

# A MATTER OF LIFE OR DEATH: THE VISUAL ARTISTS RIGHTS ACT AND THE PROBLEM OF POSTMORTEM MORAL RIGHTS

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*Congress passed the Visual Artists Rights Act (VARA) in 1990 with hopes that a national system of moral rights would serve the purposes of (1) complying with the Berne Convention; (2) providing a uniform system of moral rights protections; (3) guaranteeing personal moral rights; and (4) encouraging art preservation. However, because VARA does not continue to provide consistent nationwide moral rights after the death of the artist, the scope of postmortem moral rights varies from state to state and from artist to artist. In this Comment, the author argues that this variation in moral rights protection is inequitable and is also unjustified in light of the purposes of moral rights in general and VARA in particular. Extending VARA to include postmortem moral rights is probably the best solution to this problem and would be a valuable step towards a truly coherent tradition of moral rights in the United States.*

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## INTRODUCTION

“Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be . . . . The presence of the original is the prerequisite to the concept of authenticity.”<sup>1</sup> As the critic Walter Benjamin noted in his 1936 essay, “The Work of Art in the Age of Mechanical Reproduction,” there is something important and special about knowing that what you are seeing is the immediate product of an artist’s creative efforts. Indeed, original artwork fetches such high prices on the art market because purchasers recognize the value of authenticity and proximity to the artist’s unfettered intent. The law, under the rubric of moral rights, also acknowledges the importance of an artist’s intent by protecting art from changes or attribution the artist herself did not intend.

Protecting an artist’s creations from the actions of others implements the key policies behind the concept of moral rights. Though different jurisdictions may emphasize one policy over another, moral rights embody the dual concerns of protecting the artist’s personality and preserving art for posterity.<sup>2</sup> Any changes to a work of art that stray from the artist’s original intent, including misattribution or alteration, can distort a community’s

1. WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 211, 214 (Hannah Arendt ed., Harry Zohn trans., 1999).

2. See JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS* (4th ed. 2002).

perception of the true nature of the work.<sup>3</sup> Unauthorized changes to the artwork thus prevent future viewers from appreciating the ideas and talents the artist seeks to convey.<sup>4</sup>

In the United States, moral rights are protected under a federal statute as part of the Copyright Act.<sup>5</sup> Unlike the rest of copyright law,<sup>6</sup> which addresses the economic rights attached to intellectual property, moral rights are personal, usually vesting in the artist or her legal representative alone.

The United States formally established federal moral rights when it passed the Visual Artists Rights Act of 1990 (VARA) as an amendment to the Copyright Act.<sup>7</sup> Congress debated and enacted VARA against the international backdrop of U.S. accession to the multinational Berne Convention.<sup>8</sup> Berne created reciprocal rights among member nations so that the intellectual property of an author in one member nation would receive protection when distributed in other member nations. Even before Congress passed VARA, however, moral rights existed in varying degrees in this country through moral rights statutes enacted by several states and arguably in other federal and state laws, including copyright, trademark, defamation and the right of publicity.<sup>9</sup>

VARA established a federal system of moral rights, but it left open several questions about the duration and scope of these rights for artists in the United States.<sup>10</sup> While many of the state moral rights statutes allow moral rights to exist after the death of the artist, VARA generally terminates them at the artist's death.<sup>11</sup> However, there are limited instances when VARA protections may last beyond the life of the artist.<sup>12</sup> For example, one

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3. See *id.*

4. See 136 CONG. REC. S17,574 (daily ed. Oct. 27, 1990) (statement of Sen. Edward Kennedy) (“[A]rtists are the chroniclers and guardians of an important part of our national heritage.”); see also CAL. CIV. CODE § 987(a) (West Supp. 2003) (“[T]here is also a public interest in preserving the integrity of cultural and artistic creations.”).

5. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101).

6. For purposes of this comment, references to “copyright” will refer exclusively to the economic rights of authors and not to moral rights. Even though the Visual Artists Rights Act of 1990 (VARA) is part of the Copyright Act, the rights created by VARA will be referred to as “moral rights.”

7. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.).

8. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention].

9. See *infra* Part I.B.

10. In this Comment, the term “duration” will refer to the length of time an individual artist or her estate retains legal recourse for violations of her moral rights under the applicable moral rights statute.

11. See *infra* Part II.

12. *Id.*

provision of VARA allows moral rights to continue after the death of the artist if the work in question was created before the enactment of VARA and the artist still retains title to the work.<sup>13</sup> Another section of VARA allows the surviving artist of a joint work to retain moral rights after the co-artist's death.<sup>14</sup> These postmortem rights are exceptions to VARA's overarching scheme to terminate moral rights at the death of the artist.

The implications of postmortem moral rights after the passage of VARA become increasingly complex when viewed in light of VARA's preemption provision. This provision is intended to ensure that the federal legislation overrides "equivalent" state moral rights during the life of the artist.<sup>15</sup> However, the combination of federal rights under VARA and the post-mortem rights granted by state statutes can lead to inequitable and inefficient results for both artists and owners of artwork who may have great difficulty predicting what rights will be enforced by the courts.<sup>16</sup>

Ultimately, the scheme of federal postmortem moral rights in the United States is unjustified in light of the purposes of moral rights in general and VARA in particular. This Comment describes the problems created under VARA's postmortem scheme and discusses possible solutions to these problems.

Part I outlines the current state of moral rights legislation in the United States. Although Congress enacted federal moral rights legislation with VARA, state statutes still play an important role in granting moral rights, especially after the death of the artist. Part II explains the problems concerning postmortem moral rights under VARA and how these problems undermine the purpose of the legislation. By allowing state postmortem rights to remain intact while still attempting to retain some control over postmortem rights, Congress has created a scheme that makes it nearly impossible for artists to take measures to preserve their reputation and work after they die, or for the public to understand what behavior is prohibited. Ultimately, this uncertainty undermines the very purposes of VARA, including uniformity of rights, Berne convention compliance, the protection of the personal rights of the artist, and the promotion of art preservation.

Finally, Part III discusses possible solutions to these postmortem problems. While creating a single, uniform federal system of postmortem rights is one solution, it may ultimately constrict the current scope of artists' rights. Another possible solution includes a combination of recommendations for judicial interpretation and reform of state moral rights legislation. This

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13. See 17 U.S.C. § 106A(d)(2) (2000).

14. See *id.* § 106A(d)(3).

15. See *infra* Part I.D.3.

16. See *infra* Part II.

solution seeks to guarantee a fundamental, reliable level of expectations for postmortem protection through moderate, viable measures but may prolong uncertainty because state moral rights legislation may be preempted by the Copyright Act. Therefore, an extension of VARA seems to provide the greatest resolution of the problem by creating the highest degree of certainty regarding postmortem moral rights. Ultimately, while VARA's post-mortem scheme is a fundamental flaw in the legislation, finding a solution to this problem is an essential and easily definable first step towards solidifying moral rights in this country.

## I. BACKGROUND

### A. The Definition of Moral Rights

Moral rights historically derive from the "belief that an artist, in the process of creation, injects some of his or her spirit into the art and that, consequently, the artist's personality, as well as the integrity of the work, should be protected and preserved."<sup>17</sup> This concept of moral rights translates into laws that prevent members of the public and even owners of art from changing a work of art in certain, often detrimental, ways. As many have noted, this restriction on what owners can do to their own property is often difficult for Americans, who may strongly believe in the sanctity of private property, to accept.<sup>18</sup> Restrictions on what a person can do to an artist's work are usually justified by one or both of the dual desires to promote the protection of the personality of the artist and to preserve art for the overall benefit of the public.<sup>19</sup>

The concept of moral rights originated in Europe and is fairly new in the United States. Most consider it to have begun in France and some trace its origins to the individualism fostered during the French Revolution and the slowly developing laws of civil-law nations.<sup>20</sup> Germany also participated in developing moral rights, particularly at the end of the nineteenth century.<sup>21</sup> Yet, even today, France "remains [the] foremost champion" of moral rights.<sup>22</sup>

While the laws in France may represent the optimal scope of moral rights, other countries also protect moral rights, often to a lesser extent.

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17. RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 943 (2d ed. 1998).

18. See MERRYMAN & ELSEN, *supra* note 2, at 251-52.

19. See *infra* Part I.C.3-4. and accompanying notes.

20. See LERNER & BRESLER, *supra* note 17, at 944, 950-59.

21. See *id.* at 944.

22. *Id.*

Countries that recognize moral rights in some form include the United Kingdom, Canada, the Netherlands, Mexico, Australia, Germany, Japan, Morocco, Nigeria, and the United States.<sup>23</sup>

#### B. History of the Enactment of VARA

Even before legislative recognition of moral rights, artists sought to protect their work, reputations, and personality through existing laws. Artists found various degrees, but by no means guarantees, of success in protecting their reputations and work under federal and state laws concerning breach of contract, copyright infringement, defamation, privacy, and trademark infringement.<sup>24</sup> Artists also found some success with claims under theories of unfair competition, defamation, and privacy statutes.<sup>25</sup> Whatever protection artists found under these laws was undermined by the constant uncertainty about the success of future claims and the willingness of courts to accept moral rights.

Although currently the main source of moral rights in the United States, VARA was not the first legislation to define and recognize moral rights in this country. In 1979, with the passage of the California Art Preservation Act, California became the first U.S. jurisdiction to enact moral rights legislation.<sup>26</sup>

The California statute protects works of “fine art,” defined as “an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality” but does not include “work prepared under contract for commercial use by its purchaser.”<sup>27</sup> California protects a right of integrity by ensuring that “[n]o person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, altera-

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23. See *id.* at 948–49.

24. There are a number of notable cases seeking protection of moral rights before the creation of statutory protection. See, e.g., *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947) (rejecting an artist’s attempt to impute foreign law concepts to American law and denying recovery for breach of contract); *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 816 (Sup. Ct. 1949) (rejecting an artist’s claim that destruction of his mural violated his “limited proprietary interest in his work after its sale, to the extent reasonably necessary to the protection of his honor and reputation as an artist”); *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 23–25 (2d Cir. 1976) (affirming the grant of a preliminary injunction on the plaintiff’s claim for trademark infringement under the Lanham Act based upon the heavy editing of plaintiff’s Monty Python sketches for rebroadcast in the United States); see also MERRYMAN & ELSEN, *supra* note 2, at 316–25.

