral rights. When some complained, for example, that Ted Turner, who owns the world’s largest film library, should not colorize black and white movie classics, Turner quipped, “The last time I checked, I owned those films.” Artists, Newly Militant, Fight for Their Rights, N.Y. TIMES, March 3, 1988, at C29, col. 1. James Stewart, testifying before Congress, said that the colorization of Frank Capra’s “It’s a Wonderful Life” “broke his [Capra’s] heart.” Paul Page, Jimmy Stewart, Burt Lancaster Speak Out for Artists’ Rights, ASSOCIATED PRESS NEWSWIRE, March 15, 1988.

When it began to look as though the opponents of including moral rights in the BCIA would carry the day, Senator Edward M. Kennedy (D-Mass.) tried to limit the scope of the BCIA moral rights to visual arts. He was, however, unable to garner sufficient support at the time. Howard Fields, Senate Expected to Pass Berne Bill in September, PUBLISHER’S WEEKLY, Sept. 9, 1988, at 68.

In July of 1987, Representative Carlos Moorehead (R-Calif.) introduced a bill (H.R. 2962), which was backed by the administration, that contained no moral rights provisions. The Reagan administration had taken the position that U.S. law was already roughly equivalent to the provisions of Article 6bis. See Administration Officials Back Adherence to Berne Copyright Convention, Daily Rep. for Executives (BNA) No. 34 (Feb. 22, 1988), supra note 14. In December of 1987, Senator Orrin Hatch (R-Utah) introduced Senate Bill 1971. However, the bill that the Senate ultimately approved was Senate Bill 1301, introduced in May of 1987 by Senator Patrick Leahy (D-Vt.). Senator Leahy’s bill did not have any moral rights provisions either. Id.

35. These rights are, generally speaking, the right of attribution and the right of integrity. For a more detailed discussion, see infra Part I.C.

36. See 17 U.S.C.A. §§ 501–11 (West 1977 & Supp. 1992); see also Damich, VARA 1990, supra note 3, at 949 (commenting that "the damages provisions of the Copyright Act [are] inappropriate because they are aimed at injury to property rights rather than personal rights").
ish the scope of the Act's remedies by drafting language that addresses the section 106A rights in their agreements.37

B. Statutory Subject Matter: A "Work of Visual Art"

The Act specifically defines what types of works are "work[s] of visual art."38 This definition is critical to artists. Artists can only take advantage of the section 106A rights if the work that they create falls within the scope of the Act's definition. The Act defines a "work of visual art" as follows:

(1) 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) 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.39

37. In this regard, this Article takes issue with Congress' conclusion that "the civil penalties provided in title 17 are adequate to redress any violations of the rights of attribution and integrity." H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6932 (emphasis added). Thoughtful proactive measures in a contract can offer far better protection than title 17 remedies.


39. Id. This is the same definition that had appeared in earlier bills proposed by Senator Edward Kennedy (D-Mass.) and Representative Robert Kastenmeier (D.-Wis.). See Damich, VARA 1990, supra note 3, at 951. House Report 514 notes that the decision to create a narrow definition was a conscious one. H.R. Rep. No. 514, 101st Cong., 2d Sess. 9 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6919. The subcommittee's hearings "revealed a consensus that the bill's scope should be limited to certain carefully defined types of works and artists, and that if claims arising in other contexts are to be considered, they must be considered separately." Id.

House Report 514 stresses that Congress went "to extreme lengths to very narrowly define the works of art that will be covered . . . ." Id. at 11, 1990 U.S.C.C.A.N. at 6921 (quoting the statement of the Honorable Edward Markey at the subcommittee hearings). "The definition is not synonymous with any other definition in the Copyright Act and, in particular, it is narrower than the definition of 'pictorial, graphic, and sculptural works' set forth in 17 U.S.C. 101." Id.

Congress has indicated, however, that a certain degree of common sense and experience must guide courts when interpreting this definition:

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 a number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend upon the medium or materials used. For example, the term "painting" includes murals, works created on canvas, and the like. The term "sculpture" includes, but is not limited to, castings, carvings, modelings, and constructions. Similarly, the term "print" includes works
The Act also explicitly excludes certain types of works. Any work that is executed as a "work made for hire" cannot be considered a "work of visual art" within the scope of the Act. Furthermore, the Act's definition of a "work of visual art" does not encompass

(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; [and] (iii) any portion or part of any item described [above].

In addition, any "reproduction, depiction, portrayal or other use of a work" used in connection with posters, maps, globes, merchandising items, etc. and works made for hire is not considered a "work of visual art," although the original of such a reproduction, depiction, or portrayal could be considered a work of visual art on its own merits. Consequently, the way that someone (a purchaser, for example) uses an artist's work can affect whether the work will be considered a

such as lithographs, serigraphs, and etchings. The latter term does not, however, cover photographic prints, which are covered separately.

The photographs encompassed by the definition are those still photographic images produced for exhibition purposes. The bill covers both positives (for example prints, contact sheets, and transparencies such as slides) and negatives (negative photographic images or transparent material used for printing positives) of a photograph. The limitation to "still" photographic images is intended to ensure that "moving" images, such as those appearing in motion pictures and other audiovisual works, are not protected under the bill. In fact, those categories of works are expressly excluded pursuant to subparagraph (1)(A)(1) of the definition of a work of visual art.


One point well worth making is that basic protection under the Act is in no way tied to artistic merit or value (except for the artist's right to prevent destruction of "a work of recognized stature"). 17 U.S.C.A. § 106A(a)(3)(B) (West Supp. 1992). The legislative history notes that "[t]he Committee appreciates that less well-known or appreciated artists also have honor and reputations worthy of protection." H.R. REP. No. 514, 101st Cong., 2d Sess. 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6925.

40. 17 U.S.C.A. § 101 (West Supp. 1992). The definition expressly states that "[a] work of visual art does not include... any work made for hire...
. . . . " Id. § 101(2)(B).
41. See infra note 79 for a more complete explanation of the concept of "work made for hire."
43. The Act states that the § 106A rights

shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with 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 . . . any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container . . . or any work made for hire . . . .

Id. §§ 101(2)(A), 101(2)(B), 106A(c)(3).
"work of visual art" within the Act. For example, if a corporation were to purchase a large outdoor sculpture, display it in front of its office building, and were to subsequently adopt it as the company's logo or trademark, then, arguably, the sculpture itself could no longer be considered "a work of visual art" since it would then be used for "advertising and promotional purposes." 44

This definition has important ramifications for artists. First, in order for the Act to apply, artists must make sure that the medium in which they are working is one of the media that the Act contemplates. The categories of "works of visual art" are exhaustive. The Act in no way suggests that the drafters intended to open the door to permit media other than paintings, drawings, prints, sculptures, and still photographs.45 Secondly, artists must pay close attention to and observe the formalities that the Act's definition of "work of visual art" demands.

In order for a painting, drawing, or print to be considered "a work of visual art," artists must be certain that the work either (1) be executed as a single copy (i.e., the original work itself); or (2) in a case where an artist wishes to make limited edition copies, she must be certain to make no more than 200 copies.46 In fact, in order to com-


45. The legislative history reinforces this conclusion, stating that the definition "encompasses certain paintings, drawings, prints, sculpture, and finally, still photographic images produced for exhibition purposes only. In all cases these works are covered only in single copies or in limited editions of 200 or fewer copies." H.R. REP. No. 514, 101st Cong., 2d Sess. 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6921 (emphasis added). The legislative history does, however, note that other means of protection are often available to artists if their works fail to meet the § 106A definition:

Consistent with current law on preemption for economic rights, the new federal law will not preempt state causes of action relating to works that are not covered by the law, such as audiovisual works, photographs produced for non-exhibition purposes, and works in which the copyright has been transferred before the effective date. Similarly, state artists' rights laws that grant rights not equivalent to those accorded under the proposed law are not preempted, even when they relate to works covered by [the Act]. For example, the law will not preempt a cause of action for misattribution of a reproduction of a work of visual art or for a violation of a right to a resale royalty. Further, State law causes of action such as those for misappropriation, unfair competition, breach of contract, and deceptive trade practices, are not currently preempted under section 301, and they will not be preempted under the proposed law.

Id. at 21, 1990 U.S.C.C.A.N. at 6931 (emphasis added).

46. House Report 514 states: "Limited editions, as opposed to reproductions, are comprised of multiple originals of the same work and are thus deserving of special protection." Id. at 12, 1990 U.S.C.C.A.N. at 6922 (footnote omitted). Professor Ginsburg criticizes this tenet, noting that "[t]he artist's interest in receiving credit for her creation, and the public's interest in knowing the creator's identity, do not diminish as the size of the edition increases." Ginsburg, supra note 7, at 484. Richard Posner and William Landes recognize, nevertheless, that the status
port with the language of the statute, it might be prudent for an artist to actually designate those copies as "limited edition," both on the copies themselves (for example on their reverse) and also on any documents (e.g., a sales agreement) that refer to them.47

For paintings, drawings, and prints which exist in "limited edition" copies, an artist must sign the copies and must number them consecutively.48 The Act itself is ambiguous as to whether an artist must sign an original (i.e., "single copy") of a painting or drawing. The legislative history clearly states that "single copies of paintings, drawings, prints and sculptures need not be signed."49 Nevertheless, the wisest course will be for artists always to sign their originals, as apparently most artists do as a matter of custom.50

of an original or limited edition work of art can be important in terms of whether there is a need for copyright protection in an open market:

In the case of books and other printed matter, the copier may not be able to match the quality of paper or binding of the original or crispness of the printing, and there may be errors in transcription. None of these is an important impediment to good copies any longer, but in the case of works of art—such as a painting by a famous artist—a copy, however accurate, may be such a poor substitute in the market that it will have no negative effects on the price of the artist's work.


47. The importance of a paper trail leading to compliance with the statutory definition is critical. House Report 514, for example, states that "a printmaker who creates a limited edition must show that the edition consists of 200 or fewer copies." H.R. REP. No. 514, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6923.


