



The Visual Artists Rights Act (VARA)

A Discussion About Moral Rights for Visual Artists

VOLUNTEER LAWYERS FOR THE ARTS

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Class Agenda

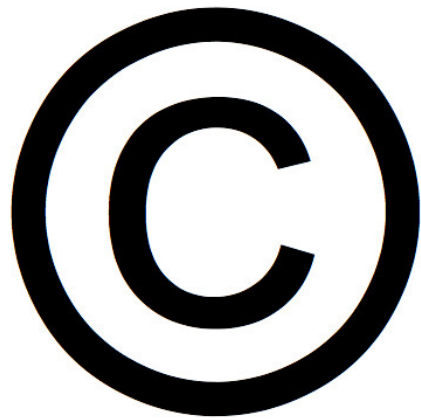
Points we will cover today:

- A brief look at copyright
- What are “moral rights”?
- What works are protected by VARA?
- Which moral rights does VARA provide?
- Waiving your VARA rights
- How to acquire VARA protection



What is Copyright? A Brief Intro

- VARA only arises if your work is protected by copyright
- Copyright is a type of Intellectual Property right and is an economic constitutional right designed to “promote the progress of science and the useful arts”



What is Copyright? (Cont.)

- Copyright protection is granted to authors of “**original works of authorship**” that are **fixed in a tangible form** of expression
 - An “original work of authorship” needs to be **independently created** by a human author and possess a **minimal degree of creativity**
- Protection exists automatically from the moment the work is fixed and lasts for a **limited** period (generally, author’s life plus 70 years)
- Copyright Registration: www.copyright.gov/registration

What Types of Works Does Copyright Protect?

- Literary works
- Musical works (underlying composition and lyrics)
- Sound Recordings
- Dramatic Works
- Pantomimes and Choreography (if “fixed”)
- Pictorial, graphic, and sculptural works
- Motion Pictures and audiovisual works
- Architectural works



What Does Copyright NOT Protect?

- Ideas & Themes
- Works that are not fixed in a tangible form
- Titles
- Words
- Short Phrases
- Facts
- Skill, diligence, or “sweat of the brow”



What Rights Does U.S. Copyright Law Grant the Rightsholder?

17 U.S.C. §106 Bundle of Exclusive Rights:

- Right to reproduce the work
- Right to prepare derivative works
- Right to distribute copies of the work to the public
- Right to perform and display the work publicly
- Right to perform by digital transmission (for sound recordings)



*These are considered “economic rights” and are divisible

Moral Rights in International Law

- Originated from France, where the French term *droit moral* was used to recognize a category of “personal rights” (also called “moral rights”)
- Moral rights protect the **personal connection and reputational bond** between an artist and his or her creation
- U.S. copyright law does not give traditional moral rights that are recognized in other parts of the world