25. See MERRYMAN & ELSEN, *supra* note 2, at 323.

26. See CAL. CIV. CODE §§ 987, 989 (West Supp. 2003); Joseph Zuber, *The Visual Artists Rights Act of 1990: What It Does, and What It Preempts*, 23 PAC. L. J. 445, 449 (1992).

27. CAL. CIV. CODE § 987(b)(2).

tion, or destruction of a work of fine art."<sup>28</sup> Furthermore, "no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence."<sup>29</sup> The statute also protects a right of attribution by stating that the "artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art."<sup>30</sup>

Before VARA, ten states provided some sort of moral rights legislation.<sup>31</sup> Yet, despite protections already in place at the state level, many opposed federal legislation on the matter.<sup>32</sup> The main explanation for this resistance is the novelty of personal rights in property in the midst of laws that "[t]raditionally . . . focused upon protection of the artist's economic, rather than personal rights."<sup>33</sup> Many worried that acknowledgment of moral rights conflicted with traditional notions about the sanctity of personal property in the United States.<sup>34</sup> These opponents tended to view the artist's continuing control over the work once it has left her hands as a "lien" on the owner's property and an impediment to the full exercise of his property rights.<sup>35</sup>

Still others expressed concern that forbidding destruction of artwork would lead to a stockpile of amateur works overflowing the museum storage spaces and the attics of the country or alternatively, a flood of litigation over alteration of any amateur creative product.<sup>36</sup> Yet, these arguments lost

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28. *Id.* § 987(c)(1).

29. *Id.* § 987(c)(2).

30. *Id.* § 987(d).

31. Edward J. Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 COLUM.-VLA J.L. & ARTS 291, 293 (1989) [hereinafter Damich, *State Statutes*]. In 1989, these states were California, Connecticut, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. *Id.*

32. See Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997); see also *Moral Rights in Our Copyright Laws: Hearing on S. 1198 and S.1253 Before the Senate Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. 138 (1990) [hereinafter *Senate Hearings*] (letter by Marc F. Wilson, Director, Nelson-Atkins Museum of Art) (explaining the "many pitfalls" of moral rights legislation).

33. Zuber, *supra* note 26, at 447.

34. After VARA was passed, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law, an opponent of VARA, claimed that "basic property rights no longer apply in the case of artistic property regulated by the Visual Artists Rights Act. The statute imposes an artist's lien on such property—and thereby represents an unprecedented incursion on property rights as Americans know them." George C. Smith, *Artistic License Takes on a New Meaning*, LEGAL TIMES, Dec. 17, 1990, at 23, 24.

35. See *id.*

36. See, e.g., *Senate Hearings*, *supra* note 32, at 137 (statement of Marc F. Wilson, Director, Nelson-Atkins Museum of Art). However, the "recognized stature" requirement in VARA and similar provisions seek to address these problems by eliminating frivolous claims for violation of the integrity of a child's fingerpainting and similar insignificant works. See Edward J. Damich, *The*

to proponents of moral rights who focused on the four main purposes of federal moral rights legislation as discussed in the next subpart.<sup>37</sup>

### C. The Four Purposes of VARA

While the ultimate purpose of any moral rights legislation is to advance the policies of promoting artists' personality rights and preserving art, VARA also sought to promote political goals. Passed shortly after U.S. accession to the Berne Convention, VARA highlighted the implications of membership in this multinational group, which required a certain level of moral rights protection by member nations.<sup>38</sup> Also, by making moral rights a federal issue, Congress ensured that the political concerns of federalism, including uniformity, also played a role in the debate over VARA.<sup>39</sup> This subpart discusses each of these four main purposes of federal moral rights legislation.

#### 1. Berne Convention Compliance

When the United States acceded to the Berne Convention, it used existing laws as the vehicle for complying with the moral rights requirements of Berne's article 6 *bis*.<sup>40</sup> The United States had resisted joining Berne for a long time and had instead joined the competing Universal Copyright

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*Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 954 (1990) [hereinafter Damich, *Toward a Federal System*]. See also *infra* Part I.D.2. For a discussion of the "recognized stature" requirement, see Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935 (2000).

37. One of the leading proponents of moral rights was Senator Edward Kennedy, who stated, "Over the past two Congresses I have worked with the copyright community to craft a precise bill that does not inadvertently affect other copyrighted works. I look forward to speedy approval of the bill by the committee and the full Senate without changes that would upset this delicate balance." *Senate Hearings*, *supra* note 32, at 17 (statement of Sen. Edward Kennedy). Indeed, Senator Kennedy had first proposed the legislation in the 99th Congress and continued to promote it for several years. See Zan Dubin, *Three-Part Measure: Bill Is Reintroduced to Protect Visual Artists*, L.A. TIMES, Aug. 13, 1987, at 9. With the earlier bill that also affected motion pictures, Senator Kennedy gained the support of personalities including Steven Spielberg and George Lucas. See William H. Honan, *Artists, Newly Militant, Fight for Their Rights*, N.Y. TIMES, Mar. 3, 1988, at C29. Opposition to the earlier bill included members of the publishing and recording industries. See Michael Cieply, *At Issue: Copyright Fight Resumes in Congress*, L.A. TIMES, Mar. 14, 1988, at 6. Most importantly, this previous bill and the debate surrounding it took place while Congress was still debating ratification of the Berne Convention. *Id.*

38. The United States acceded to the Berne Convention on March 1, 1989, and Congress passed VARA on December 1, 1990.

39. Senator Dennis DeConcini also noted four similar justifications used to promote federal moral rights legislation. See *Senate Hearings*, *supra* note 32, at 40 (letter of Edward J. Damich (recounting the Senator's four justifications)).

40. See, e.g., Paul Geller, *Comments on Possible U.S. Compliance With Article 6bis of the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 665, 665 (1986).

Convention (UCC)<sup>41</sup> largely because the UCC did not make as many demands on the United States and did not require protection of moral rights.<sup>42</sup> However, it became clear that American artists were harmed by the lack of copyright protection abroad under the smaller UCC union. As one author notes:

The major impetus for United States accession to the Berne Convention was not a new found desire to bring its copyright laws into harmony with those of the Berne Union, but instead resulted from a stronger, more traditional American impulse: pure economic self-interest. American copyright-based industries whose products were being pirated in international markets, with which the United States did not have copyright relations, wanted greater protection.<sup>43</sup>

Article 6 *bis* of the Berne Convention requires member nations to address and protect moral rights.<sup>44</sup> Because U.S. copyright law did not fully comply with Berne requirements, Congress passed the Berne Convention Implementation Act in 1988. However, these changes to U.S. law did not include any reference to or addition of moral rights. Although legislators were aware that the Berne Convention Implementation Act<sup>45</sup> did not create changes in existing law with regard to moral rights, as Edward Damich states:

[O]mission was justified on the basis of the less than scrupulous observance of article 6*bis* on the part of other Berne members and on the determination that federal statutory law and state statutory

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41. See Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 399 (1995).

42. See *id.* at 399–400.

43. *Id.* at 398–99 (citing David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROBS. 211, 215 (1992)) (“By the mid-1980s, losses to U.S. copyright proprietors from piracy abroad had mounted into the billions of dollars. At that point, U.S. participation in the UCC seemed inadequate.”).

44. The full text of Article 6 *bis* is as follows:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

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

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

Berne Convention, *supra* note 8, art. 6 *bis*.

45. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

and common law sufficiently protected moral rights in the United States to comply with the Berne Convention.<sup>46</sup>

Thus, the United States claimed that state statutes protecting the rights of integrity and attribution in certain works of art as well as copyright, trademark, and state laws regarding publicity, misrepresentation, unfair competition, defamation, and invasion of privacy were sufficient to comply with Berne.<sup>47</sup>

However, many argued that these existing federal and state laws did not substantially protect moral rights as required by Berne,<sup>48</sup> and "moral rights advocates looked to the introduction of bills to protect moral rights in the visual arts as a possible remedy to defects in the [Berne] adherence legislation."<sup>49</sup> One of the leading scholars on moral rights in the United States urged Congress to pass federal moral rights legislation "in order to fulfill the United States' obligations under Berne."<sup>50</sup> Ultimately, Congress had Berne compliance in mind when passing VARA.<sup>51</sup>

## 2. Uniformity

Another reason for passing a federal moral rights law was the need and desire for uniformity of law throughout the country.<sup>52</sup> In his opening statement for House hearings on VARA, Representative Edward Markey, a key advocate for moral rights legislation, stated that "copyright protection is properly a matter for, in my opinion, the Federal Government. A Federal law on moral rights would be far preferable to the hodge-podge of State statutes."<sup>53</sup> Others joined in this desire for one source of uniform protec-

46. Damich, *State Statutes*, *supra* note 31, at 292; see also Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655, 655 (1986) [hereinafter Damich, *Moral Rights*].

47. See Damich, *State Statutes*, *supra* note 31, at 292 n.7.

48. See *id.* at 292-93.

49. Damich, *Toward a Federal System*, *supra* note 36, at 946.

50. *Senate Hearings*, *supra* note 32, at 28 (statement of Edward J. Damich); see also *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House, Comm. on the Judiciary*, 101st Cong. 66 (1990) [hereinafter *House Hearings*] (statement of Ralph Oman, U.S. Registrar of Copyrights) ("[Federal moral rights legislation] brings U.S. law into greater harmony with laws of other Berne countries.").

51. See, e.g., *Senate Hearings*, *supra* note 32, at 85. During the hearings on VARA, Senator DeConcini addressed Damich's concerns about Berne compliance in the area of moral rights: "Then you're saying that in your opinion we are not part of the Berne Convention? We have not adopted the legislation necessary to be in compliance? What we did last year really doesn't put us in any better position than if we passed nothing?" *Id.* Damich replied, "That's correct." *Id.*

52. See H.R. REP. NO. 101-514, at 9 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6919 (indicating that VARA "creates a uniform Federal system of rights for certain visual artists"); see also Zuber, *supra* note 26, at 495.