49. Id. at 13, 1990 U.S.C.C.A.N. at 6923.

50. In addition to signing works, artists should understand the benefits that accrue from affixing a copyright notice to all of their works. A proper copyright notice includes three elements: (1) the author's name (the signature required by the Visual Artists Rights Act would surely suffice to satisfy this element); (2) the symbol ©, or the word "Copyright," or the abbreviation "Copr.;" and (3) the year of first publication of the work. The legal advantages that flow from routinely placing a copyright notice on works (as well as the advantages that come from registering the copyrights to works) are significant. Under the present Copyright Act, copyright registration is entirely permissive, not mandatory. 17 U.S.C.A. § 408(a) (West Supp. 1992). The registration fee is now $20.00. Id. at § 708(a)(1) (West Supp. 1990) Although artists are not required to place a notice on their works (The statute provides that "a notice of copyright . . . may be placed on publicly distributed copies," Id. § 401(a) (emphasis added)), the Copyright Act presently offers worthwhile incentives for artists to continue to place a copyright notice on their works. Specifically, the Copyright Act provides:

If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages . . . . Id. § 401(d). Furthermore, the Copyright Act provides that a registration certificate is prima facie evidence of a valid copyright in infringement litigation. Id. § 410(c) (1977). In addition, a plaintiff who has placed a proper copyright notice on a work and has registered it in a timely
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The plain language of the Act states that it is the "author" who must sign and consecutively number the "limited edition" copies. The meaning of "consecutively" is unclear. Is it intended to mean that the number that the author affixes to the copy must correspond numerically to the order in which the copies were made? If so, it would be a significant departure from industry custom. As a general rule, artists do not sign and number copies in the order that they are made. Rather, the printer makes the copies and then the artist sits down and numbers them with no thought of their order of production. This practice does cause some concern among buyers since copies produced later, near the end of a relatively large run (e.g., 100 or more), are often of a lesser quality than copies produced earlier in the run. Consequently, if Congress intended artists to number their limited editions so that the numbers correspond to their order of production, artists will have to change their customary methods of signing and numbering.

Sculptors who wish to ensure that a work meets the Act's definition of a "work of visual art" must follow specific procedures. A traditional sculpture will fall within the Act's definition easily. As is the case with original paintings and drawings, the statute does not expressly mandate that artists sign a "single copy." The legislative history explicitly states that "single copies of . . . sculptures need not be signed." Still, signing a work, or affixing some sort of trademark or other "identifying mark," is clearly advisable. In addition, a fashion may recover statutory damages and attorneys' fees from the infringer. Id. § 504(c)–505 (1988). See also id. § 412 (West Supp. 1992).

51. Id. § 101(1).


53. Id.

54. Id.

55. 17 U.S.C.A. § 101(1) (West Supp. 1992). The definition states that a "work of visual art" is as follows:

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 . . . .

Id. (emphasis added). The use of the plural verb "are" suggests that the signature requirement applies only to limited editions and not to single copies. See also supra notes 48–50 and accompanying text.


57. See supra note 50 (explaining why artists ought to place a copyright notice (and therefore also the name of the author) on their works).
sculptor must either sign any copies or affix some "other identifying mark of the author" and number the copies consecutively. 58

Photographers who want to create works that meet the Act's definition of a "work of visual art" face peculiar problems. First, the only type of photograph that can come within the Act's definition is "a still photographic image." 59 Clearly, for example, a photographer who prints only one positive picture on paper from a negative produced via a standard 35mm camera creates a work which could qualify. 60 Moreover, the term "still photographic image" implies that a single frame from a motion picture film or even a frozen videotaped image could qualify for protection under the Act, so long as the artist meets the other statutory requirements—signing, single copy or limited edition, and consecutive numbering. 61

The phrase "produced for exhibition purposes only" presents a particularly troublesome issue. According to the Act, in order to be considered a "work of visual art," a photograph must be "produced for exhibition purposes only." 62 Must photographers intend, at the nanosecond that they click the shutter, to produce a picture solely for exhibition? 63 What if, in a photographer's mind, she intended not only to exhibit the work but also to sell it? Would such a dual purpose in

58. 17 U.S.C.A. § 101(1) (West Supp. 1992); see supra notes 52–54 and accompanying text for a more complete discussion of the meaning of the word "consecutively."
60. Although it is arguable that the photographic negative constitutes the true "single copy" and that any prints made from the negative would be copies (i.e., positive images of the negative), there is nothing in the Act or its legislative history to suggest that such a hyper-technical reading is warranted. A more reasonable interpretation, given the practical realities of the photographic development and printing processes, would be to consider the production of a negative as merely part of the creative process, and to consider the print(s) as the "single copy" or "limited edition copies."
61. As a general rule, the Act does not recognize motion pictures or other audiovisual works as works of visual art. See 17 U.S.C.A. § 101(A)(i) (West Supp. 1992). But a frozen image could be a "work of visual art" protected by the Act as long as that individual image meets the other requirements of the Act.
62. Id. § 101(2).
63. Professor Damich poses this hypothetical: "What if Ansel Adams made a positive for his own use, which he signed, but later, it was sold and exhibited in a museum? Presumably, the work would not qualify for moral rights protection because it was not intended for exhibition purposes only." Damich, VARA 1990, supra note 3, at 952. Damich views this limitation as Congress' attempt to impose a standard of "artistic merit." Id. at 977. House Report 514 expressly states that "many photographs are produced for use by newspapers and magazines and for other non-exhibition purposes and are specifically excluded by the definition . . . ." H.R. Rep. 514, 101st Cong., 2d Sess. 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6921. House Report 514 continues, noting that:

[the nature or location of the exhibition is not relevant to the determination of whether the photograph is produced for exhibition purposes. In addition, it is the initial purpose for which the image is produced that controls whether a photograph is covered. Thus, a
the photographer's mind catapult the photograph forever outside the scope of the Act? If a photograph is "produced for exhibition purposes only" does that mean that a photographer cannot have had any motive for creating the work other than exhibition? Such a narrow reading is patently ridiculous. It is more plausible that Congress intended the phrase "for exhibition purposes only" to exclude the millions of ordinary people who take pictures of their families, dogs, houses, and the like, with no intent to show them to anyone outside of their normal circle of friends. It makes sense to interpret the word "exhibition" to mean a general public display rather than a limited showing to family, friends, and acquaintances.64 Indeed, although some photographers may enjoy the luxury of creating photos purely for exhibition with no thought of profit or other remuneration in mind, the majority of photographers who care enough about their work to want to meet the Act's definition of "a work of visual art" are probably professional photographers who ordinarily produce pictures with a profit motive in mind. Arguably, the phrase "produced for exhibition purposes only" should not be interpreted as mutually exclusive of "for purposes of selling."

Alternatively, one could argue that exhibitions of photography, by their very nature, implicitly entail the notion that the photographs will be for sale (in addition to being exhibited). Consequently, if one begins with the premise that exhibitions of photographs ordinarily occur as a vehicle for offering photographs to the public for sale, it follows that a sales incentive on the part of the photographer will not negate the photographs having been produced "for exhibition purposes only."

qualifying photograph will not fall outside the ambit of the bill's protection simply because it is later used for non-exhibition purposes.

*Id.* at 12, 1990 U.S.C.C.A.N. at 6922. Professor Ginsburg views this approach as unfortunate "because it fails to recognize that some images created for journalistic or similar purposes may come to be appreciated as works of art." Ginsburg, *supra* note 7, at 481 n.20.

64. It is unfortunate that Congress failed to define "exhibition." Perhaps the most appropriate interpretation of the word "exhibition" as it is used in the Act would be to equate it with the phrase "To . . . display a work publicly" which is defined in the Copyright Act as follows:

To . . . display a work "publicly" means—

(1) to . . . display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a . . . display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the . . . display receive it in the same place or in separate places and at the same time or at different times.

As is the case with painters, drawers, and sculptors, a photographer should sign any “single copy” and should both sign and consecutively number any limited edition copies. The Act’s narrow definition forces artists to be vigilant if they wish to create works that the Act will recognize as “work[s] of visual art.” As a general rule, artists should sign every copy (including the original), must consecutively number any copies, must take whatever steps that they possibly can to make sure that limited edition copies number 200 or less, and, in the case of photographers, they must do what they can to make it clear that they create works solely for exhibition purposes.

C. The New Moral Rights

On its face, the Act ostensibly grants rights to artists. The Act, however, merely states that “the author of a work of visual art . . . shall have the right to” these new rights. It does not say that an author shall always receive the practical benefits of these rights by fiat.

The Act grants to an “author of a work of visual art” the following rights:

1) The Right of Attribution: “to claim authorship” of a work of visual art;

2) The Right of Disclaimer: “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;”

3) Another Form of the Right of Disclaimer: “to prevent the use of his or her name as the author . . . in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation;”

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65. The Act specifically says “sign.” Although a court might be willing to interpret this word broadly (to include stamping since many professional photographers use pre-made stamps that bear their names, addresses, telephone numbers, etc. to identify photographs), if a photographer wishes to have her work come within the Act’s provisions, it would be wise for her to take the extra time necessary to actually hand-sign and number each limited edition copy herself.

66. As noted above, the Act does not expressly require that an artist sign originals. Nevertheless, as a practical matter, and as a matter of copyright law, it is clearly advisable for artists to sign originals as well as copies. See supra notes 48–51 and accompanying text.

67. See infra notes 149–57 and accompanying text.


70. Id. § 106A(2).
4) The Right of Integrity: “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation;”

5) A Higher Level of The Right of Integrity for Works of Recognized Stature: “to prevent any destruction of a work of recognized stature.”

These five rights, the section 106A rights, are functionally discrete forms of the right of attribution and the right of integrity.

II. CONTRACT
A. General Considerations

Artists are usually in relatively weak bargaining positions in the United States. Numerous books and articles have tried to educate artists in an effort to apprise them of their economic rights, the advantages of drafting contracts, and of registering their copyrights. Most artists, however, still create and sell their works without taking adequate contract or copyright measures. The Act gives artists a fresh opportunity. Now artists possess moral rights in their artwork not

71. Id. § 106A(a)(3)(A). This right is, however, subject to certain exceptions when the work “has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work . . . .” Id. § 113(d); see infra Part II.G.3.

72. 17 U.S.C.A. § 106A(3)(B) (West Supp. 1992). The statute provides that a destruction that results from either intentional conduct or gross negligence is presumed to be a violation of this right. However, the language of the statute appears to grant artists of works of recognized stature the right to prevent destruction under any circumstances (i.e., whether through intentional conduct, gross negligence, or otherwise, e.g., ordinary negligence). See also infra note 185 regarding the definition of “gross negligence.”