Berne Convention for the Protection of Literary and Artistic Works

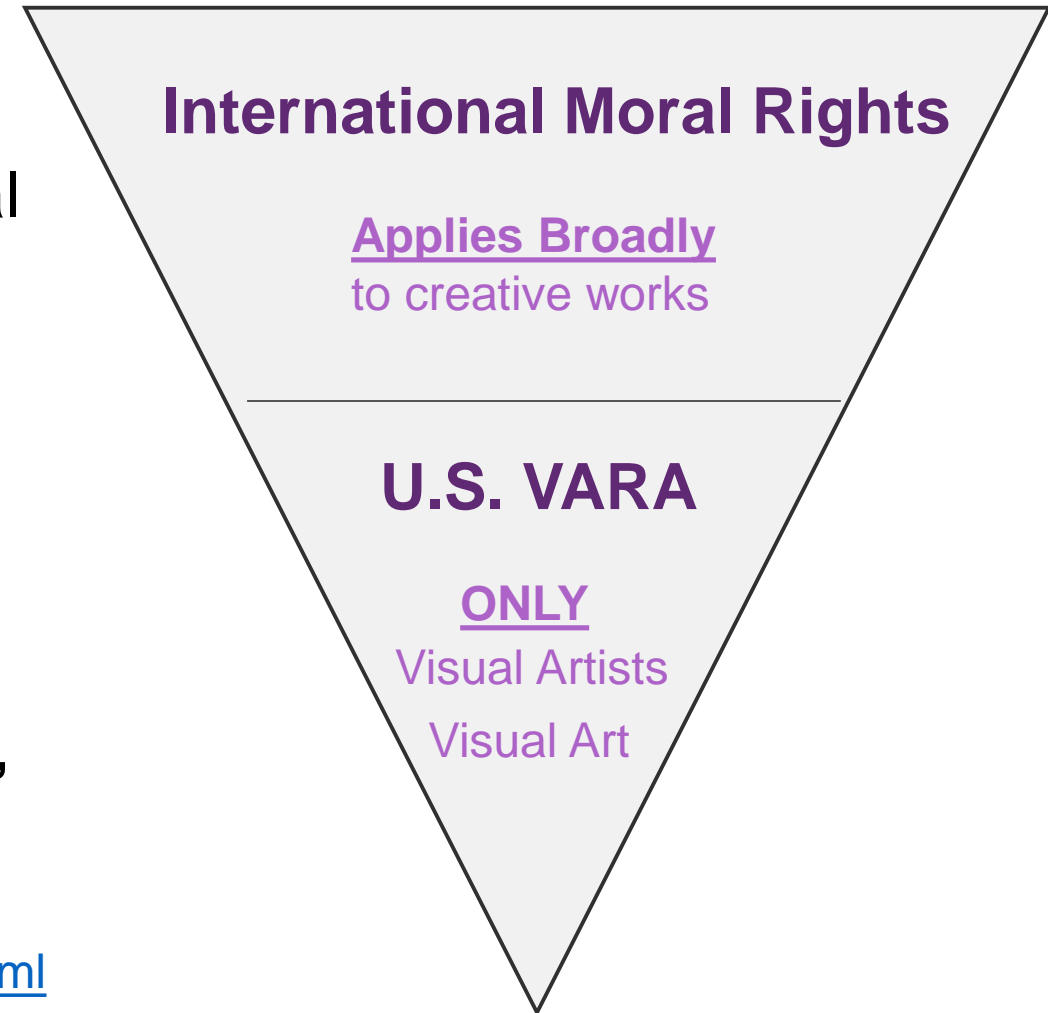
- **Berne Convention** is an international agreement governing copyright, signed by member states including the U.S.
- Article 6*bis* articulates that **moral rights are an independent category of rights, distinct from economic rights**
- All signatory members are required to provide at a minimum, the moral **right of attribution** and **right of integrity**



Moral Rights in U.S. Copyright Law

- The **Visual Artists Rights Act of 1990** amended the Copyright Act to include moral rights
- Up until this point, U.S. copyright law only protected the economic rights of artists
- Under VARA, the U.S. takes a much narrower approach to moral rights than other countries by only providing protection to **visual artists** and “**works of visual art**”

See https://www.wipo.int/treaties/en/ip/berne/summary_berne.html



Duration of Moral Rights in the U.S.



- **Works created after June 1, 1991:**
 - Granted for the life of the author (for joint works, granted until the death of the last surviving author)
- **Works created before June 1, 1991:**
 - If title to the work was transferred by author before this date – No protection granted
 - If the work was owned by the author as of this date, duration of rights is coextensive and expire at the same time as the copyright

Who Can Exercise Moral Rights?

- Only the author of the work
- Physical possession over the artwork is not necessary – an author can still assert these rights after an artwork has been sold
- Moral rights cannot be transferred to someone else like economic rights can



What Constitutes a Work of Visual Art?

- A “**work of visual art**” is defined in the Copyright Act as:
 - 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
 - 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.