53. *House Hearings*, *supra* note 50, at 19 (statement of Rep. Edward Markey).

tion.<sup>54</sup> Some even voiced concern over uniformity and comprehensive coverage within a federal statutory scheme. During the Senate hearings on VARA, the presiding chairman of the Senate Judiciary Committee Subcommittee on Patents, Copyrights and Trademarks, Senator Dennis DeConcici, claimed in opening remarks that “it is important that, if moral rights are to be incorporated in the copyright law, they not be implemented piecemeal but rather in a coherent and logical way, if possible.”<sup>55</sup> One witness who testified at the hearings on VARA expressed the opinion that state moral rights laws constituted “a ‘patchwork’ of rules which by itself vitiates somewhat the single, unified system of copyright. Artists, lawyers, courts, and even the owners of the works deserve a single set of rules on this subject.”<sup>56</sup> Congress and members of the intellectual property community were optimistic about the possibility of consistent, uniform federal moral rights.

### 3. Personal Rights

One of the fundamental bases for the concept of moral rights in general is the sanctity of the personality that the artist injects into the work that she creates.<sup>57</sup>

Some state statutes, like the New York Arts and Cultural Affairs Law, emphasize the personal rights of the artist<sup>58</sup> by prohibiting the public display or publication of altered works, as well as altered reproductions, and by foregoing protection against outright destruction. Yet even presentation to the public by display or publication is not enough to satisfy a claim under the New York statute: The statute also requires a showing that the display or publication is likely to cause damage to the artist’s reputation.<sup>59</sup> Furthermore, New York does not protect against the destruction of a work. Failure to protect against destruction of the work is consistent with favoring the artist’s reputation under the argument that an artist’s reputation can no longer suffer adversely from a work that no longer exists.<sup>60</sup> New York’s requirements regarding display, publication, and prejudice,<sup>61</sup> as well as the

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54. See, e.g., *Senate Hearings*, *supra* note 32, at 43 (letter of Edward Damich).

55. *Id.* at 1.

56. Zuber, *supra* note 26, at 495 n.338 (citing H.R. REP. NO. 101-514, at 9–10 (quoting John Koegel)).

57. See LERNER & BRESLER, *supra* note 17, at 943.

58. See Zuber, *supra* note 26, at 449.

59. See N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 2003).

60. See MERRYMAN & ELSEN, *supra* note 2, at 331; see also H.R. REP., No. 101-514, at 16 (1990), reprinted in 1990 U.S.C.A.N. 6915, 6926.

61. See N.Y. ARTS & CULT. AFF. LAW § 14.03.

failure to protect against destruction, demonstrate that the New York legislature highly valued the public perception of the artist and the artist's reputation.

VARA contains several provisions similar to New York's to implement the policy of protecting the artist's personality and reputation.<sup>62</sup> Under VARA, an artist may recover for alterations, distortions, mutilations, or modifications or prevent the use of her name as author only when such actions are prejudicial to her honor or reputation.<sup>63</sup> By adopting the prejudice requirement in VARA, the drafters of federal moral rights recognized the importance of the personal rights of the artist.

#### 4. Art Preservation

As Senator Kennedy noted in the hearings on VARA, "you get a greater understanding, greater sensitivity, and greater awareness by the population generally with a Federal statute. The result would be greater preservation of art."<sup>64</sup> Kennedy, who promoted moral rights over the span of many years and several sessions of Congress, claimed that art preservation was a fundamental purpose of a federal moral rights law, noting that works that "are mutilated or destroyed . . . are irreplaceable."<sup>65</sup>

Other legislators have recognized the importance of moral rights for the promotion of art preservation. The California Art Preservation Act<sup>66</sup> places great emphasis on the preservation of art for the benefit of the general public.<sup>67</sup> After acknowledging the importance of art as an "expression of an artist's personality" and that alteration or destruction of fine art is "detrimental to the artist's reputation," the California legislature's findings

62. See 17 U.S.C. § 106A(a)(3)(A) (2000).

63. See *id.* § 106A(a).

64. *Senate Hearings*, *supra* note 32, at 141 (statement of Sen. Edward Kennedy).

65. 136 CONG. REC. S17,574 (daily ed. Oct. 27, 1990) (statement of Sen. Edward Kennedy).

One scholar explained during the VARA hearings:

The public is well aware of what Leonardo's [Mona Lisa] looks like, and can readily examine copies of the portrait. But the availability of these copies is no substitute for preservation of the original. Were the original defaced or destroyed, we would still have the copies, we would all know what the work looked like, but, I believe, we would all agree that the original's loss deprives us of something uniquely valuable.

*House Hearings*, *supra* note 50, at 84 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law).

Even those who believe that the foremost purpose of moral rights is protection of the artist's personality rights have agreed that art preservation is a desirable result of moral rights protection, even if it is "theoretically . . . considered only a by-product of moral rights protection." Damich, *State Statutes*, *supra* note 31, at 323.

66. CAL. CIV. CODE § 987 (West Supp. 2003).

67. See Zuber, *supra* note 26, at 449.

on moral rights note that “there is also a public interest in preserving the integrity of cultural and artistic creations.”<sup>68</sup>

Specific language in the California statute stresses the importance of preserving art for the public good. This includes the requirement in the definition of “fine art” that the work be of “recognized quality,” as well as the protection of the artist’s work against destruction. The “recognized quality” language ensures that only significant works receive coverage.<sup>69</sup> The implied logic behind protecting only high quality work is that superior art will best reflect our culture to the public both now and in the future.<sup>70</sup> Protection against destruction seeks to ensure that these high quality works survive for the public benefit rather than for the benefit of the artist’s reputation—a work is far less likely to harm an artist’s reputation when it no longer exists.<sup>71</sup>

Other state statutes follow the California model by highlighting the public policy of preserving art.<sup>72</sup> VARA, too, adopts this preservationist policy. VARA protects against destruction and does so only for works of “recognized stature” without the requirement of prejudice to the artist’s reputation.<sup>73</sup> The specific language in VARA thus supports Senator Kennedy’s contention that federal moral rights would promote art preservation.

#### D. How VARA works

While VARA protects moral rights, its application is limited to a narrow class of works of visual art defined as:

- (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.<sup>74</sup>

VARA also states that a work of visual art does not include among other things, “any poster, map, globe, chart, technical drawing, diagram, model, applied art,

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68. CAL CIV. CODE § 987(a) (West 2001).

69. See *supra* note 36 and accompanying text.

70. See MERRYMAN & ELSEN, *supra* note 2, at 257.

71. See H.R. REP. NO. 101-514, at 16 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6926.

72. See MERRYMAN & ELSEN, *supra* note 2, at 257.

73. 17 U.S.C. § 106A(a)(3) (2000).

74. *Id.* § 101.

motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication"; or "any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container"; or "any work made for hire."<sup>75</sup>

If a work falls under VARA's definition of "visual art" then a claimant must also show that the conduct for which she seeks to recover actually is prohibited by VARA. In reviewing several of these rights in the next subparts, it is important to note that although each of these discrete provisions may appear simple to satisfy, the overarching system in which all of these statutory elements work together and in conjunction with other laws is complex, especially in the area of postmortem rights.

### 1. Attribution

VARA protects the right of attribution by stating that the author of a work of visual art

shall have the right (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create . . . [and] shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.<sup>76</sup>

VARA thus gives artists the moral right to claim or disclaim authorship under certain circumstances.

### 2. Integrity

VARA protects works of art by granting artists the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and; (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.<sup>77</sup>

Although the integrity provision empowers artists to ensure that their works remain as they intended, these rights are also very limited. First,

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75. *Id.*

76. *Id.* § 106A(a)(1)-(2).

77. *Id.* § 106A(a)(3).

VARA only protects works that are of “recognized stature” from destruction.<sup>78</sup> Whether a work meets this requirement may be difficult to discern, even with the help of expert testimony, as “recognized stature” may depend on a reputation that has not yet been established. Problems also appear for an artist who does not attain a high level of ability or recognition until mid-life or later. Earlier works, which may have less artistic merit, but which are nevertheless important to the overall understanding of the artist’s body of work, may be difficult to categorize as works of “recognized stature.” Furthermore, if a work is destroyed while still in the possession of the artist and before anyone else has seen it, courts will have difficulty determining whether it had artistic merit.<sup>79</sup>

Still another hurdle for an artist to overcome is the requirement of intent in VARA’s clause prohibiting alteration: A careless curator or gallery owner may get away with altering the work as long as it was not “intentional.”

To recover, an artist must also show prejudice to her reputation caused by the alteration or mutilation of her work. Satisfying the prejudice requirement again poses varying degrees of difficulty for different artists. The up-and-coming artist who is in the course of her first, second, or third show may have a more difficult time proving prejudice to her reputation if her reputation is being established by the altered, mutilated work itself. A more established artist at least has a point of comparison and reviews from before the alteration occurred to prove that her reputation actually suffered prejudice after the alteration.<sup>80</sup> While it is clear that artists may face hardships in

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78. This provision addresses George Smith’s concern that every amateur attempt at art lying in the attics across America would fall under federal protection. See Damich, *Toward a Federal System*, *supra* note 36, at 954; see also *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *rev’d on other grounds*, 71 F.3d 77 (2nd Cir. 1995). However, Smith continued to argue that the failure to define this standard would allow an artist “only [to] produce the testimony of some friendly colleagues to claim that his or her works are of recognized stature and must be preserved.” Smith, *supra* note 34, at 24.

In *Carter v. Helmsley-Spear, Inc.*, the district court used a two-pronged test to determine that the work in question met VARA’s “recognized stature” requirement, stating that a plaintiff must prove “(1) that the visual art in question has ‘stature,’ *i.e.* is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” *Carter*, 861 F. Supp. at 325. The court in *Martin v. City of Indianapolis*, 982 F. Supp. 625 (S.D. Ind. 1997), *aff’d*, 192 F.3d 608 (7th Cir. 1999), followed the *Carter* analysis and found that the plaintiff Martin’s sculpture was a work of “recognized stature” based on evidence of art exhibitions, awards, funding, and newspaper critiques. *Id.* at 630–31.

79. Steven Thomas raised the issues noted in this paragraph in a course lecture for Art and the Law at UCLA School of Law, Sept. 18, 2002. See also *supra* note 36.