73. In her statement at the Subcommittee Hearings, Professor Jane C. Ginsburg of Columbia University School of Law, elaborated on these moral rights, noting that they:

promote . . . the interests of artists and the public alike. [They] benefit artists by assuring their rights to recognition for the works they have created and by protecting the works themselves against destruction or mutilation. These safeguards may enhance the creative environment in which artists labor. Equally important, these safeguards enhance our cultural heritage. The attribution right not only affords basic fairness to artists, it promotes the public interest by increasing available information concerning artworks and their provenance, and by helping ensure that that information is accurate. The integrity right helps preserve artworks intact for all of us to enjoy.


74. See supra note 2.

75. The Act is “user friendly” for artists in several respects. For example, artists are not required to register the copyright to works as a prerequisite to bringing a lawsuit for violation of any of the § 106A rights. 17 U.S.C.A. § 411(a) (West Supp. 1992). Artists are required to register as a prerequisite to bringing a lawsuit for violation of any of the “economic” rights in § 106 of the Copyright Act. Id. Similarly, artists are not required to register the copyright to their works as a prerequisite to obtaining statutory damages or attorneys’ fees. Id. § 412.
previously recognized by federal law.\textsuperscript{76} Congress’ recognition of these rights can enhance artists’ bargaining power in drafting and negotiating contracts.

One may, legitimately, ask why artists should concern themselves with the effect of the Act on their contracts. After all, one of the principal reasons for the passage of the Act was Congress’ perception that artists were unable to secure moral rights for themselves through written contracts precisely because they had such weak bargaining power.\textsuperscript{77} Indeed, there are a number of situations in which having no written contract may be advantageous for artists. For example, freelance artists ensure that they will own the copyright to their works by refraining from signing any agreements. In \textit{Community for Creative Non-Violence v. Reid},\textsuperscript{78} the U.S. Supreme Court (Justice Marshall writing for a unanimous Court) held that freelance artists own the copyright to their works done on commission unless the parties agree in a signed writing that the work will be a work for hire and the work falls within one of nine narrowly defined categories.\textsuperscript{79} Thus, if free-
lance artists sign *nothing*, they can be certain that they will own the copyright to their work. Similarly, in a recent article, Professor Ginsburg noted, and quite rightly so, that "the very informality of art work commissions" and the "handshake deal[s]" that are most common in art transactions "may work to artists' advantage" because artists cannot waive their section 106A rights unless they agree to do so in a written agreement signed by them. Again, as was the case in the work for hire situation, artists who sign nothing can be certain that they have not waived any of their moral rights.

**B. Waiver**

The very fact that the Act permits artists to waive the section 106A rights is one of the most important factors for artists to consider in drafting and negotiating contracts. In order to waive these rights, an artist must expressly agree to the waiver in a written instrument signed by him or her. The written instrument must identify the work to which the waiver is intended to apply and must specify which of the section 106A rights the artist intends to waive. Here the importance of drafting agreements becomes manifest. Buyers can draft purchase agreements for works of visual art that include boilerplate waivers of the section 106A rights. Artists also can take the offensive by drafting their own boilerplate, stating that the artist expressly *does not*...
waive the rights of attribution and integrity granted by section 106A of the Copyright Act. By drafting a sales agreement as an offer to sell, artists can assume a stronger bargaining position.

Co-authors possess the right to waive the section 106A rights for all authors without authorization or agreement from other co-authors. Thus, it is prudent for artists who work with others as joint authors to reduce their agreements to writing. Each artist who is a joint author could agree not to waive the section 106A rights without the prior express written consent of his or her co-author(s).

Moreover, the power to waive or to refuse to waive the section 106A rights clearly has economic value that artists can choose to exploit. Prospective art purchasers, no doubt, perceive the section 106A rights as analogous to easements, encumbrances, or other “clouds on title” in real estate. Purchasers pay more for real estate when the title is clear than not or when they obtain a warranty deed as opposed to a quit claim. Similarly, prospective art purchasers can be expected to pay higher prices for works of visual art when the artists have waived their section 106A rights as part of the bargain. Thus, by granting section 106A rights to artists, Congress has, in essence, given an added economic value to artists.

This would defeat the purpose of compelling artists and art work owners to reflect on and negotiate over the genuine need to alter or destroy the work.

Ginsburg, supra note 7 at 489. She does find some solace, however, in the fact that the Act directs the U.S. Copyright Office to study the use of moral rights waivers. Id.

85. 17 U.S.C.A. § 106A(e)(1) (West Supp 1992); Ginsburg, supra note 7 at 489; see also Damich, VARA 1990, supra note 3, at 966 (criticizing the power of joint authors to waive the § 106A rights on behalf of their fellow joint authors: “In the context of moral rights . . . it is difficult to understand why one author’s evaluation of his personality should take precedence over the other’s, possibly causing irreparable harm to both.”).

86. The Copyright Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C.A. § 101 (West 1977).

87. Professor Damich takes a contrary position. He argues that “[a] waiver provision would largely undermine the purpose of federal moral rights legislation by eviscerating moral rights in situations of unequal bargaining power.” Damich, VARA 1990, supra note 3, at 966. His opposition to an artist’s power to waive the § 106A rights is clear. He argues that moral rights are “theoretically personal rights” and as such, “they fall into the category of rights which, in American law, has traditionally been subject to restraints on the freedom of contract” Id. at 967. He adds that “because artists ordinarily have little or no bargaining power, they fall into another category that has traditionally been tolerant of restraints on freedom of contract.” Id. (footnote omitted). He does, however, concede that Article 6bis of the Berne Convention does not mandate that moral rights must be either inalienable or unwaivable. Id.

88. It is clear, however, that Congress is unsure about waiver. The legislative history reveals that Congress wanted to be extremely cautious. According to House Report 514:

The Committee recognizes that 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. It also recognizes that routine waivers of the rights will eviscerate the law. On the other
One possibility that the Act does not directly address is the prospect that artists could transfer the right to waive the section 106A rights. The Act does recognize that the "right to waive" is essentially an additional right granted to artists by virtue of section 106A. The Act does not expressly prohibit artists from transferring the right to waive the section 106A rights in a contract. House Report 514, however, supports the view that Congress never intended such a contract to be effective. Obviously, transferring the right to waive section 106A rights would be tantamount to transferring the section 106A rights themselves.

C. Transfer And Duration

1. Inter Vivos Transfer

The Act makes it clear that artists cannot transfer any of the section 106A rights inter vivos. Congress takes the position that these rights are regarded as extensions or outgrowths of an artist’s personality, and therefore, ought not be lent or sold. Congress’ decision to prohibit inter vivos transfers of the section 106A rights is a double edged hand, the Committee believes that to proscribe waiver would be to inhibit normal commercial practices.


In addition, the Act mandates that “[t]he Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of section 106A of title 17 United States Code [i.e., the § 106A rights], have been waived.” Visual Artists Rights Act of 1990, Pub. L. No. 101-650 § 608(a)(1), 104 Stat. 5128, 5132. The Act also directs the Register of Copyrights to submit a preliminary report to Congress not later than two years after the date of enactment of this act and a final report not later than five years after the date of enactment of this act on the results of its study of waiver. Id. § 608(a)(2).

See supra notes 7-8, 73 and accompanying text; see also H.R. REP. No. 514, 101st Cong., 2d Sess. 15 (1990), reprinted in U.S.C.C.A.N. 6915, 6925 (quoting the statement of John Koegel who testified that “[a]n artist’s professional and personal identity is embodied in each work
sword. The inability to transfer the section 106A rights can be viewed as either beneficial or detrimental to artists. Some scholars have argued that prohibitions of this type (i.e., limitations on an individual's freedom of contract) are imposed to advance specific societal goals.\footnote{See Michael Walzer, Spheres Of Justice 100-03 (1983); R. H. Graveson, The Movement from Status to Contract, 4 Mod. L. Rev. 261, 270 (1941).} Graveson, for example, argues that the state prohibits certain transfers because of the status of the parties involved. He contends that the status of certain entities and individuals (e.g., employer versus employee) tends to dictate the relative abilities of the parties to bargain freely. Because of the imbalance of bargaining power, the state is justified in stepping in to regulate the contractual framework. Graveson points to various housing laws, public transportation laws, minimum wage laws, workers' compensation laws, and the like, as illustrations of state legislation which, taking into account the status of the parties involved, restricts freedom of contract in a constructive manner. Thus, Graveson concludes that the state changes the rules of contract (based on status) to help the condition of those who are of lowly status. "Public policy decides whether any matter is one for private agreement or of status."\footnote{Graveson, supra note 94, at 269.} According to this view, by changing contract law in this manner, the state creates a situation where "[f]reedom of contract is giving way in industry and agriculture to social welfare, and the maintenance of a fairer standard of work and living."\footnote{Id. at 271.} If this is a valid analysis of why a state chooses to restrict freedom of contract, the inevitable conclusion to be drawn from the Act's prohibition on the transfer of section 106A rights is that Congress sought to protect artists. Apparently, Congress was trying to rectify an imbalance of bargaining power between artists and buyers.

Others argue, however, that restraints on freedom of contract like this are entirely unwarranted and ill advised.\footnote{See, e.g., Charles Fried, Contract As Promise 21, 31, 103-11 (1981); Anthony T. Kronman & Richard A. Posner, The Economics Of Contract Law 253-67 (1979); Richard A. Posner, Economic Analysis Of Law 84-88 (3d ed. 1986).} In their book The Economics Of Contract Law, Kronman and Posner concede that some limits on freedom of contract are justified.\footnote{Kronman and Posner, supra note 97, at 253-54.} For example, they suggest that the statute of frauds (i.e., the limitation that certain contracts must be in writing in order to be enforceable) is a desirable restraint because it is "an efficiency-promoting device whose constraints reduce
the cost of contracting and thus facilitate rather than retard the voluntary transfer of entitlements. On the other hand, they forcefully contend that other limits on freedom of contract, like the non-transferability of the section 106A rights, are inappropriate:

However, while many limitations on freedom of contract may be consistent with even the strongest conception of individual autonomy, at least one class of limitations is not. These are limitations which may be called paternalistic. As we use the term, a limitation on an individual’s freedom of contract is paternalistic if the sole justification for imposing it is to promote or protect the individual’s own welfare (or happiness or good). If a particular limitation is imposed in order to reduce the costs of the bargaining process (for example, by insuring its procedural propriety), or to protect the interests of third parties, it can be justified on nonpaternalistic economic grounds.