What Moral Rights Do You Have Under VARA?



The Right of Attribution

The right to:

- Claim authorship of a work;
- Prevent the use of your name as the author of a work which you did not create;
- Prevent the use of your name as the author of a work that has been distorted, mutilated or modified in a way that would be prejudicial to your honor or reputation



The Right of Integrity

The right to:

- Prevent any intentional distortion, mutilation, or other modification of a work which would be **prejudicial to your honor or reputation**
- Prevent any destruction of a work of **recognized stature**

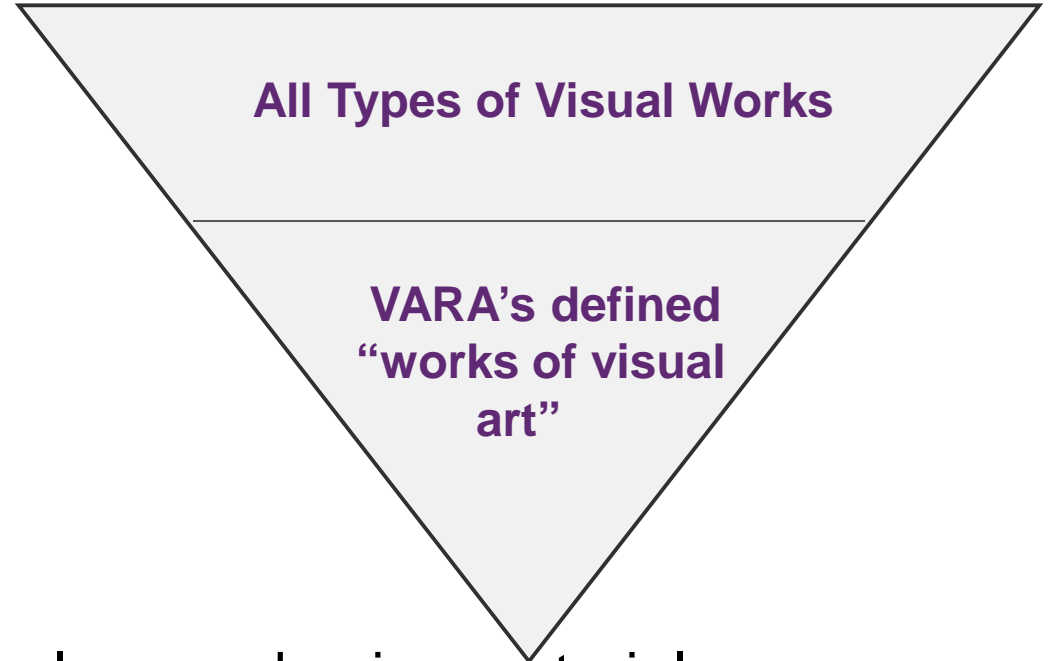
Exceptions to VARA Protection

- Passage of time
- Inherent Nature of the materials
- Conservation
- Public Presentation



What Works Are NOT Protected by VARA?

- Posters
- Maps
- Charts and Diagrams
- Globes
- Motion Pictures and Audiovisual works
- Books and Electronic Publications
- Merchandising items, advertising, promotional, or packaging materials
- Works produced in a bulk (more than 200 copies)
- **Applied Art**
- **Works Made for Hire**



Applied Art

- Applied art constitutes works in which artistic design is applied to functional objects of everyday use



See Cheffins v. Stewart
Image: *ArtnetNews*, Ryan Swift



Site-Specific Art

- Site-specific art are works conceived and constructed for a location, and one of the elements of the work is the location itself. It is not explicitly excluded by VARA, but courts have historically rejected VARA protection for these works.

See Tobin v. Trinity Church and Kelley v. Chicago Park District



Works Made for Hire

- **Scenario 1:** A studio assistant is hired full time at an artist's studio and receives employee benefits. He works under the close supervision and instruction of the artist while also using the artist's tools and materials.
- **Scenario 2:** A sculptor is commissioned by a company to create an intricate piece of artwork for their lobby area. The sculptor uses his own tools, buys the paint and materials himself, works on creating the work offsite, is paid a one-time fee, and sets his own work schedule.