80. Many of these issues were also addressed by Thomas. See *supra* note 79. VARA also describes additional rights including provisions that apply when a work of art is installed in a building and a provision that allows an artist to waive his VARA rights in a “written instrument signed by the author.” 17 U.S.C. § 106A(e). However, as these are largely procedural provisions

satisfying claims under VARA's right of integrity, the true degree of these difficulties may be resolved in future judicial decisions.

### 3. Preemption

VARA states that it preempts "all legal or equitable rights that are equivalent to any of the rights conferred by section 106A [of the Copyright Act],"<sup>81</sup> and preemption does not apply to any moral rights claimed after the death of the artist.<sup>82</sup> Because VARA was intended as the primary and supreme source of integrity and attribution rights for covered works during an artist's life but not after the artist's death, the scope of protection of an artist's work will likely differ during the artist's life and after her death.<sup>83</sup>

Preemption by VARA may arise in several different contexts. Most important to the discussion in this Comment is the fact that VARA likely preempts some state moral rights statutes. There are two main issues raised by VARA's preemption of state moral rights laws: (1) Does VARA preempt moral rights only for works covered under its limited definition of "art" (subject matter preemption<sup>84</sup>) and (2) What state rights are "equivalent" to those granted to the artist under VARA (equivalent rights preemption<sup>85</sup>)?

In *Gegenhuber v. Hystopolis Productions, Inc.*,<sup>86</sup> the district court addressed the issue of subject matter preemption.<sup>87</sup> Plaintiffs sought proper credit in a theater's playbill for the puppets they created for the theater's show.<sup>88</sup> The court rejected the defendant's attempt to remove the action to federal court under VARA because the definition of "art" in VARA did not include puppets. The court thus applied a narrow reading of the rights granted under VARA, stating that "[b]y its terms, VARA does not include puppets, costumes or sets. . . . We will not read into VARA that which Congress has evidently chosen to leave out."<sup>89</sup> As yet, the other question of

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requiring notification and written instruments, they are not substantively different rights and are beyond the scope of this Comment.

81. 17 U.S.C. § 301(f)(1).

82. See *id.* § 301(f)(2)(c) ("Nothing in [the preceding preemption paragraph] annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . (C) activities violating legal or equitable rights which extend beyond the life of the author.").

83. See Kwall, *supra* note 32, at 34 ("Since several state statutes provide authors with a longer period of protection than VARA, this exemption creates the interesting irony that authors of works created post-VARA obtain more protection for their works after their deaths than during their lifetimes.").

84. See 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1053-55 (1994).

85. See *id.* at 1055-57.

86. No. 92-C1055 1992, 1992 WL 168836 (N.D. Ill. July 13, 1992).

87. *Id.*

88. See *id.* at \*2.

89. *Id.* at \*11.

equivalent rights preemption has not been squarely addressed by a published court opinion.

A single act may raise questions about both types of preemption. For example, consider the distortion of the 201st lithograph by a little-known artist early in her career.<sup>90</sup> Some state statutes may protect lithographs in excess of the first two hundred, while VARA generally protects the first two hundred only.<sup>91</sup> With respect to subject matter preemption, the 201st work does not fall under VARA's definition of protected works but may fall under just such a state statute's definition.<sup>92</sup> It is unclear whether VARA's protection of the first two hundred lithographs should be the exclusive source of all lithograph protection under subject matter or equivalent rights preemption principles, or whether a state statute can provide additional protection for the 201st lithograph.<sup>93</sup>

On the one hand, VARA would seem to preempt the subject matter of this statute with its express provision defining how many limited edition prints are protected, and its requirement of prejudice. Even though the state right prohibiting distortion may be broader than the right under VARA, VARA should preempt in this case because the legislative history suggests that "[VARA] will preempt a State law granting the right of integrity . . . even if the State law is broader than Federal law, such as by providing a right . . . of integrity with respect to covered works without regard to injury to the author's honor or reputation."<sup>94</sup>

However, many argue that the 201st print does not fall within the definition of VARA and thus VARA should not preempt the state statute because it does not cover the same subject matter.<sup>95</sup> Some also argue that Congress did not intend VARA to restrict broader rights granted under state statutes and that the broader right of protection of works from distortion that may not be prejudicial is a more generous right that can co-exist with VARA.<sup>96</sup>

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90. See Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better off After VARA?*, 15 HASTINGS COMM. & ENT. L.J. 953, 956-57 (1993) [hereinafter Damich, *Better off After VARA?*].

91. 17 U.S.C. § 101 (2000); see Damich, *Better off After VARA?*, *supra* note 90, at 956-57.

92. Damich, *Better off After VARA?*, *supra* note 90, at 956-57.

93. *Id.*

94. H.R. REP. NO. 101-514, at 21 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6931; see also Joshua H. Brown, Note, *Creators Caught in the Middle: Visual Artists Rights Act Preemption of State Moral Rights Laws*, 15 HASTINGS COMM. & ENT. L.J. 1003, 1026-27 (1993). But see 136 CONG. REC. H13,314 (Oct. 27, 1990) (statement of Rep. Kastenmeier) (stating in reference to the preemption language amendment that "Congress does not intend to preempt section 989 of the California Civil Code, the 'cultural heritage protection' or any other similar State code").

95. See Damich, *Better off After VARA?*, *supra* note 90, at 957.

96. See 136 CONG. REC. H13,314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier).

Even if VARA does not preempt states from protecting the 201st lithograph, the distortion of the same work may also raise questions of equivalent rights preemption. VARA protects against intentional distortion when such distortion is “prejudicial to [an artist’s]... reputation.”<sup>97</sup> VARA’s right to prevent distortion only when the acts cause such “prejudice” may be similar to a right under a state statute that prevents distortion but does not require a showing of such “prejudice.”<sup>98</sup> Yet, VARA’s additional requirement of “prejudice” at least suggests that these two rights may be different enough that they are not “equivalent.”<sup>99</sup>

A broad reading of the term “equivalent” in the preemption clause can lead to the preemption of many state laws that are more generous than VARA merely because both state law and VARA seek to protect the same sort of right (for example, “integrity”). A narrower reading would only preempt state laws that seek to protect against the same conduct mentioned in VARA, while still allowing artists to reap the benefits (and possibly detriments) of any state laws that go beyond the rights mentioned in VARA.<sup>100</sup>

In addition to preempting state moral rights statutes, VARA may also preempt other state laws suggestive of moral rights, including state laws on defamation and the right of publicity. Preemption of both state and federal laws that were not enacted for the specific purpose of granting moral rights protection poses difficult problems. As *Nimmer on Copyright* notes, if VARA were held to preempt any law that granted only a slightly similar right, VARA might very well swallow up these similar laws.<sup>101</sup>

Artists will likely welcome VARA’s preemptive power when VARA increases their existing rights by overriding less generous grants of moral

97. 17 U.S.C. § 106A(a)(3).

98. See Damich, *Better off After VARA?*, *supra* note 90, at 960.

99. *Id.* Conversely, if rights granted by a state statute were substantially different (that is, not “equivalent”), the fact that the state statute and VARA apply to similar works might not force subject matter preemption.

100. Professor Damich advocates just such a narrow preemption analysis. See, e.g. Damich, *Better off After VARA?*, *supra* note 90, at 965 (“Hopefully, courts will not lessen the sum-total of moral rights protection in the United States by a draconian preemption analysis.”).

101. See MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 8D.06[F][3][B] (2002). In an illustrative example of this problem, the Nimmer treatise outlines the case of a seller of portable toilets who uses the slogan “Here’s Johnny,” advertising its product as “The World’s Foremost Commodity” with a graphic of a cropped painting by Jasper Johns. *Id.* The treatise claims that according to the policy behind VARA, the federal moral rights should yield Johns a remedy for this use of his name. *Id.* Yet, under a broad reading of the VARA term “equivalent,” Johns’ “right of publicity action implicates a right akin to attribution, inasmuch as it is concerned with the right to use one’s name and persona.” *Id.* VARA would thus preempt any possible state claim under the right of publicity. *Id.* Such action under VARA would in turn fail because VARA protects only the original work which would remain safely intact as the artist intended in a modern art wing of a museum. *Id.*

rights. However, the true problem for artists arises when VARA overrides state laws that may have granted more generous rights or may have made it easier for artists to bring claims for violations of integrity or attribution.<sup>102</sup>

There is currently no case law resolving the preemption issues discussed above. The outcome of preemption questions is usually difficult to predict and may be a function of changing jurisprudence.<sup>103</sup> Ultimately, though many of these unanswered preemption questions are beyond the scope of this Comment, it is important to observe that preemption may fundamentally change the scope and reach of state grants of moral rights.<sup>104</sup>

#### 4. The Duration of VARA Coverage

Generally, VARA protection terminates at the death of the artist.<sup>105</sup> While there are some exceptions, the original federal moral rights bills (which ultimately became VARA) in both the House and Senate extended the grant of moral rights for the life of the artist plus fifty years. Just before VARA was passed as part of the Judicial Improvements Act of 1990,<sup>106</sup> a massive amendment (which included mainly provisions relating to federal judgeships) changed the duration provision to only the life of the artist.<sup>107</sup> Apparently, this change was at the urging of one of the members of the Senate Judiciary Committee.<sup>108</sup>

Though VARA generally confers rights for the life of the artist, there are a few exceptions. One exception refers to works created by joint artists after one of the artists dies and is beyond the scope of this Comment.<sup>109</sup> Another exception grants postmortem protection for works created before VARA was enacted and to which the author retains title.<sup>110</sup> Finally, because VARA's rights do not terminate until the "end of the calendar year in which

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102. For a discussion of VARA preemption's change in the scope of artists rights under state statutes, see Damich, *Better off After VARA?*, *supra* note 90. It is important to note that other federal laws, particularly the rest of the Copyright Act, may also have preemptive powers over state laws, including moral rights legislation. See NIMMER & NIMMER, *supra* note 101, § 8D.06[F][2].

103. See generally Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002).

104. For a full discussion of which state moral rights statutes VARA would preempt, see Brown, *supra* note 94.

105. See 17 U.S.C. § 106A(d)(1) (2000).

106. Pub. L. No. 101-650, 104 Stat. 5089.

107. See 136 CONG. REC. H13,314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier); 2 PATRY, *supra* note 84, at 1051.