Although the section 106A rights are commonly referred to as “personal” as contrasted with the section 106 “economic” rights, just as the right of artists to waive them constitutes a potential economic power, so too the right to transfer them would also constitute potential economic power. By granting section 106A rights to artists but prohibiting their inter vivos transfer, Congress has taken away with one hand what it has given with the other. If Congress is correct in assuming that artists as a general rule have a status inferior to that of buyers, then, arguably, allowing them to sell the section 106A rights actually would enhance their power to bargain. In essence, if the section 106A rights were transferable inter vivos, then artists would have five additional, individual rights that they could sell for a profit.

2. Duration and The Possibilities of Post Mortem Transfer

For works created on or after June 1, 1991 (the Act’s effective date), the section 106A rights expire with the artist. In the case of joint authorship, the rights expire upon the death of the last surviving joint author. Thus, joint authors would be well advised to provide for

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99. Id. at 253.
100. Id. at 254.
101. See supra note 9.
102. It must be admitted, however, that if, in the real world, the superior bargaining power of buyers forces artists to waive the § 106A rights, then the right to sell a waiver is merely illusory.
transfer of their rights to their heirs in a will.\textsuperscript{105} Although an artist of a joint work may provide for transfer of the section 106A rights in a will, Professor Damich vehemently argues that artists should not be able to transfer moral rights in a will to anyone other than their "heirs."\textsuperscript{106} He contends that "[a]llowing moral rights to pass to someone other than an heir would allow the author to sell his moral rights by contractually agreeing to make a will under which the moral rights would be transferred to another."\textsuperscript{107} He does, however, concede that artists might have greater confidence in someone other than their spouse or children, and thus, may want to transfer their section 106A rights to that someone else in a will.\textsuperscript{108} Nevertheless, Professor Damich believes that artists should not be permitted to transfer these rights motivated by profit but rather solely to protect the personal rights.\textsuperscript{109} He makes this argument, however, in the midst of arguing that all section 106A rights should last for as long as the section 106 rights (the so-called "economic rights").\textsuperscript{110} The Act, as a general rule, does not extend the section 106A rights beyond the author's life.\textsuperscript{111}

The Act protects not only works created after the Act's effective date, but also any work created prior to that time, provided that the artist had not transferred title to the work.\textsuperscript{112} For works of visual art created prior to June 1, 1991, the Act provides that, if title to the work "has not . . . been transferred from the author" then the section 106A rights shall endure as long as the copyright endures.\textsuperscript{113} As a general rule, for example, this means that if an artist created a sculpture on or

\textsuperscript{105} Congress expressly recognized this possibility, noting that the rights of attribution and integrity, and the authority to waive them, vest after the author's death in those people named in the author's will. If the author's will does not dispose of the rights, they will vest through intestate succession. State laws on testacy and intestacy will govern these situations. H.R. REP. No. 514, 101st Cong., 2d Sess. 19 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6929.

\textsuperscript{106} Damich, \textit{VARA 1990, supra} note 3, at 992.

\textsuperscript{107} \textit{Id.} He notes that "[t]he current Copyright Act reflects concern regarding this outcome. The Copyright Act limits the post mortem exercise of the power of termination to the author's surviving spouse and children, and makes the power of termination inalienable \textit{inter vivos}." \textit{Id.} (citing to 17 U.S.C. §§ 203(a)(2), (5) (1988)).

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.} He concludes that "\textit{inter vivos} contracts regarding will provisions that affect moral rights should not be enforceable" because "[o]therwise, the author could effectively alienate his rights for the post mortem period without the possibility of repenting an anti-personal decision." \textit{Id.} at 992-93 n.252.

\textsuperscript{110} See \textit{infra} note 113 and accompanying text.

\textsuperscript{111} See \textit{ supra} note 103; \textit{infra} notes 112-115 and accompanying text.

\textsuperscript{112} Presumably this protection could apply to limited editions owned by the artist—even if the artist had transferred title to the original and/or all other copies of the limited editions.

\textsuperscript{113} 17 U.S.C.A. § 106A(d)(2) (West Supp. 1992). The Act states: "With respect to works of visual art created on or after the effective date . . . of the Visual Artists Rights Act of 1990, the
after January 1, 1978, but before June 1, 1991, and did not sell it before then, the section 106A rights will last the life of the author plus an additional fifty (50) years. This provision of the Act makes it clear that the section 106A rights will survive beyond the artist's death for works that were created but not sold prior to June 1, 1991.

Thus, the section 106A rights can endure beyond the artist's life in two circumstances: 1) in the case of joint authorship; and 2) when the artist created but had not transferred title to a work of visual art on or before May 31, 1991. If a joint author wished to contract, inter vivos, to transfer her section 106A rights in her will, the promisee would be purchasing a right contingent upon the risk that the artist would pre-decease her joint author(s). Such a contract is merely aleatory and, generally speaking, enforceable in American law. In such instances where the existence of post mortem section 106A rights is dependent upon chance, it does not seem offensive to allow artists to contract for a term consisting of the life of the author, or of the last surviving joint author.

The Act further provides:

With respect to works of visual art created before the effective date . . . of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) [i.e., the § 106A rights] shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106. Id. § 106A(d)(2).

Because the Act does protect some works that were created prior to June 1, 1991—namely, those works of visual art that artists had not transferred title to (i.e., sold or given away) on or before May 31, 1991—and because it is likely that a tremendous number of works fall into this pre-Act category, it is important to understand just what the duration possibilities are for those works. For these pre-Act works, the Act specifies that the § 106A rights will be the same as the rights granted in § 106 (the so-called "economic rights"). The Copyright Act delineates the duration of these rights in §§ 302-304. Id. § 302–04 (West 1977).

For pre-Act works created on or after January 1, 1978, but on or before May 31, 1991, the § 106A rights will last the life of the author plus an additional fifty years. Id. § 302(a). In the case of a jointly authored work of visual art created during this time window, the § 106A rights will last for the life of the last surviving joint author plus an additional fifty years. Id. § 302(b).

For pre-Act works "created before January 1, 1978, but not theretofore in the public domain or copyrighted," the general rule is that the § 106A rights will last the life of the author plus an additional fifty years (and fifty years after the life of the last surviving joint author in the case of jointly authored works of visual art). Id. § 303. However, "[i]n no case . . . [does] the term . . . expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term . . . [does] not expire before December 31, 2027." Id.

For pre-Act works that were registered under the Copyright Act of 1909, the § 106A rights can last for up to 75 years after the date of initial registration, provided that the registrations to the works are renewed in a timely fashion. Id. §§ 304(a)-(b).

114. The Copyright Act of 1976 became effective on January 1, 1978. Thus, the new provisions regarding copyright duration became effective on that date. Id. §§ 302–305; see also supra note 113.

115. 17 U.S.C.A. § 302(a) (West 1977); see also supra note 113.

116. See Restatement (Second) of Contracts § 379 (1979).
that risk any more than it is offensive to allow insurance companies to write life insurance policies. Even where artists definitely possess section 106A rights that will last after their death, like the prohibition on inter vivos transfers, it seems decidedly paternalistic to prevent artists from taking advantage of whatever contracts they can to enhance their financial standing. Although public policy may well dictate that certain contracts ought to be void, public policy should encourage artists—a group that traditionally has been unable to reap rewards from contracts—to use contracts as freely as possible. Society should not prevent artists from transferring their section 106A rights to others (especially if the transfer actually occurs at a time when the artist has leapt into the arms of Thanatos). This contractual freedom is all the more desirable because such agreements offer economic benefits to artists during their lifetime. This is different from permitting artists to transfer their section 106A rights inter vivos.

Arguably, if artists could transfer their section 106A rights inter vivos, it would always be possible for an artist to regret the transfer and wish that she had not sold them. On the other hand, when artists transfer section 106A rights post mortem, they will always retain the right to exercise them during their lifetime. Furthermore, they retain the right to draft a will in breach of the inter vivos contract, i.e., a will that fails to transfer the section 106A rights to the promisee. Drafting a will in breach of the inter vivos contract would force the promisee to sue the artist's estate. Arguably, the promisee would sue for specific performance, contending that, because section 106A rights are unique, specific performance would be appropriate. With this eventuality in mind, artists could prevent the promisee from obtaining specific performance by providing for liquidated damages in the inter vivos contract.

Because artists may be able to garner significant advantages, both under the Act and contractually, if their section 106A rights survive them, artists should, if possible, document that any given work was created but not sold prior to June 1, 1991. To that end, artists should date their works themselves or keep a log that reflects dates of crea-

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117. See supra notes 112–15 and accompanying text.
118. See supra notes 97–100 and accompanying text.
119. See generally Walzer, supra note 94, at 100–03; supra notes 94–96 and accompanying text.
120. See supra notes 95–96 and accompanying text.
121. For a discussion of why even inter vivos transfers of § 106A rights may be desirable, see supra notes 97–100 and accompanying text.
122. See generally Restatement (Second) of Contracts §§ 357–369 (1979).
123. See infra notes 126–29 and accompanying text regarding the availability and suitability of liquidated damages in matters of § 106A rights.
If artists keep records specifying which works they created but did not sell before June 1, 1991, they should recite in future sales contracts that, because the work was created but not sold prior to that date, the section 106A rights shall subsist for as long as the rights conferred by section 106. This would create a record that, on its face, would be persuasive if the duration of the section 106A rights in a particular work were ever questioned.