What is a Work Made for Hire?

- A work made for hire is a work prepared by an **employee** within the **scope of his or her employment**
- If a work is a work for hire, the “**author**” of the work for copyright purposes is the **employer**, not the person who actually created the work
- Why is this important to us in the context of VARA?

U.S. Copyright Office Circular 30: <https://www.copyright.gov/circs/circ30.pdf>

When is a Work Made For Hire?

- Focus: whether the work is prepared by an **employee** or an **independent contractor**
- Think about these factors used by courts to determine which capacity you are working in:
 - How is the work prepared?
 - Where is the work prepared?
 - Who provides the equipment?
 - What is the method of payment?
 - Do you get benefits or tax withheld from your payment?

Let's Tie It Back

- Studio Assistant Scenario – He is more likely to be considered an “**employee**” as a work made for hire. Why?
- Sculptor Scenario – He is more likely to be considered an **independent contractor** who retains the copyright to his work as the author, has economic rights arising out of the copyright, and can assert personal rights under VARA. Why?

Contract Tips

- Always get a written contract!!
- State that you are an independent contractor
 - Pay attention to contracts that use both terms “work made for hire” AND “independent contractor”
- Do not waive your VARA rights
- Stipulate if/how works may be altered in the future
- For NYC artists, remember the “Freelance Isn’t Free Act”



A Closer Look at “Honor or Reputation”

- Would the proposed alteration “cause injury or damage to the author’s good name, public esteem, or reputation in the artistic community”?
- “Mr. Büchel contends that the display damages his reputation. It will certainly give people unfamiliar with his obsessive, history-driven aesthetic an inaccurate sense of his art, and this is indeed a form of damage.”

New York Times:

<https://www.nytimes.com/2007/09/16/arts/design/16robe.html>

See Massachusetts Museum of Contemporary Art v. Büchel

Image: AO Art Observed



A Closer Look at “Recognized Stature”

- This phrase is also not defined in VARA
- “Gate-keeping mechanism” to filter our frivolous suits
- Artists need to make two-tiered showing coming out of *Carter v. Helmsely-Spear*:
 - (1) The **work of visual art at issue** has “stature”; **and**
 - (2) This “stature” is **recognized** by art experts, other members of the artistic community, or by some cross-section of society

How to Establish “Recognized Stature”

- Expert Witnesses
- Newspaper articles about the work
- Letters about the work
- Awards won by the work
- Testimony from the public at large who can attest to the works “newsworthiness”
- The reputation of the *artist* does not matter for “recognized stature”



The Significance of 5Pointz

- Considered “recognized stature” for the first time in the context of street artists and exterior aerosol art
- The court in this case found that the aerosol works, even though they were temporary, had achieved recognized stature
 - Use of expert witnesses
 - Public recognition of the 5Pointz site



Legal Remedies

- Injunction to prevent modification and destruction
- Damages
 - Statutory Damages – range from \$750, up to \$150,000 for willful violations
 - Actual Damages –more difficult to prove
 - Profits
 - Costs and Attorney's Fees

Final Remarks

- Benefits of copyright registration
- Remember that VARA does not override standard contract principles over written agreements
- Carefully review your commission agreements to ensure that you are not waiving your moral rights
- Know your rights and your role – litigation can be lengthy, expensive, and uncertain!

Recap: Requirements for VARA Protection

- ☐ Must be copyrightable subject matter
- ☐ Must be a work of visual art as defined by VARA
- ☐ Rights must be asserted by the original author
- ☐ To prevent destruction, author must prove that the work is of “recognized stature”
- ☐ To prevent intentional modification or distortion, author must prove that the modification is “prejudicial to his honor or reputation”



THANK YOU

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