108. See Damich, *Towards a Federal System*, *supra* note 36, at 969-70 (citing a telephone interview with Kathleen Kruse, Legislative Assistant to Senator Edward Kennedy (Jan. 22, 1991)); see also PATRY, *supra* note 84, at 1051.

109. See 17 U.S.C. § 106A(d)(3).

110. See *id.* § 106A(d)(2).

they otherwise would expire,” artists’ administrators may claim VARA protection for a limited period after the death of the artist.<sup>111</sup> These postmortem rights and their implications are discussed more fully in Part II.

## II. THE PROBLEM OF POSTMORTEM RIGHTS

As mentioned above, it is possible for the estate of an artist in the United States to obtain control over the artist’s moral rights once she dies. Estate administrators may look to several sources for these rights, including state moral rights statutes and even VARA. However, the current framework for determining the existence and scope of postmortem rights does not comport with the stated purposes of VARA. This part discusses the framework of postmortem rights and explains why this system is problematic for implementing the goals and purposes of VARA.

### A. The Scope of Postmortem Coverage Varies

Section 301(f)(2) of VARA states that its preemption provision does not annul or limit “activities violating legal or equitable rights which extend beyond the life of the author.”<sup>112</sup> Thus, there is general agreement among scholars that VARA allows an artist and her heirs to benefit from any other federal or state statutes regarding visual arts after her death, including state statutes that grant moral rights beyond the life of the artist.<sup>113</sup>

The application of state laws after death occurs with respect to works created both before and after VARA was enacted. Under the first section of VARA’s duration provision, VARA applies during the artist’s life.<sup>114</sup> Any state-generated postmortem rights would apply after the artist dies.

The second section of VARA’s duration provision states that the rights granted by VARA “shall be coextensive with, and shall expire at the same time as, the rights conferred by [the Copyright Act]”<sup>115</sup>—currently the life of the artist plus seventy years—when the artist created the work in question

111. *Id.* § 106A(d)(4).

112. *Id.* § 301(f)(2)(c).

113. See NIMMER & NIMMER, *supra* note 101, § 8D.06[F][1]. The Nimmer treatise claims that these postmortem rights are sufficient to create Berne compliance since they were the basis for Berne accession. *Id.* However, as other writers have argued, and as indicated later in this part, while it is true that these state statutes were used as a justification for Berne compliance, they do not technically comply with Berne requirements. See Damich, *State Statutes*, *supra* note 31, at 293.

114. 17 U.S.C. § 106A(d)(1). The provision states that “with respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.”

115. *Id.* § 106A(d)(2).

before VARA was enacted and still owns title to the work.<sup>116</sup> It is unclear what happens to works created pre-VARA to which the artist does not retain title.<sup>117</sup>

As noted above, VARA creates moral rights for different lengths of time in different circumstances. Yet, in several instances, there is a stark contrast between the rights afforded artists who in many ways appear to face similar circumstances.

#### 1. An Artist's Estate May Need to Rely on State Moral Rights Statutes That Provide Rights Different From VARA

"[I]n certain states . . . the enactment of the Visual Artists Rights Act of 1990 and the act's corresponding preemption of state law may represent a narrowing of the rights of artists and of the public as a whole."<sup>118</sup> As noted in Part I, artists and artwork that clearly fall under state moral rights statutes will not receive protection from these state statutes if they contain "equivalent" rights to those granted in VARA.<sup>119</sup> For example, one author suggests that because they are "equivalent" to VARA's provisions, the California rights of paternity and disavowal (attribution), as well as the right to prevent modification of a work, would not be enforceable during the life of the artist.<sup>120</sup>

In many cases, VARA's preemption actually limits the scope of moral rights during the life of an artist. As one author notes, "VARA applies only to a restricted category of visual artworks, extends only limited rights, and is subject to loopholes, exclusions, and waiver provisions that substantially

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116. See *id.*

117. "Noticeably absent from the provisions specifying the duration of the rights is any provision describing the duration of rights with respect to works of art created before June 1, 1991, to which the artist *does not* still hold title." Zuber, *supra* note 26, at 487–88.

Another way in which moral rights may last beyond the life of the author is the case of joint authorship. VARA indicates that in the case of a joint work, the rights granted under VARA endure for the life of the last existing author. See 17 U.S.C. § 106A(d)(3); see also Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 851 (1992). However, given the potentially complex implications of joint authorship, this concern is beyond the scope of this Comment.

118. Zuber, *supra* note 26, at 508.

119. See *supra* Part I.D.3. and accompanying notes. In addition to preemption caused by VARA, there is the question of whether state moral rights statutes are preempted by other federal laws, including copyright. See, e.g., NIMMER & NIMMER, *supra* note 101, § 8D.07[C]. This same preemption problem existed before VARA was enacted. See Damich, *State Statutes*, *supra* note 31, at 329–38. For a discussion of preemption of state moral rights statutes by federal copyright laws other than VARA as well as the tests used to determine preemption, see *id.* For a discussion of preemption by other federal laws, see NIMMER & NIMMER, *supra* note 101, § 8D.06[F][2].

120. See Zuber, *supra* note 26, at 498–99.

erode its powers."<sup>121</sup> Because of preemption, artists whose works fall under many of the state provisions protecting the moral rights of attribution and integrity could find their rights narrowed by the limited rights of attribution and integrity found in VARA.<sup>122</sup>

For example, the California Art Preservation Act, which creates rights that last for fifty years after the death of the artist, allows an artist to disclaim authorship for a "just and valid" reason, while VARA requires that the work prejudice the artist's reputation,<sup>123</sup> a much more difficult element to prove.<sup>124</sup> In this example, because of preemption, VARA is likely the only source for rights of integrity and attribution of original works defined in the statute. Because many of the provisions describing the rights of integrity and attribution in VARA are similarly difficult to satisfy (for example, works of "recognized stature"<sup>125</sup>), artists may find that their rights of integrity and attribution are more limited under VARA than they would be under state provisions.

However, once VARA coverage and preemption cease at the death of the artist, VARA allows any postmortem rights granted under state law to apply once again. The estates of artists whose state rights were constricted under VARA may thus recover those rights after the artist's death. In the above example, the estate would no longer have to show prejudice to reputation—a "just and valid reason" standard would apply. Two artists, one living and one dead (represented by her estate's administrator), who created similar works, may both find that they have "just and valid reason," to disclaim authorship of their covered work under California law. But, the living artist will have to show prejudice to his reputation while the estate of the dead artist need only show a "just and valid reason." Thus, "[t]his interaction between federal and state laws has the anomalous result of providing greater protection to the artist's heirs after the artist's death than the protection provided to the artist during his or her life."<sup>126</sup>

The most extreme disparities wrought by VARA will occur in a state that does not have moral rights legislation. An artist who creates and sells paintings in such a state will be able to stop owners from slicing the canvases, painting

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121. CYNTHIA ESWORTHY, NATIONAL ENDOWMENT FOR THE ARTS, ART FORMS: FROM MONTY PYTHON TO LEONA HELMSLEY: A GUIDE TO THE VISUAL ARTISTS RIGHTS ACT, at <http://arts.endow.gov/artforms/Manage/VARA.html>.

122. See generally Damich, *Better off After VARA?*, *supra* note 90 (discussing the differing scope of state legislation and VARA).

123. Furthermore, "[t]he imposition of a 'damage to reputation' requirement is a more serious departure from moral rights theory, which emphasizes the relation between the artist and the work, not the artist and what others think of him." Damich, *State Statutes*, *supra* note 31, at 305.

124. See Zuber, *supra* note 26, at 499.

125. See *supra* notes 75–79 and accompanying text.

126. Zuber, *supra* note 26, at 500.

moustaches on figures, or otherwise violating the right of integrity under VARA (assuming she satisfies the other VARA requirements). However, once the artist dies,<sup>127</sup> the owners of the artist's works can use them for whatever purpose they please, including mutilation or total destruction, because neither VARA nor state legislation provides protection. While VARA created moral rights and acknowledged their importance during the artist's life, in a state without moral rights, there is no protection from a moral rights statute once the artist is dead, despite Berne's mandate for postmortem rights and the existence of postmortem rights in some parts of the country.

Even in a state that has a moral rights statute, moral rights are not necessarily secure after the artist dies. In New York, an artist's heirs may confront the same problems as they would in a state with no moral rights statute. Although the New York statute provides protection against the display of altered or mutilated works, it makes no mention of heirs or duration of rights.<sup>128</sup> Thus, the New York statute likely provides protection only during the life of the artist.<sup>129</sup> When an artist dies, if owners of her work display an altered or mutilated work, the artist's administrator would face great difficulty in trying to enforce rights under the New York statute.<sup>130</sup>

## 2. Postmortem Rights Vary From State to State

Another result of reliance on state statutes for posthumous moral rights is that such rights vary by state. Again, the most extreme example of this variation is the comparison between a state that has moral rights legislation extending beyond the life of the artist and a state that has no moral rights legislation at all. In one state, the artist can protect her work while in another state the artist is left without recourse for any alteration, distortion, or other change, no matter how extreme. This is a varied and unreliable approach to granting postmortem moral rights.

Yet, even among states that are committed to protecting moral rights, artists may have different protections. California specifically states that the

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127. VARA rights may not terminate the day of the artist's death. VARA rights extend to the end of the calendar year in which they would expire. See 17 U.S.C. § 106A(d)(4) (2000) ("All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire."); see also note 107 and accompanying text.

128. See N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney Supp. 2003); see also Damich, *State Statutes*, *supra* note 31, at 324.

129. See Damich, *State Statutes*, *supra* note 31, at 324 ("[I]t seems unlikely that *post mortem* protection is contemplated since there are no provisions indicating who has standing to sue after the artist's death.").

130. See *id.* at 324 n.166 ("It may be argued that the right of respect was intended to pass to the artist's heirs or legatees, but this proposition is weakened by the fact that no one but the artist is mentioned as having the right to consent to a violation of the right of respect." (citations omitted)).

rights granted under the statute “[s]hall, with respect to the artist, or if any artist is deceased, his or her heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist.”<sup>131</sup> Massachusetts also provides postmortem protection until the fiftieth anniversary of the death of the artist.<sup>132</sup> Therefore, an artist’s heirs in both states may enforce state rights after her death.