D. Liquidating Damages

By incorporating provisions dealing with the section 106A rights into contracts, artists may provide for liquidated damages in the event that the other party violates any of the section 106A rights, or in the event that the other party impedes the artist's ability to obtain or exercise any of the section 106A rights. The essence of the section 106A rights is to protect the value of an artist's "honor or reputation." It is manifestly difficult to assign a precise dollar value to an artist's honor or reputation. It is even more difficult to forecast just how much, in terms of dollars and cents, any given act would actually diminish an artist's honor or reputation. Therefore, provided that the parties make a good faith effort to estimate the loss that an artist would incur due to a violation of one of the section 106A rights, courts should uphold liquidated damages provisions dealing with section 106A rights. The Restatement (Second) of Contracts provides that liquidated damages may be "reasonable in light of the anticipated or

124. See supra note 50 regarding the necessity of a date in a valid copyright notice.
125. See supra note 113.
126. See infra Part II.G.
127. See generally 17 U.S.C.A. § 106A (West Supp. 1992). An artist's ability to vindicate the rights afforded by this section is premised on whether a defendant's conduct damages the artist's "honor or reputation." When an author is unable to claim authorship of a work, that inability is considered potentially injurious to his or her honor or reputation. Id. § 106A(a)(1)(A). Similarly, when an artist is incorrectly identified as the author of a work that he or she did not create, that inaccurate identification is considered potentially damaging to his or her reputation as well. Id. § 106A(a)(1)(B). The Act also presumes that when an artist's work has been distorted, mutilated, or modified in a manner that would be prejudicial to his or her honor or reputation, it would, therefore also be potentially injurious to his or her honor or reputation if he or she were unable to prevent the use of his or her name being displayed as the author of that work in its distorted, mutilated, or modified state. Id. § 106A(a)(2). Likewise, an artist's prerogative to prevent intentional distortions, mutilations, or modifications (and in the case of "a work of recognized stature," any intentional or grossly negligent destruction) of a work is premised upon the potential injury to the artist's "honor or reputation." Id. §§ 106A(a)(3)(A)-(B). For a more detailed discussion of these rights, see infra Part II.G.

Professor Damich has noted that "violation of moral rights is akin to a dignitary tort [and thus] adopting the damages provisions of the Copyright Act, which are aimed at economic loss, is inappropriate." Damich, VARA 1990, supra note 3, at 994.
actual loss caused by the breach and the difficulties of proof of loss." Similarly, the Uniform Commercial Code (U.C.C.) states that liquidated damages are appropriate in "an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasability of otherwise obtaining an adequate remedy."

In many respects, the economic impact of liquidating damages is similar to a waiver of the section 106A rights. The benefits of liquidation, however, would only flow to the contracting party, third party beneficiaries, or assignees. Conversely, a waiver would be construed in rem as to the work generally. Liquidation may be advantageous for both artists and other parties to the transaction because, by liquidating, the parties essentially predetermine the value of the purchaser's breach.

E. Additional Practical Considerations: Common Law and U.C.C.

In addition to obtaining economic leverage through waiver and liquidation, artists may benefit by using written contracts for the sale, rental, or any other transfer of their works. For example, the statute of limitations is generally longer for contract causes of action than for suits under the Copyright Act. When artists create their own documents to use as a contract for sale—i.e., "offers" that buyers can

128. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1979). Comment b explains that

[T]wo factors combine in determining whether an amount of money fixed as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. . . . Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss . . . . The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, . . . the easier it is to show that the amount fixed is reasonable.

Id.


130. The Copyright Act provides that a civil claim must be "commenced within three years after the claim accrued." 17 U.S.C.A. § 507(b) (West 1977). The Uniform Commercial Code establishes a four-year statute of limitations "after the cause of action has accrued." U.C.C. § 2-725(1) (1989). The Uniform Commercial Code also adds that for purposes of warranty, a cause of action accrues "when tender of delivery is made." Id. § 2-725(2). Most jurisdictions in the United States have a six-year statute of limitations for common law contract actions. Robert D. Marshall, The Applicability of the Uniform Commercial Code to Construction Contracts, 28 EMORY L.J. 335, 341 n.26 (1979). Notable exceptions to the six-year statute of limitations are: Delaware, the District of Columbia, Maryland, and North Carolina (three years); California and Texas (four years); Arkansas, Florida, Idaho, Kansas, Nebraska, Oklahoma, and Virginia (five
"accept"—they become the masters of the terms of acceptance. In fact, by incorporating the section 106A rights in their contracts, artists can virtually ensure that offerees cannot reject the section 106A rights while at the same time attempting to accept title to the work. The U.C.C. makes it possible for artists 1) to explicitly state in their offers that acceptance is limited to the precise terms of the offer, and 2) to state explicitly in their offers that they are giving notice of a prior objection to any new terms in the contract that the buyer may attempt to add in an acceptance. In fact, the U.C.C. provides that when an offeree's purported acceptance includes a material alteration of the offeror's terms, such an attempt to alter is ineffective. Arguably, if an artist were to make section 106A rights part of her sales contract, an acceptance that rejected any of those section 106A rights should be construed as a “material alteration” and thus ineffective.

However, if the buyer is a merchant, there may be some question as to whether the contract should be considered “between merchants.” This raises the question of whether an artist is considered a “merchant” under the U.C.C.

The U.C.C. defines a “merchant” as

see E. Allan Farnsworth, Contracts § 3.12, at 132 (1982). U.C.C. § 2-207 provides as follows:


U.C.C. § 2-207 (1989) (emphasis added); see also infra text accompanying notes 135-36.

U.C.C. § 2-207 (1989). Note the language of subsection (2)(b) stating that additional terms do not become part of a contract when the additional terms “materially alter it.” Id. § 2-207(2)(b).

130. Official Comment 4 provides:

Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability of fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

Id. § 2-207 cmt. 4.
a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.135

In fact, in addition to section 2-207, a number of other U.C.C. provisions have special effect when a party is considered a "merchant" or when a transaction is characterized as "between merchants."136 Perhaps one of the most important consequences of the characterization of a person as a "merchant," is the obligation of "good faith." The U.C.C. expressly imposes an obligation of good faith in all transactions.137 For nonmerchants, the U.C.C. defines "good faith" as "honesty in fact in the conduct or transaction concerned."138 This is a subjective standard. However, for merchants, the U.C.C. imposes an objective standard of good faith. The official comments to the U.C.C. state that

good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout the Article whenever a merchant appears in

135. Id. § 2-104(1). Of course, if an artist is not considered a "merchant," then, the conclusion implicit in subsection (2) of § 2-207 is that the buyer's acceptance would still operate as an acceptance but that all of the buyer's additional terms would fall away with no effect.

136. See, e.g., id. § 2-201(2).

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) [i.e., circumvents the statute of frauds] against such party unless written notice of objection to its contents is given within 10 days after it is received.

Id. § 2-205 (written offers by merchants irrevocable even without consideration for the time stated, or for a reasonable time, but not longer than three months); id. § 2-207(2) (additional terms in acceptance or confirmation of a contract between merchants become part of the contract unless: "(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."); id. § 2-209(2) (modification, rescission and waiver: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party."); id. § 2-314(1) (implied warranty of merchantability applies when "the seller is a merchant with respect to goods of that kind"); see U.C.C. § 2-402(2) (1989) (special rights attach to creditors of a seller when the seller is a merchant); id. § 2-403(2) ("[E]ntrusting . . . goods to a merchant who deals in goods of that kind gives him [i.e., the merchant] power to transfer all rights of the entruster to a buyer in ordinary course of business."); infra notes 166–71 and accompanying text.

137. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1989) ("Obligation of Good Faith").

138. Id. § 1-201(19).
the case an inquiry into his observance of such standards is necessary to determine his good faith.139

Commercial art galleries, art auctioneers, and private art dealers should be considered merchants under the U.C.C.140 Persons engaged in these professions fall squarely within the language of U.C.C. section 2-104(1).141 On the other hand, “a collector whose occupation is not related to art and who sells items from his or her art collection only occasionally,” would not be a “merchant” for U.C.C. purposes.142

There will be instances when the U.C.C. will control the contract application of the section 106A rights and other instances when state common law will control.143 This division exists because Article 2 of the U.C.C. applies only to “transactions in goods.”144 The U.C.C. defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract . . . .”145 Thus, for example, if a photographer brings an undeveloped roll of film to a commercial developer, common law, not the U.C.C. governs the contract between the photographer and the developer because the developer is performing a service for the photographer (i.e., the service of developing the roll of film). However, in a situation where a photographer sells photographs to the public, the U.C.C. probably governs that contract, because photographs are likely to be considered “goods.” Courts often experience difficulty, however, in deciding whether the sale of certain types of art, photographs, and the like should be considered a sale of “goods” or “services.” Most authorities generally characterize works of art as “goods” for purposes of the U.C.C.146 Thus, an artist who assumes the role of contract

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139. Id. § 1-201 cmt. 19. For purposes of Article 2, the concept of “good faith” is defined in §§ 1-201(19), 1-203, and 2-103(1)(b).
141. See supra, text accompanying note 135.
142. LERNER & BRESLER, supra note 2, at 66.
143. In his forward to the 1978 text of the U.C.C., Herbert Wechsler, Chairman of the Permanent Editorial Board for the Uniform Commercial Code, noted that “[b]etween 1958 and 1967, the U.C.C. (1958 Official Text) was enacted with but minor variations in all the states except Louisiana, as well as for the District of Columbia.” U.C.C. Official Text (11th ed. 1989) (forward to the 1978 Official Text).
145. Id. § 2-105(1).
146. The U.C.C. provides that “[g]oods means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .” Id. § 2-105(1). The Code also adds that “[g]oods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are ‘future goods.’ A purported present sale of future goods or of any interest therein operates as a contract to sell.” Id. § 2-105(2). For authorities holding that works of art are “goods” under the U.C.C., see e.g.,
drafter should consider the potential application of both the common law and the U.C.C. to contracts dealing with "works of visual art" and the section 106A rights.147

F. The Definition: "A Work of Visual Art"

Because the definition of "a work of visual art"148 is so narrow, artists must tailor certain agreements to help ensure that their works will fit within the Act's definition. For example, if an artist relies on another person or entity (a "printer") to create limited edition copies of her original painting, drawing, or print, the artist ought to have a written agreement with the printer expressly stating that the copies are "limited edition" and also stating that the printer shall not make more than 200 copies.149 In contracts with printers who make limited edi-


A contract by an artist to paint a portrait may be said to be a contract to specially manufacture a picture, but it is not within the scope of Article 2, because its service aspect predominates over the portion of the agreement that concerns goods, and it is not the kind of transaction contemplated by the words "specially manufactured" as used in section 2-105(1).

Haukland UCC Series § 2-105:01 (1982); see also Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (stating in dicta that a "contract with an artist for painting" was a paradigm example of a contract for a "service, with goods incidentally involved").

An analogous controversy has arisen in recent years regarding the characterization of custom-designed computer software. A thorough discussion of this issue is well beyond the scope of this article. For a good summary, see Ricardo Meza, Note, Analysts Int'l Corp. v. Recycled Paper Prods., Inc.: Is Custom-Designed Software a "Good" Under Article 2 of the U.C.C.? 3 Software L.J. 543 (1989); see also Roberta A. Holmes, Application of Article Two Of The U.C.C To Computer System Acquisitions, 9 Rutgers Computer & Tech. L.J. 1 (1982); Andrew Rodau, Computer Software: Does Article 2 of The U.C.C. Apply?, 35 Emory L.J. 853 (1986); Bonna Lynn Horovitz, Note, Computer Software As A Good Under the U.C.C. Taking a Byte Out Of The Intangibility Myth, 65 B.U. L. Rev. 129 (1985).

147. Certain issues involving art transactions may, however, be covered by the peculiarities of the Copyright Act if copyright law preempts the U.C.C. or common law. See 17 U.S.C.A. § 301 (West 1977 & Supp. 1992).

148. See supra text accompanying note 39.

149. See supra note 46 and accompanying text. Arguably, a careless printer could jettison an artist's work beyond the Act's scope simply by creating more than 200 copies. Printers, in the ordinary course of their business, make what are called "artist's proofs." Printers make artist's proofs so that the artist can examine proofs in order to select one as the prototype for the limited edition run of copies. Printers ordinarily make as many as 10% artist's proofs. Thus, in a limited edition run of 200, a printer might make as many as 20 artist's proofs. Those 20 would be marked "A.P." and signed but not numbered by the artist. The printer normally keeps one and the artist gives the others as gifts or sells them separately. Artists and printers must reevaluate this custom in light of the Act. In the event that the number of artist's proofs causes the total number of copies to exceed 200, a court could, legitimately, construe the existence of the artist's proofs as removing the work from the scope of the Act. It would be unfortunate, indeed, if this
tion copies, artists would be well advised to include a provision specifying the number of “limited edition” copies to be made, and expressly alerting the printer that breach of this provision will seriously jeopardize the artist’s rights. To that end, artists should consider estimating the damages that they are likely to incur from a printer’s breach that causes any given work to fall outside of the Act’s definition. The artist should insist on that sum as liquidated damages if the printer breaches. Artists should educate printers and explain the seriousness of this potential breach. In addition, because of the signature requirement, in their agreements with printers, artists should demand that the printer promise to make the “limited edition” copies available to them so that they may sign and number the copies.

When sculptors authorize multiple copies (“cast, carved, or fabricated”), they must be certain that those who create the copies do not exceed 200 in number. As in the relationship between artist and printer, a sculptor ought to have a written agreement with those who create the cast, carved, or fabricated copies that expressly limits the number of allowable copies to 200 or less.

common industry practice were to inadvertently prevent a work from being considered a “work of visual art” subject to the protections of § 106A. The legislative history takes the position that a printmaker who creates a limited edition must show that the edition consists of 200 or fewer copies.” H.R. Rep. No. 514, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 615, 6923; see supra note 47. Professor Damich has questioned the logic of using the number 200 arbitrarily. Damich, VARA 1990, supra note 3, at 976. He notes that the number 200 “does not seem to correspond with the exhaustion point of a lithographic stone or a metal plate . . . .” Id. He makes the same point with respect to photographic negatives as well. Id. For more about the requirements for photographs as “work[s] of visual art,” see supra text accompanying notes 59–67.

Professor Ginsburg interprets this provision to mean that “if a work is first published in a limited edition of two hundred or less, and subsequently is published in a larger edition, the second publication will not deprive the limited edition of protection.” Ginsburg, supra note 7, at 481 n.20. The plain language of the Act, however, makes this position somewhat dubious.

150. Professor Damich has noted the apparent incongruity of discussing “limited editions” of paintings and drawings: “The limited edition provision grammatically seems to modify ‘painting, drawing, print, or sculpture,’ but the concept of a limited edition painting or drawing, as opposed to print or sculpture, requires some thought. Presumably, legislators contemplated reproductions of paintings and drawings.” Damich, VARA 1990, supra note 3, at 952.

151. See supra text accompanying notes 126–29.

152. See supra text accompanying note 39.

153. Once again, it would be prudent for the artist to establish liquidated damages in the event of the printer’s breach. See supra text accompanying notes 126–29.


155. See supra text accompanying note 39.


157. Again, like the artist-printer contract, the sculptor should consider demanding liquidated damages in the event that the copyist creates more than 200 copies (thus placing the sculptor’s work outside of the Act).
The requirement that photographs must be created "for exhibition purposes only"\(^\text{158}\) makes it advisable for photographers to create concrete evidence indicating that their works are "produced for exhibition purposes only."\(^\text{159}\) In order to build a paper trail showing that an exhibition purpose exists, photographers should insert a clause in all of their agreements representing that they "produce all photographs for exhibition purposes only." Likewise, if they establish a corporation or other formal/legal business organization, photographers should include in the articles of incorporation or bylaws a similar statement regarding the "exhibition purpose."\(^\text{160}\)

If the photographer does not print the limited edition copies herself, she ought to insert a clause in her contract with the printer stating precisely the number of limited edition copies allowed to be printed.\(^\text{161}\)

**G. The Section 106A Rights**

**1. Attribution and Disclaimer**

If artists wish to avail themselves of the right of attribution,\(^\text{162}\) their sales, lending, leasing, and other agreements should expressly state that the artist's name will be prominently displayed as the author of the piece. Artists may want to specify the size, typeface, and location of the credit. Arguably, if a gallery were to refuse to give an artist credit in anything bigger than microscopic typeface, such a refusal would violate the author's "right to claim authorship."\(^\text{163}\) This is not entirely clear, however. The Act also states that decisions regarding public presentation ordinarily shall not be considered a distortion, mutilation, or other modification of a work.\(^\text{164}\) Although the exception for public display does not explicitly relate to the right of attribution, a gallery or other buyer may contend that it is not bound to

\(^{158}\) See supra text accompanying note 39.

\(^{159}\) H.R. Rep. No. 514, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6923. The legislative history makes it clear that the photographer will have the burden of proving that a photograph was produced "for exhibition purposes" only. Id.

\(^{160}\) Photographers can include similar language in brochures, business cards, advertisements, etc. Such statements could provide documentary evidence regarding this element of purpose. In the absence of such documentary evidence, photographers could be forced to make self-serving statements about the reasons why they took a particular photograph.

\(^{161}\) See supra text accompanying note 39. Photographers also ought to include a clause in their agreements with printers that provides for liquidated damages and explains the seriousness of a potential breach. See supra text accompanying notes 126–29.

\(^{162}\) See supra text accompanying note 68.

\(^{163}\) The Act expressly provides that "the author of a work of visual art—(1) shall have the right—(A) to claim authorship of that work . . . ." 17 U.S.C.A. § 106A(a)(1)(A) (West Supp. 1992).

\(^{164}\) Id. § 106A(c)(2).
acquiesce to all of an artist’s demands regarding the particulars of public display since the Act’s policy is clearly opposed to treating matters of public display as violations of the section 106A rights. Nevertheless, Congress has declared that artists who create “works of visual art” have the right to receive credit for their creations. Thus, artists should not be reticent to demand the credit that they deserve.

The grant of the right of attribution to artists, however, raises another difficult question: what is the legal effect of an artist’s claim of authorship? For example, suppose that artist A approaches a gallery with a work of visual art. Suppose that artist A, relying on section 106A(a)(1)(A) of the Copyright Act, demands that the gallery display her name as author of the work. The gallery complies. Shortly thereafter, artist B appears, and, claiming that she, not artist A, is the true author, demands that the gallery remove artist A’s name, and instead, display her [artist B’s] name. Suppose now that the gallery had already sold the work to a purchaser when artist B made her claim. Does artist A’s claim of authorship create an express warranty to the gallery? Did the gallery’s display of artist A’s name on the work create an express warranty to the purchaser? Even if the claim of authorship does not create an express warranty, a claim of authorship would create an express warranty to the buyer.

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165. The Act expressly states that “modification of a work of visual art which is the result 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.” Id. § 106A(c)(2).

166. The U.C.C. provides that there are several ways to create an express warranty:

(1) Express warranties by the seller are created as follows:
(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.


167. U.C.C. § 2-313(1)(a) suggests that the answer is yes.

168. See Weisz v. Parke-Bernet Galleries, Inc., 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), rev’d, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974). In Weisz, the trial court held that a written description of a work of art in an auction catalogue (claiming that the work was painted by Raoul Dufy) created an express warranty that a disclaimer was ineffective to dissolve. Id. On appeal, the court reversed, relying on three factors: 1) at the time of the sale involved, neither the applicable statute nor case law gave rise to any warranty of authenticity based on a seller’s expression of opinion or judgment; 2) Park-Bernet’s catalogue “gave [a] leading and prominent
ship may create either an implied warranty of merchantability,\textsuperscript{169} or in some circumstances, an implied warranty of fitness for a particular purpose.\textsuperscript{170} However, in order for the implied warranty of merchantability to apply, the warrantor must be a "merchant."\textsuperscript{171}

The right to disclaim\textsuperscript{172} is probably of limited contractual value. At the very least, however, the right to disclaim works that are not, in fact, created by an artist does give artists the opportunity to spell out in agreements with galleries, for example, that the gallery has a contractual obligation to ensure that an artist's name will be associated only with works actually created by that artist.

2. \textit{Disclaimer of Works Prejudicially Altered}\textsuperscript{173} and Integrity

\textit{a. Consequences of Prejudicial Alteration}

The Act creates two rights that hinge upon whether a work has been or is in danger of being distorted, mutilated, or modified in a place . . . to a clear [and] unequivocal disclaimer of any express or implied warranty or representation of genuineness . . . ;" and, 3) buyers in circumstances like those of the plaintiffs, where there was no evidence of fraud or intentional deceit by the sellers, assume the risk that they might be mistaken in judging the works to be originals, have the opportunity to bid accordingly, and cannot complain when it turns out that they made a bad bargain in a situation clearly calling for buyers to beware. \textit{Id.} at 912; see also Gerstenblith, \textit{supra} note 146, at 509–10.

\begin{itemize}
\item \textsuperscript{169} The U.C.C. provides:
\begin{enumerate}
\item Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .
\item Goods to be merchantable must be at least such as
\begin{enumerate}
\item pass without objection in the trade under the contract description; and
\item in the case of fungible goods, are of fair average quality within the description; and
\item are fit for the ordinary purposes for which such goods are used; and
\item run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
\item are adequately contained, packaged, and labeled as the agreement may require; and
\item conform to the promises or affirmations of fact made on the container or label if any.
\end{enumerate}
\end{enumerate}

\item \textsuperscript{170} The U.C.C. provides:
\begin{enumerate}
\item Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.
\textit{Id.} § 2-315.