However, the heirs may be able to protect against very different actions. For example, in California, “changes violative of the right of [integrity] must ordinarily be intentional.”<sup>133</sup> However, in Massachusetts, the gross negligence standard applies to all changes.<sup>134</sup> So, the estate of a dead artist in California may recover only upon satisfying the “intentional” standard, while in Massachusetts the estate must show only gross negligence.

Thus, the heirs of dead artists are not guaranteed any uniform minimum threshold of moral rights. The ability of these heirs to prevent mutilation, destruction, or false attribution through a moral rights statute depends on what state law governs the claim.<sup>135</sup> Though property rights often differ from state to state, moral rights should not, particularly when Congress has concluded that uniformity in the area of moral rights is just as desirable as it is under the rest of the Copyright Act.<sup>136</sup> The need for uniformity does not disappear upon the death of the artist.

### 3. Confusion Over Concurrent State and Federal Law Protection

VARA’s scheme for determining the rights of an artist’s estate also creates a distinction between works of art created before and after VARA’s effective date of June 1, 1990. If an artist retains title to a work created before VARA’s

131. CAL. CIV. CODE § 987(g) (West Supp. 2003).

132. See MASS. ANN. LAWS ch. 231, § 85S(g) (Law. Co-op. 2002); see also Damich, *State Statutes*, *supra* note 31, at 323–24.

133. Damich, *State Statutes*, *supra* note 31, at 316.

134. See MASS. ANN. LAWS ch. 231, § 85S(c).

135. Several witnesses in the VARA hearings noted the jurisdictional and choice of law complications arising from individual state moral rights protections. See, e.g., *Senate Hearings*, *supra* note 32, at 182 (statement of Ralph Oman, Registrar of Copyrights) (“Visual art works are not bound to any one location. Interstate movement of such works presents questions of conflict of laws, vesting, and other issues that make negotiations under multiple state laws unnecessarily complex.”); *id.* at 99 (statement of Peter H. Karlen, Attorney at Law) (noting the problems with “cases involving interstate shipments and uncertainty about application of various laws”).

Although these jurisdictional issues are beyond the scope of this Comment, it is important to keep them in mind when discussing the full implications of moral rights granted by many individual, varying state statutes.

136. See H.R. REP. NO. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919 (“[VARA] creates a uniform Federal system of rights for certain visual artists. This system is akin to the uniform copyright system codified in the 1976 Copyright Act.”).

effective date, VARA's provisions are considered coextensive with those of the Copyright Act.<sup>137</sup> However, the preemption exception remains in effect, prohibiting preemption for "activities violating legal or equitable rights which extend beyond the life of the author."<sup>138</sup> Thus, in cases in which the artist's estate retained title to works created before VARA, the administrator may look to both VARA and state statute protections of moral rights.<sup>139</sup>

In allowing an artist's estate to assert claims based on both federal and state laws, VARA creates confusion about the scope of moral rights afforded an artist's estate. A dispute involving conflicting heirs is a particularly compelling example of the context in which dual coverage by federal and state moral rights statutes could create acute problems for the courts and even the estate-planning artist during her lifetime.

If the artist's heirs dispute the ownership of postmortem moral rights, a court would have to decide which law—federal or state—covers the right in question. In many cases, two or more of these laws may directly conflict. Such would be the case, for example, regarding the moral rights provision in a state like Massachusetts that grants moral rights to artists for "any original work of visual or graphic art of any media [*sic*] which shall include, but not [be] limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof."<sup>140</sup> In Massachusetts, a work such as a hand-crafted puppet would likely fall under the protection of the state statute. However, VARA, as interpreted in *Gegenhuber*, would then prohibit protection of the puppet.<sup>141</sup> If the heirs of a puppet's creator sought to prevent alteration or other moral rights violations, they could claim a remedy under Massachusetts law (assuming they could satisfy the other requirements of the Massachusetts statute) while they would explicitly be denied a remedy under federal law as interpreted by the *Gegenhuber* court. Heirs who disagree over who owns the moral rights to the deceased artist's works might

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137. 17 U.S.C. § 106A(d)(2) (2000).

138. *Id.* § 301(f)(2)(C).

139. As *Nimmer on Copyright* suggests, this concurrent coverage will lead to confusion. As an example, he describes a

hypothetical 1980 painting to which the artist retained title, both its copyright and its artists' rights protection last until 2050. State law protection equivalent to the artists' rights is pre-empted during the artist's lifetime. But following the artist's death in 2000, that pre-emption ceases. The result is that from 2000 to 2050, the same work is subject to protection under the Visual Artists Rights Act, under other federal laws such as the Lanham Act, and under applicable state law.

NIMMER & NIMMER, *supra* note 101, § 8D.06[F][2].

140. MASS. ANN. LAWS ch. 231 § 85S(b) (Law. Co-op. 2002); see Damich, *State Statutes*, *supra* note 31, at 299.

141. See *Gegenhuber v. Hystopolis Prods., Inc.*, No 92-C1055, 1992 WL 168836, at \*11 (N.D. Ill. July 10, 1992); see also the discussion *supra* Part I.D.3.

seek a judicial determination of ownership, particularly when they disagree about whether some specific alteration or attribution should be allowed or not.<sup>142</sup> Each of the parties could legitimately cite statutory authority for his or her position.<sup>143</sup>

#### 4. The Arbitrary Nature of Postmortem Protection Under VARA

Another complication is that VARA protection does not expire at the moment the artist dies. Rights extend to the end of the calendar year in which the artist dies. It is unclear why this would be the case unless VARA was intended to allow heirs to bring an action after the artist's death.<sup>144</sup> If so, heirs may enforce postmortem rights under both VARA and state laws for variable periods, depending on what point in the calendar year the artist died. This can create significant inequities in addition to the problems of concurrent federal and state coverage. For example, in a state without its own moral rights statute, the heirs of an artist who dies on January 2 can use VARA to prevent others from harming the artist's work for nearly an entire year after the artist's death. However, the heirs of an artist who dies on December 31 can only sit by and watch while others destroy, mutilate, alter, or claim authorship for the deceased artist's work because their rights under VARA expire the same day as the artist's death.

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142. Such a situation could easily arise when an exhibition would require the museum or other site of exhibition to make alterations to fit the exhibition space, or décor. Alternatively, one heir may want to sell individual pieces of the work while the other wants to preserve the whole. See, e.g., John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1023 (1976).

143. Another source of conflict is the question of who may enforce the artist's postmortem rights. Some states, like Massachusetts and New Mexico, allow the attorney general to assert the rights on behalf of the artist. Damich, *State Statutes*, *supra* note 31, at 324 n.163. VARA, on the other hand, does not specify exactly who may enforce the rights after the artist dies. See Damich, *Toward a Federal System*, *supra* note 36, at 992. Most likely, postmortem rights will follow the usual laws transferring valuable rights to the artist's heirs. See H.R. REP. NO. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919. Thus, in enforcing the rights of an artist who retained title to a pre-VARA work, the attorney general of Massachusetts or New Mexico may find that the concurrent federal law prohibits his intervention. Conflict may arise in a situation similar to that already stated when the attorney general and the artist's heirs have different intentions about allowing or prohibiting alteration or attribution of a work.

144. See Zuber, *supra* note 26, at 488 (discussing the possible results of the end-of-calendar-year provision).

## 5. Non-VARA Preemption of State Postmortem Rights

Further complicating the reversion to state statutes for postmortem moral rights is the possibility that these state statutes may be preempted by other federal laws, most notably the rest of the Copyright Act.<sup>145</sup>

While certain sections of a state moral rights statute, like the California Art Preservation Act's, prevent "physical defacement, mutilation . . . or destruction of a work of fine art," *Nimmer on Copyright* suggests that the state right that allows artists to prevent alteration of their work may "be precisely 'equivalent' to the right under the Copyright Act 'to prepare derivative works based upon the copyrighted work.'"<sup>146</sup> The treatise proceeds to explain that even though other parts of the California statute, like the right to prevent defacement or mutilation, may appear to remain intact after preemption, "[i]t could even be persuasively argued further that because only subjective aesthetic judgment determines whether any given alteration constitutes a 'defacement or mutilation,' it follows that these rights should also be deemed pre-empted."<sup>147</sup>

Others suggest, however, that because state moral rights protect personal rather than economic interests, and because Congress relied on state statutes to provide compliance with Berne during the debates on accession, the Copyright Act should preempt little, if any, state moral rights law.<sup>148</sup> Furthermore, the legislative history suggests that Congress wanted the postmortem state statutes to survive in order to comply with Berne in the area of postmortem moral rights as evidenced by their desire for limited preemption power over state grants of moral rights.<sup>149</sup>

Because the question of preemption by the Copyright Act is unresolved and preemption is usually a difficult area in which to predict judicial

145. See 2 PATRY, *supra* note 84, at 1057–58.

146. NIMMER & NIMMER, *supra* note 101, § 8D.07[C].

147. *Id.*

148. See Damich, *State Statutes*, *supra* note 31, at 337–38.

149. See 136 CONG. REC. H13,314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier). During the discussion of VARA, Representative Kastenmeier stated:

Because the act terminates the rights it confers in works created on or after its effective date at the death of the author, it is necessary expressly to provide for the postmortem continuation of some aspects of the rights of attribution and integrity. The approach taken by the Senate is to provide that State and common law rights that survive the death of the author are not preempted by the system of rights created by the act. . . . By so doing, we leave undisturbed the preexisting law based upon which the Berne Implementation Act of 1988 dealt with the general question of artists' rights.

*Id.*; see also Laura Nakashima, Comment, *Visual Artists' Moral Rights in the United States: An Analysis of the Overlooked Need for States to Take Action*, 41 SANTA CLARA L. REV. 203, 212 (2000).

outcomes,<sup>150</sup> and because preemption might occur as to some clauses of a state law but not others, protection of postmortem moral rights under state laws is at best unreliable.