\item \textsuperscript{171} See \textit{supra} text accompanying note 135.

\item \textsuperscript{172} See \textit{supra} text accompanying note 69.

\item \textsuperscript{173} For purposes of this article, the author has adopted the term "prejudicial alteration" (and logical, grammatical variants of this term, e.g., "prejudicially altered") as a shorthand for the Act's cumbersome phraseology: "distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation . . . ." \textit{See} 17 U.S.C.A. §§ 106A(a)(2), 106A(a)(3)(A), 106A(c)(1), (2), (3), 113(d)(1)(A), (B), 113(d)(2) (West Supp. 1992).
\end{enumerate}
\end{itemize}
manner that would be prejudicial to the artist's honor or reputation.\footnote{174} First, the Act furnishes a hybrid right that is fundamentally a cross between integrity and disclaimer.\footnote{175} As was noted,\footnote{176} this provision secures for artists the right to prohibit their names from being associated with their own works in instances where the works have been prejudicially altered.\footnote{177} In addition, the Act gives artists the right "to prevent any intentional" prejudicial alteration.\footnote{178} Thus, in addition to the right to \textit{disclaim} authorship of works that have been prejudicially altered, artists have the right to \textit{prevent} these prejudicial alterations \textit{ex ante}. Although the Act does not attempt to define "distortion, mutilation, or other modification" in a positive way, it does specify certain things that will not be considered a "distortion, mutilation, or other modification." First, "[t]he modification of a work of visual art which is the result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification . . . ."\footnote{179} Furthermore, the Act dictates that "[t]he 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 . . . distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence."\footnote{180} Thus, from a contractual perspective, the right to disclaim authorship of prejudicially altered works permits artists to place the burden on transferees to promise to remove the artist's name from a protected work in the event that the work is prejudicially altered at some time in the future. An agreement should contain a clause specifying the types of distortion, mutilation, or modification which the parties agree shall be considered prejudicial to the artist's honor or reputation. For example, the agreement could say: "The fol-

\begin{footnotes}
\item[174] Id. §§ 106A(a)(2), 106A(a)(3)(A).
\item[175] Id. § 106A(a)(2).
\item[176] See supra text accompanying note 70.
\item[178] Id. § 106A(a)(3)(A).
\item[179] Id. § 106A(c).
\item[180] Id. § 106A(c)(2). This a far cry from the heinous example of mutilation cited in the legislative history where Representative Markey described the actions of two Australian entrepreneurs who cut Picasso’s "Trois Femmes" into hundreds of pieces and sold them as "original Picasso pieces." This is clearly not a presentation question. On the other hand, the Committee believes that the presentation exclusion would operate to protect a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time.

\end{footnotes}
ollowing types of distortion, mutilation, or modification shall be deemed by the parties prejudicial to the artist's honor or reputation: X, Y, and Z.” Artists may wish to state that the list is meant to be illustrative but not exhaustive, and that the occurrence of any one of the aforementioned events shall be a condition precedent to the transferee's removal of the artist's name. An artist may wish to include a clause that would require transferees to notify the artist in writing at a specified address, to determine whether the artist considers a certain distortion, mutilation, or modification to be “prejudicial to his or her honor or reputation.” After all, who is in the better position to determine what would or would not be prejudicial to an artist’s honor or reputation than the artist herself? On the other hand, perhaps the issue of whether any distortion, mutilation, or other modification is prejudicial to an artist's honor or reputation should be subject to an objective rather than a subjective test. One might ask whether an alteration would be prejudicial to a “reasonable artist” under the circumstances. Neither the Act itself nor the accompanying House report make the standard clear.

Thus, in the absence of any judicial decisions construing the language, artists and buyers are free to negotiate their own interpretations.

181. As has been noted, the linchpin issue for assessing damages under the Act is the extent of injury to the artist’s honor or reputation. See supra note 127. Congress was adamant that this standard should have nothing to do with the American notion of injury to reputation in defamation. H.R. REP. No. 514, 101st Cong., 2d Sess 15 (1990), reprinted in 1990 U.S.C.C.A.N. at 6915, 6925. House Report 514 states:

The Committee believes that the best approach to construing the term “honor or reputation” . . . is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected. The standard used is not analogous to that of a defamation case, where the general character of the plaintiff is at issue. In a suit for a violation of the rights accorded . . ., any evidence with regard to the latter is irrelevant.

Id. (emphasis added). Although it may seem difficult for American courts to think about injury to reputation without reference to the law of defamation, Congress' admonition makes perfect sense. The Copyright Act provides the possibility for plaintiffs to recover statutory damages without any proof of actual injury. 17 U.S.C.A. § 504(c) (West Supp. 1992). The U.S. Supreme Court has held that unless defamation plaintiffs prove malice (i.e., that a defendant's statement was false or the defendant made the statement recklessly disregarding whether it was true), they cannot recover damages for anything other than “compensation for actual injury.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Thus, if an artist were to recover statutory damages using a defamation standard for injury to reputation as a benchmark, arguably, such a recovery would be the same as recovering presumed (i.e., not actual) damages in a suit for defamation. Gertz teaches that such a recovery is unconstitutional. Presumably an award of statutory damages under § 504(c)(2) of the Copyright Act, “where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully . . .,” would not bar the defamation analogy to an injury to honor or reputation under § 106A since the willful nature of the infringement would probably satisfy the malice requirement under Gertz.
As is true in the case of the right to disclaim prejudicially altered works, an artist should attempt to establish those types of intentional alterations that he or she would deem "prejudicial to his or her honor or reputation." Having formulated such a list, artists can then expressly state in a contract that those listed alterations would be prejudicial. Once again, artists should state that the list is meant to be illustrative not exhaustive.

Also, if artists aspire to prevent transferees from intentionally altering their works in a prejudicial manner, they should draft a contract provision requiring transferees to notify them in writing at a designated address, in the event that they (the transferees) ever contemplate any alterations of the work. In this way the artist would have the opportunity to determine, in advance, whether she considers such an alteration prejudicial.

The "public presentation" exception is, however, relatively clear. Congress did not intend to permit artists who are displeased with elements of presentation, such as framing, lighting, or proximity to other artists in a show to have the ability to notify the exhibitors and allege that such elements constitute a distortion, mutilation, or other modification of the work, thereby forcing the exhibitor to remove the artist's name or else be subject to liability. Nevertheless, since the Act's definition of distortion, mutilation, or other modification does not encompass the display of works, it is even more desirable for artists to protect themselves contractually. If an artist wishes to have a work framed in a particular manner, not framed in a particular manner, or not framed at all, the artist should provide those specifications in a written agreement. Similarly, if an artist wishes his or her works to be exhibited in a certain location in the gallery or lighted in a certain way, the only viable control he or she can assert over such details is by contract.

The modification of a work by a conservator or exhibitor that is prejudicial to the artist's honor or reputation can be considered a distortion, mutilation, or modification sufficient to trigger the author's right of integrity only if the distortion, mutilation, or modification is the result of gross negligence. Therefore, artists may desire to pre-

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183. Id. § 106A(c)(2). See also supra text accompanying note 180.
184. It is, however, doubtful whether such a provision could bind subsequent transferees.
185. 17 U.S.C.A. § 106A(c)(2) (West Supp. 1992). The Act does not define "gross negligence." The leading single volume treatise on tort law explains that "gross negligence" has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some
serve this right contractually. For example, in their written agreements with buyers, artists should recite that the buyers agree to notify the artist in the event that the gross negligence of an exhibitor or conservator causes distortion, mutilation, or other modification that would be prejudicial to the artist’s honor or reputation.

Conservators, framers, and exhibitors also may wish to create agreements in which the artist consents to specific procedures, framing techniques, and the like. As long as the conservator, framer, or exhibitor can show that she gave the artist the opportunity to make an alternative decision, a court should not consider the framer’s or exhibitor’s conduct as “gross negligence.” For example, if a conservator were to inform a painter that specific types of processes could preserve the life of a painting better than others, and then the painter selected a cheaper, less effective, process, perhaps the conservator should draft a written agreement to reflect the painter’s decision. This could be a form similar to “informed consent” forms used by doctors for their patients.

b. Works “Of Recognized Stature”

The Act gives artists more extended rights vis a vis destruction of a work “of recognized stature.” The use of the word “destruction” is somewhat curious. It seems quite logical to assume that all destructions of a work, by definition, would constitute either a distortion, mutilation, or other modification. On the other hand, all distortions, mutilations, or other modifications are not also destructions. House Report 514 suggests that the term “destruction” contemplates more or less definite point of reference to it, have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as shall be evidence thereof—sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that “gross negligence” falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind. There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences.


186. Id.
189. See, e.g., id. §§ 106A(a)(2), 106A(a)(3)(A) (addressing artists’ rights as regards “intentional distortion, mutilation, or other modification of that work”); see also supra note 179 and accompanying text.
190. Professor Damich has noted that Article 6bis itself has “no explicit right against destruction, although some instances of destruction surely could be labeled ‘a derogatory action
that the work "no longer exists." The House Report's characterization implies that the destruction of a work occurs when the work has been physically obliterated. In other words, the work no longer exists in the same recognizable physical state. Presumably, burning a work beyond recognition or applying chemicals to a work causing it to decompose would fit within the meaning of destruction in the Act. However, the House Report's example of destruction is not particularly helpful. The House Report describes an instance where two sculptures "were sold for scrap metal." Clearly it was not the sale that rendered the sculptures "destroyed," but rather it was their subsequent reduction to scrap metal. In other words, the fact that they had been changed to the point where they were no longer recognizable as the sculptures that they had been is what rendered them "destroyed." The line between destruction and distortion, mutilation, or modification is not necessarily a bright one.

In addition, the Act fails to define "a work of recognized stature." Presumably, the drafters, at the very least meant "a work of

... prejudicial to [the author's] honor or reputation." Damich, VARA 1990, supra note 3, at 950.