B. The Results of Variation in Moral Rights Are Unjustifiable and Inefficient

Given the goals of VARA, the uncertain state of postmortem rights is inefficient and unjustifiable. Congress enacted VARA for a variety of political and ideological reasons. As noted in Part I, the legislation was enacted after the United States acceded to Berne by questionably using various existing laws, including state moral rights statutes, to justify its compliance with the Berne's moral rights requirement. Throughout the legislative process, many advocates of moral rights argued for a uniform system that would set clear rules and boundaries for the enforcement of moral rights.<sup>151</sup> Presumably, uniformity would make it easier for artists to bring claims since the law would be established throughout the country and geographical distinctions would play a minimum role in enforcement.<sup>152</sup> Finally, the new law sought to promote the personal rights and integrity of artists as well as to preserve for posterity the valuable culture of the United States. The fact that there are a variety of circumstances that the estates of deceased artists may face, including questions about choice of law or the type of harm suffered, shows that VARA's provisions fail to fulfill the political and ideological purposes of the legislation.<sup>153</sup>

1. Berne Convention Compliance

The United States acceded to the Berne Convention using existing laws such as state moral rights statutes as a basis for claiming compliance with Berne's moral rights requirements.<sup>154</sup> Against this backdrop, Congress enacted VARA to ensure full compliance in the face of claims that compliance through existing laws was insufficient.

Like those in France, true moral rights are ideally perpetual.<sup>155</sup> However, the Berne convention requires only that "[t]he rights [of integrity and

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150. See generally Davis, *supra* note 103 (outlining the Supreme Court's various approaches to preemption).

151. See, e.g., *supra* Part I.C.2.

152. See Davis, *supra* note 103, at 1016–17.

153. See *supra* Part I.

154. See *supra* Part I.C.1.

155. See LERNER & BRESLER, *supra* note 17, at 948. The authors note:

attribution] granted to the author, after his death, be maintained, at least until the expiration of the economic rights.”<sup>156</sup> The same clause also maintains that

those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.<sup>157</sup>

Since Berne requires the protection of only two rights—integrity and attribution—the United States need protect only one of the two rights after the death of the artist.<sup>158</sup>

While state law may supply postmortem rights in some cases, VARA does not extend either integrity or attribution rights for the duration of the economic rights, currently the life of the author plus seventy years.<sup>159</sup> As Edward Damich indicates, “[t]he Act confines the term of moral rights to the life of the author in direct contradiction to article 6bis which requires that moral rights last as long as economic (copyright) rights.”<sup>160</sup> The patchy, motley assortment of postmortem rights granted in some cases by VARA, but mostly by individual state statutes, certainly does not guarantee that all artists in the United States have moral rights lasting until the expiration of the economic rights. The fact that it remains unclear whether the Copyright Act preempts some of the state moral rights laws makes the existence of postmortem moral rights via state moral rights legislation even more tenuous.<sup>161</sup>

French law, Mexican law, and Nigerian law clearly provide that the *droit moral* is perpetual. Although that right may contradict the tenet that the *droit moral* vests solely in the person of the creator of the work, such laws distinguish between the moral right itself and the right to exercise it. Thus, the artist’s heirs inherit only the right to exercise the prerogative, not the prerogative itself. . . . Generally, the rights of authorship and of integrity survive the author.

*Id.*

156. Berne Convention, *supra* note 8, art. 6 bis(2). “[T]he use of the words ‘at least,’ makes it clear that it is a minimum obligation.” Sherman, *supra* note 41, at 385 n.70.

157. Berne Convention, *supra* note 8, art. 6 bis(2).

158. See Sherman, *supra* note 41, at 385–86; see also *id.* at 385 n.70 (citing SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, at 456 (1987)).

159. The Supreme Court recently upheld this “life plus seventy years” term as constitutional. See *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

160. Damich, *Toward a Federal System*, *supra* note 36, at 947.

161. See Damich, *State Statutes*, *supra* note 31, at 655–56.

## 2. Uniformity

While VARA may seek to create a uniform source and set of moral rights during the lifetime of the artist, Representative Markey's "hodge-podge" of state statutes appears again after the death of the artist when the artist's heirs may again look to state provisions to enforce moral rights. The purpose of having a single federal provision that preempts all equivalent state protection is to ensure that the federal government is the one and only source of certain moral rights.<sup>162</sup> Under a uniform federal system of rights, artists would know where to look to determine their rights and would have a clear idea of what they are entitled to protect. Because protecting an artist's moral interests after death is mandated by Berne, and because such protection currently exists in many states, the reasons for seeking uniformity during the life of the artist do not disappear once the artist dies.

Uncertainty about the source and scope of postmortem moral rights can lead to many inefficient outcomes. First, many may not be aware of the existence of postmortem rights, even if they are aware of the existence of VARA. This is particularly true because recognition of moral rights is a fairly new concept in the United States<sup>163</sup> and may seem to contradict American perceptions of absolute property rights. Unlike a cause of action for another "personal" right, defamation, which is a long-recognized tort claim that exists in every state,<sup>164</sup> a claim based on moral rights is an innovation in the United States that is much more prevalent in foreign countries.<sup>165</sup> Second, because of the uncertainty about the scope of postmortem rights in different states, it is difficult to predict which rights an artist's estate will retain after her death: It is often unclear where the art will be located when the artist dies, where the artist will have been domiciled and where the alteration, destruction, or misattribution will have taken place. Even if an artist could predict these locations during her lifetime, it may be unclear which state's law would apply in a given situation. Does the state law of the artist's domicile apply since it is where her estate was injured? Or, does the state law of the place where the art was altered, misattributed,

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162. See Davis, *supra* note 103, at 1017–18.

163. See LERNER & BRESLER, *supra* note 17, at 950–59.

164. See Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1525–32 (1989). In addition, defamation laws avoid confusion because "the centuries-old rule against liability for defamation of dead people kicks in automatically. The rule's greatest virtue is that there are no exceptions: either you're dead or you're not." *Id.* at 1525–26; see also Damich, *State Statutes*, *supra* note 31, at 157 (comparing moral rights with defamation).

165. See LERNER & BRESLER, *supra* note 17, at 943–44; Kwall, *supra* note 32, at 2.

or destroyed apply?<sup>166</sup> All of these issues may affect what state law ultimately governs the heirs' claims.

Without knowing the answers to these questions, artists will have a difficult time making the right decisions about selling their art, choosing their media, and selecting their heirs to ensure that their art endures beyond their lifetimes.<sup>167</sup> Such uncertainty requires artists, their estates, and art owners to invest resources in attempting to determine what laws apply in order to plan for whatever a court may or may not decide. This is the very situation that advocates of uniformity seek to avoid.

### 3. Personal Rights

An artist's personality lives on and may even grow in recognition after she dies. In fact, artists' contributions to a country's culture and art historical traditions are often not fully recognized until after their death. It is important that the true intent and meaning of the artist's work remain intact, as the artist intended, even after she dies. Therefore, the integrity of her personality and work should extend beyond her death as well. Such is the case in France, where moral rights are perpetual.<sup>168</sup>

Yet, because VARA does not guarantee these postmortem rights, heirs of artists in this country may have a difficult time enforcing moral rights after the death of the artist. For many of the same reasons already mentioned, the "hodge-podge" of state postmortem rights is an unreliable source

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166. See *supra* note 135 (noting the many jurisdictional and choice of law problems arising from differing state laws).

167. It is easy to conceive of an art owner who buys a watercolor by a recently deceased artist during a trip to New York and brings it back to his Minnesota domicile. Once the artwork is home, he decides that it is too large to fit over his mantelpiece. He takes it to a frame shop where he tells the framer to cut the watercolor down by a few inches on either side to make it fit its assigned spot. Several weeks later, in hope of displaying the work in a retrospective in the artist's home state of California, the children of the artist discover that the work has been intentionally altered and mutilated. This scenario illustrates the difficulty in predicting where a work of art may be at any given time and the potential involvement of the laws of several states.

168. See Damich, *State Statutes*, *supra* note 31, at 323. In fact, the heirs to moral rights find these rights to be quite profitable, as they are often consulted for authentication and settlement of any legal action questioning its authenticity. See John Henry Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445, 446 (1995).

But, some argue that, much like defamation, once the artist dies, he or she can no longer be injured by harm to his work and reputation. See Damich, *State Statutes*, *supra* note 31, at 323; see also Zuber, *supra* note 26, at 488 n.291. However, as Professor Damich explains, "[w]hichever view is correct, since we have adopted the Berne Convention as an example of substantial protection of moral rights . . . [the duration] should be the same as that for the economic rights." Damich, *State Statutes*, *supra* note 31, at 323. Professor Damich also notes the tradition of personal rights in U.S. laws regarding the right of privacy and other torts. See *Senate Hearings*, *supra* note 32, at 31-33 (statement of Edward J. Damich).

of rights. If the only state where the heirs may bring the claim (1) does not cover the alteration or attribution in question, (2) does so but does not allow postmortem enforcement, or (3) is deemed preempted by federal copyright law, then the heirs may have no recourse against the injury.<sup>169</sup>

This system clearly does not provide the protection that the original doctrine of moral rights seeks to guarantee. Thus, the current scheme that allows postmortem reversion to state law does not promote one of the key functions of moral rights—perpetual, or at least extended, protection of the artist's personality.

#### 4. Art Preservation

While VARA was making its way through Congress, many of its supporters claimed that the Act would help preserve art. Senator Kennedy urged his colleagues to pass VARA, stating, "Visual artists create unique works. If those works are mutilated or destroyed, they are irreplaceable."<sup>170</sup> The current system that relies on a variety of different sources for postmortem rights fails to serve a foundational purpose of moral rights—art preservation.

First, an artist will not be able to make reliable decisions about how best to ensure that her work will exist for posterity as she intended. Under the current system, an artist who lives in a state without moral rights does not have rights to assign after her death. Even if the artist's heirs find that they can enforce her moral rights in another state, perhaps where the work was altered or mutilated, the heirs will not necessarily be the parties most sympathetic to the artist's intent or interests. Or, an artist who takes all measures to ensure that her art is protected by trustworthy heirs after her death, and who works in a medium that she believes will be covered under most states' postmortem moral rights legislation, may end up planning for naught if a violation is governed by the law of a state that does not include moral rights or that terminates protection upon the death of the artist. Many questions like the ones above will end up being fact-specific and will depend on the particular court that decides them—certainly not reliable methods for ensuring protection of art.<sup>171</sup>

Given the uncertainty of securing postmortem moral rights, the "hodge-podge" of state statutes leaves the relevant public without a clear sense of the law. This is particularly problematic in the United States because moral

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169. Again, they may rely on the methods of moral rights enforcement used before the state statute or VARA came into existence. However, these will likely lead to only limited success as they did before VARA.

170. 136 CONG. REC. S17,574 (daily ed. Oct. 27, 1990) (statement of Sen. Kennedy).

171. See *supra* note 135.

rights may seem counterintuitive to Americans who believe in absolute property rights.<sup>172</sup> If the public is not aware that postmortem alteration or destruction is prohibited in certain states, because neither the federal law nor their own state's law prohibits it, there is no deterrence mechanism to stop those set on changing, destroying, or misattributing art. Just as Senator Kennedy noted that federal legislation on the subject will make the population more aware of moral rights, so too is the opposite true—an inadequate legislative scheme will promote public ignorance of the issue and will thus be more likely to result in alteration, mutilation, destruction, or misattribution.

The combination of artists uncertain about their rights and a public ill-informed about the law creates a precarious system of protection. Mutilation, alteration, destruction, and false attribution are more likely to occur without uniform, guaranteed postmortem protection.<sup>173</sup>

### III. POSSIBILITIES FOR A COHERENT SYSTEM OF POSTMORTEM RIGHTS

#### A. Extend VARA and Preemption

The most obvious solution to the problems created by VARA's preemption and duration provisions is to amend VARA to extend federal moral rights to last for the life of the artist plus seventy years.<sup>174</sup> Extending preemption for this period would also eliminate the problem of concurrent federal and state coverage, as is the case for works created before VARA and owned by the artist. Creating this one uniform source of postmortem moral rights would solve many of the problems discussed above.

First, the provision would comply with Berne because the rights would last for the duration of economic rights under the Copyright Act.<sup>175</sup> Second, there would be a uniform source of authority and rights for all artists to look to during their lifetime and their heirs would look to the same source for postmortem enforcement. The variations from state to state or between dead and living artists in the same state would be eliminated. Uniformity and certainty would prevail.

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172. See *supra* note 18 and accompanying text.

173. See Damich, *Toward a Federal System*, *supra* note 36, at 993 (“[I]nsofar as moral rights protection indirectly benefits art preservation, perpetual protection is appropriate.”).

174. See *id.* (supporting an extension for the life of the artist plus fifty years, the duration of copyright protection at that time); see also Sherman, *supra* note 41, at 427–28 (supporting an extension for the life of the artist plus fifty years).

175. See Damich, *Better off After VARA?*, *supra* note 90, at 993.

This extension would also come closer to protecting the scope of true moral rights, which are intended to be perpetual.<sup>176</sup> Artists could be sure that as long as trusted representatives exist to enforce their rights,<sup>177</sup> their work would survive mutilation, alteration, or false attribution, as described in VARA. Ultimately, this would fulfill the policy of protecting personality and reputation.

However, this extension would still be less than ideal because VARA's preemption provision may provide much narrower protection than many state statutes, as state statutes "[a]s a whole . . . more completely embody the basic rights of attribution and respect."<sup>178</sup> While some believe that additional state rights above and beyond those provided by VARA only enhance VARA's moral rights protection,<sup>179</sup> a broader reading of the preemption provision could very well render any state rights to attribution or integrity useless if extended after the death of the artist.<sup>180</sup>

In its current form, VARA allows artists in states with more generous moral rights provisions that extend beyond the death of the artist to have at least the chance for greater protection of their work after their deaths. Artists would likely not appreciate looking to VARA as the only source of postmortem rights because of its potentially restrictive nature.

#### B. Narrow Preemption and Encourage State Statutes

Another solution may lie in a two-pronged combination of adjustments. The first prong would include encouraging courts to adopt a narrow reading of VARA's preemption provision.<sup>181</sup> This would ideally preempt only closely identical rights. Any state that had greater coverage would still allow artists to assert state rights that extend beyond the scope of VARA. Thus, living and dead artists in the same state would have roughly similar coverage and would be able to reap the full range of benefits of the state legislation.

This approach would also include as a second prong a campaign for state legislation across the country.<sup>182</sup> Advocates could encourage states without

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176. See, e.g., *Senate Hearings*, *supra* note 32, at 38–39 (statement of Edward J. Damich).

177. See Damich, *Toward a Federal System*, *supra* note 36, at 992 (questioning whether VARA would allow postmortem transfer to someone other than the artist's heirs).

178. Damich, *Better off After VARA?*, *supra* note 90, at 959.

179. See 136 CONG. REC. H13,314 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier).

180. H.R. REP. NO. 101-514, at 21 (1990); see also Zuber, *supra* note 26, at 495.

181. See Damich, *Better off After VARA?*, *supra* note 90, at 956–57; see also Damich, *Toward a Federal System*, *supra* note 36, at 972–73 (encouraging a narrow interpretation of preemption).

182. See generally Nakashima, *supra* note 149 (suggesting supplementing VARA protection through state statutes).

moral rights legislation to enact laws that create broad moral rights for both the living artist and her heirs and urge states that already have moral rights provisions that terminate at the death of the artist (for example, New York) to amend those statutes to provide postmortem protection. A model code or statute would provide a good place for these states to look in enacting their legislation.

Encouraging this legislation would still result in discrepancies in post-mortem rights among states. For example, New York may still have requirements for publication or display that California does not. However, artists would have a uniform place to look to determine their possible state law rights—the state laws.<sup>183</sup> Those who did not know about moral rights or the fact that they may last beyond the life of the artist would have a source of authority within their state to discover this information. While this may not solve the problem of pre-VARA works retained by the artist, who would still have concurrent state and federal protection, it would certainly create postmortem rights across the country and thus move towards greater compliance with Berne.

Also, because art would be protected at some minimum level all across the country once the artist dies,<sup>184</sup> there would be uniformity in artists' expectations of some form of postmortem protection. These expectations would also promote the personal rights of artists and the preservation of their works after they die since every artist in the country would have some source to turn to for enforcement of their rights. Though not all works of art would be covered in all states, an artist could gain a greater sense of the scope of artistic protection and therefore plan accordingly (for example, creating a painting on canvas rather than on a utilitarian clock or vase, because all states protect oil paintings on canvas while only some protect applied art like decorative clocks).

These gradual, smaller provisions may be more practical and viable than an overhaul on the federal level. Furthermore, they likely would not infringe on the scope of any postmortem rights artists currently believe they and their estates will have under state moral rights statutes once they die (and VARA coverage and preemption end).

However, a fundamental flaw with this solution is the fact that state rights might be preempted by other federal laws like the rest of the Copyright

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183. Of course, this would not end the problem of concurrent federal and state rights under the provision applicable to those retaining title to works created before VARA.

184. Damich asserted a similar argument in the VARA hearings for federal coverage during the artist's lifetime. See *Senate Hearings, supra* note 32, at 43 (letter from Edward J. Damich to Sen. Dennis DeConcini).

Act. In this case, the state postmortem protections might have limited application if many important rights were preempted after the artist's death.

### C. Proposal

Given that the two possible solutions discussed previously each poses its own problems for a unified system of postmortem moral rights, the best solution should seek to minimize the restriction of rights. Therefore, I propose continuing VARA coverage and its accompanying preemption provisions for the duration of the economic copyright, much like the original House and Senate bills did. This would be a more radical step than gradual reform through courts and state legislatures but it would ensure that there is a uniform system of reliable postmortem rights that complies with Berne. Ultimately, the guarantee of even limited rights under VARA would be preferable to ineffective, preempted state legislation that nevertheless varies from state to state.

## CONCLUSION

Situations in the art market have changed significantly since the enactment of VARA. Over the past decades, the Internet has changed nearly all aspects of commerce, including the art market. Websites such as eBay and Sotheby's.com have brought artists and collectors to the Internet.<sup>185</sup> Furthermore, the art market has been particularly strong in the past several years.<sup>186</sup> These phenomena suggest an increasing awareness of rules and problems of the art world by artists, experts, owners, and lay people alike. In particular, websites such as the site for the National Endowment for the Arts explain VARA and other legal issues at the click of a mouse.<sup>187</sup> Others in the art world are learning about VARA from members of the legal community and through professional organizations.<sup>188</sup>

This combination of factors indicates that even though there has not been extensive litigation under VARA to date, protection of moral rights will remain vital to a growing segment of the population. Thus, it is increasingly important that legislatures and courts make a commitment to clarifying moral rights protection in the United States. Rethinking the adequacy of

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185. See, e.g., *Revenge of the Nerds*, FORBES, Dec. 25, 2000, at 184 (indicating that many prefer the information at online auction sites to the brick-and-mortar auction houses).

186. See Brooks Barnes & Alexandra Peers, *Impressionist, Modern Art Sales Raise \$67.5 Million at Christie's*, WALL ST. J., Nov. 7, 2002, at B4 (noting that even though the art market has softened recently, it remains solid).

187. See ESWORTHY, *supra* note 121.

188. See, e.g., BEYOND COPYRIGHT: DO ARTISTS HAVE RIGHTS? A PANEL DISCUSSION OF THE VISUAL ARTISTS RIGHTS ACT (VARA), at <http://www.studiolo.org/CIP/VARA/CIP-VARA.htm>.

the postmortem rights scheme created by VARA is an attainable first step in the process.

After VARA was enacted, many authors praised the legislation's support of moral rights, despite acknowledging the legislation's many shortcomings.<sup>189</sup> Many saw VARA as merely the beginning of a moral rights tradition in the United States.<sup>190</sup> Given the ways that the single issue of postmortem protection directly conflicts with the purposes of the legislation, the area of postmortem rights is a good place to begin in progressing towards a truly coherent tradition of moral rights in this country.

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189. See, e.g., Damich, *Toward a Federal System*, *supra* note 36, at 947; Zuber, *supra* note 26, at 508.

190. See, e.g., Brown, *supra* note 94, at 1031; Kwall, *supra* note 32, at 52.

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