192. Id.

193. The distinction may be analogous to the common law distinction between trespass to chattels and conversion in tort law. See generally Keeton et al., supra note 185, §§ 14-15, at 85-106. Professor Damich has recognized other pertinent discrepancies between an artist's right to prevent destruction as opposed to the right to prevent distortion, mutilation, or other modification:

The Act recognizes a right "to prevent destruction of a work of recognized stature" and then adds: "and any intentional or grossly negligent destruction of that work is a violation of that right." The added provision not only emphasizes that destructions that have already occurred are violations, but also provides that intentional or grossly negligent destructions are ipso facto violations of the right. But if a destruction has occurred through mere negligence, no cause of action apparently exists. Because the right to prevent destruction is not limited to intentional and grossly negligent acts, there is an asymmetry between the first and the second provisions, although it is difficult to think of examples of impending destructions that are not intentional. If there can be no impending destructions that are not intentional, then the second provision is broader than the first because it protects against grossly negligent as well as intentional acts.

The right against destruction is also asymmetrical with the right against modification because the right against destruction is not limited to destructions that would be prejudicial to the author's honor or reputation. The right against destruction is also broader than the right against modification because the former provides for recovery for grossly negligent as well as intentional acts. The right against destruction, however, is narrower than the right against modification because the former is limited to works "of recognized stature."

Damich, VARA 1990, supra note 3, at 962 (footnote omitted).

visual art of recognized stature.” The interpretation of this term likely will provide fertile ground for debate and expert testimony as to whether a work ought to be characterized as possessing “recognized stature.” Arguably, any work executed by a particularly well known artist should be considered “of recognized stature” regardless of that individual work’s quality. Perhaps decision makers will be forced to seek lists of “who’s who in the art world” or similar publications.

In terms of contract law, this provision probably has the least effect of any of the Act’s provisions on the ordinary artist. The provision dictates that the artist of a “work of recognized stature” has the right to prevent others from destroying it. Although an artist might be able to obtain an injunction to prevent destruction from occurring as a result of intentional or grossly negligent conduct, this right has limited value at the contract bargaining table. Perhaps artists might want a transferee to agree in a signed writing that a work has “recognized stature.” Aside from some type of estoppel, such a recitation is likely to carry little weight. There is a chance, however, albeit somewhat tenuous, that a transferee’s promise not to destroy a work either intentionally or through gross negligence could be useful to an artist. At the very least, it would provide a contract remedy for the artist, and

195. Since the Act’s provision regarding destruction of works of recognized stature does not expressly state that it applies only to “works of visual art” as that term is defined in the new § 101 definition, it is conceivable theoretically that it could also apply to works that are not necessarily “works of visual art.” Such an interpretation, however, would be anomalous with the rest of the Act’s coverage and scope.

196. Professor Ginsburg makes a point similar to this one, suggesting that “substitution of the term ‘artist of recognized stature’ might have rectified the problem.” Ginsburg, supra note 7, at 480 n.19. Nevertheless, she concludes: “Such a step would, however, provoke further anomalies because it would penalize the unknown, or up-and-coming artist.” Id.

197. The Kennedy bill, which was not adopted, had stated that the “court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature.” S. 1198, 101st Cong., 1st Sess., 135 CONG. REC. S6811 (daily ed. June 15, 1989). An analogous provision in the California law states that in determining whether a “work of fine art” will be considered “of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.” CAL. CIV. CODE § 987(f) (West Supp. 1992) (emphasis added).

Instead of making moral rights protection contingent on the quality or recognized stature of a work, some state statutes opted for a minimum market value approach. See, e.g., CONN. GEN. STAT. § 42-116s(2) (West Supp. 1992) (providing that a “work of fine art” must have “a market value of at least two thousand five hundred dollars”).

therefore, a longer statute of limitations and potentially greater incidental and consequential damages.\textsuperscript{199}

3. The Building Exception

The Act addresses one particular practical problem that can affect the integrity of a work of visual art. In cases where artists create works that are ultimately “incorporated in or made part of a building [hereinafter referred to as a “building work”] in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work . . . ,” special new rules apply.\textsuperscript{200} If the artist who created a building work consented to the installation of the work in the building prior to June 1, 1991, then the artist loses three significant section 106A rights. First, she is not entitled to prevent the use of her name as the author of the work in the event of a prejudicial alteration.\textsuperscript{201} Second, she is not entitled to prevent any intentional prejudicial alteration itself.\textsuperscript{202} Third, she is not entitled “to prevent any destruction of” the work in the event that the work is considered “a work of recognized stature.”\textsuperscript{203} Simply stated, if an artist consented to installation of a building work prior to June 1, 1991, the artist has ipso facto lost the right of disclaimer and the right of integrity as to that particular work.\textsuperscript{204} The artist apparently still retains the right of attribution and, in the unlikely event that she consented to the installation of a work that she did not, in fact, create, the artist still may prevent the use of her name on that work.\textsuperscript{205}

The same loss of section 106A rights applies in cases where both the artist and the building owner execute a written instrument on or after

\textsuperscript{199} See supra note 130 and accompanying text. The statute of limitations for violations under the Act would be three years. 17 U.S.C.A. § 507 (West 1977).


\textsuperscript{201} Id. § 113(d)(1)(B).

\textsuperscript{202} Id.

\textsuperscript{203} See supra notes 194–97 and accompanying text regarding “a work of recognized stature.”

\textsuperscript{204} The Act states that when the artist has consented to installation prior to June 1, 1991, “then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.” 17 U.S.C.A. § 113(d)(1)(B) (West Supp. 1992). Paragraphs (2) and (3) of § 106A(a) provide that artists: 1) have the right to prevent their names from being associated with their works when the works have been altered in a manner that would be prejudicial to their honor or reputation; 2) have the right to prevent intentional alterations of their works that would be prejudicial to their honor or reputation; and 3) have the right to prevent destruction of a work of “recognized stature.” See supra notes 194–97 and accompanying text.

June 1, 1991 "that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification by reason of its removal . . . " 206 This provision of the Act does not state that the parties understand that installation "will" or even "is likely" to cause destruction, distortion, mutilation, or other modification of the work. Nor does it differentiate between any destruction, distortion, mutilation, or other modification of the work from a destruction, distortion, mutilation, or other modification of the work that is prejudicial to the artist's honor or reputation. Here again, the importance of the artist assuming the role of contract drafter is apparent. A transferee need only state that the parties agree that removal of the work may cause destruction, distortion, mutilation, or other modification of the work, in order to extinguish the majority of the artist's section 106A rights. 207 An artist, on the other hand, could simply remain silent and preserve the section 106A rights, or she could draft a provision stating that, in the event that the work is incorporated in or made part of a building in such a way that removing the work from the building will cause destruction, distortion, mutilation, or other modification of the work, the artist expressly reserves all of the rights of integrity, attribution, and disclaimer granted by section 106A of the Copyright Act, including paragraphs (2) and (3) of section 106A. Either position may be rather extreme in practical terms. A transferee's flat insistence that an artist forfeit these rights may be unreasonable. Similarly, an artist's insistence on retaining these rights when a work will be incorporated into a building in such a manner that its removal is likely to cause destruction, distortion, mutilation, or other modification may be equally unrealistic. What if a business one day decides to move its corporate offices and needs to dismantle a sculpture in order to take it to the new space? Parties may wish to pursue a middle ground. Perhaps a contract provision could grant the artist the right either to remove the work herself or to supervise the removal or even to have a right of first refusal to remove or to supervise removal. In the event that the artist is unavailable, the contract could provide that a designated third party would remove the work or supervise removal. Provisions like these would be an appropriate compromise between totally squelching artists' rights of integrity and disclaimer, and unnecessarily handcuffing a building owner whose needs are likely to change over time. 208

207. For the precise rights affected, see supra notes 201–04 and accompanying text.
208. Professor Ginsburg notes that the Act itself "seeks to prevent the artist from holding the building hostage to the artworks." Ginsburg, supra note 7, at 486.
Federal Moral Rights

In situations where removal is possible without destruction, distortion, mutilation, or other modification of the work, all of an artist's section 106A rights persist even though the building owner may wish to remove the work. The Act does, however, create two exceptions to this general rule. If a building owner makes "a diligent, good faith attempt without success to notify" the artist of her intent to remove the work, the artist loses her rights of integrity and disclaimer. Also, if the building owner successfully notifies the artist (or the artist's heir(s)), and the artist (or her heir(s)) fails to either remove the work or pay for its removal within ninety days, the artist forfeits her rights of integrity and disclaimer.

III. CONCLUSION

The Visual Artists Rights Act of 1990 provides myriad opportunities for persons who deal in the many facets of the creation and exchange of art. This Article has shown that artists now must reevaluate and restructure their contracts with others. Artists should be cautious about how they create, what they create, and how many copies they create because the Act narrowly defines the art that comes within its scope. Artists must also tailor their agreements with others to maximize the benefits these newly fashioned rights provide because the Act establishes specific rights that are not necessarily the same as the traditional European moral rights. It is imperative that artists realize the value that these rights add to their works. Artists must exercise them carefully and waive them sparingly.

The Visual Artists Rights Act creates a wealth of opportunities for artists and others who deal in the art market to explore contractual solutions to their concerns. It would be unfortunate if the art world were to treat the Act merely as an afterthought, using it to redress grievances only in the wake of a disappointing occurrence. The future of U.S. copyright law may hold additional moral rights for visual artists, but in the meanwhile, artists, galleries, buyers, and others

210. Id. § 113(d)(3). The Act presumes that an attempt is diligent and in good faith if the owner sends notice by registered mail to the artist at the most recent address of the artist recorded with the Register of Copyrights. The Act mandates that rules be enacted establishing a registry system in the Copyright Office. Id. Those regulations were recently promulgated.
211. Id. (section 113(d)(3) implies that the building owner must wait at least until she receives notice from the post office stating that the attempt to deliver the registered letter was unsuccessful).
should not neglect the chance to incorporate the new moral rights of artists into their agreements. Unless artists become aware of these new rights and learn how to exercise them, simply having them in the abstract will be of little value. Artists can use contracts to put these rights to work and to garner the benefits of them.  

213. Although Professor Macaulay has explained that academics often overestimate the potential of contract planning in the real world, the opportunities for artists to use the Act's provisions are, indeed, a splendid addition to American law, and artists would be remiss were they to neglect the contract possibilities. See generally Stewart Macaulay, An Empirical View of Contract, 1985 Wis. L. Rev. 465.