



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

NOTICE OF HEARING AND REQUEST FOR PUBLIC COMMENT

REQUEST FOR COMMENTS ON THE WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. 95-5]

Request for Comments on the Waiver of Moral Rights in Visual Artworks

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of hearing and request for public comment.

SUMMARY: The Copyright Office is holding a public hearing to solicit comments on the effect of the waiver of moral rights provision of the Visual Rights Act of 1990 (VARA). Section 608 of VARA requires the Copyright Office to study the effect of VARA's waiver provision and to publish its findings. To fulfill the statutory obligations of section 608, the Copyright Office is examining the extent to which authors waive moral rights in their visual artworks under the waiver provision. The Office also will accept written comments.

DATES: The public hearing will be held on Wednesday, June 21, 1995, from 10:00 a.m. to 4:00 p.m. Requests to present oral testimony at the hearing should be received on or before June 16, 1995. Written comments by those persons testifying at the hearing should be received on or before June 19, 1995. All other written comments must be received on or before July 31, 1995.

ADDRESSES: Interested parties should submit written comments and requests to present oral testimony by mail to Marilyn J. Kretsinger, Acting General

Counsel, Copyright Office GC/I&R, P.O.* Box 70400, Southwest Station, Washington, D.C. 20024, or by hand delivery to the Office of General Counsel, Copyright Office, James Madison Memorial Building, Room LM 407, First Street and Independence Avenue, S.E., Washington, D.C., or by Telefax: (202) 707-8366. The hearing will be held in Room 414, which is located on the fourth floor of the Library of Congress, James Madison Memorial Building, First Street and Independence Avenue, S.E., Washington, D.C. Written comments and a transcript of the hearing will be available for public inspection in the Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First Street and Independence Avenue, S.E., Washington, D.C.

FOR ADDITIONAL INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, Copyright Office GC/I&R, P.O.** Box 70400, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8389. Telefax: (202) 707-*** 8366.

SUPPLEMENTARY INFORMATION: On December 1, 1990, President Bush signed into law the Visual Artists Rights Act (VARA), which was codified as section 106A of title 17 of the United States Code and went into effect on June 1, 1991. VARA grants certain visual artists the moral right of attribution, which is the right to claim or disclaim authorship of a

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work, and the moral right of integrity, which is the right to prevent any intentional distortion, mutilation or other modification of a work which is prejudicial to the artist's reputation or honor and to prevent the destruction of a work of recognized stature by any intentional or grossly negligent act. VARA also provides that these rights may not be transferred but can be waived.

The waiver provision was the most controversial portion of VARA. Congress was concerned that artists might be compelled to waive their rights of integrity and attribution. This concern is detailed in the House Report:

The Committee intends to ensure that the waiver provisions serve to facilitate current practices while not eviscerating the protections provided by the proposed law. It is important, therefore, for the Congress to know whether waivers are being automatically obtained in every case involving a covered work of visual art, whether any imbalance in the economic bargaining power of the parties serves to compel artists to waive their rights, and whether the parties are properly adhering to the strict rules governing waiver.

H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990).

To address this concern, when Congress passed VARA it included section 608, requiring the Copyright Office to study the waiver provision to determine whether artists' contracts routinely provide for waiver of moral rights. Specifically, section 608 requires the Copyright Office to study the extent to which the rights conferred by VARA are being waived by visual artists and to present its findings to Congress in an interim report which was submitted on

December 1, 1992, and in a final report which must be submitted by December 1, 1995. The Copyright Office is in the process of preparing this final report.

I. Background

On March 1, 1989, the United States acceded to the Paris text of the Berne Convention for the Protection of Literary and Artistic Works. Article 6bis of the Berne Convention requires countries to provide protection of the moral rights of paternity and integrity.¹ During the debate on adherence to the Berne Convention, some argued that the United States needed to enact specific moral rights legislation. The vast majority of those seeking adherence contended that existing laws, both Federal and State, statutory and common, were sufficient to meet the requirements of the Berne Convention. Congress agreed with the majority and therefore did not include any substantive moral rights provisions in the Berne Convention Implementation Act. H.R. Rep. No. 514, 101st Cong., 2d Sess. 7-8 (1990).

Congress acknowledged that adherence to the Berne Convention did not end the debate about whether the United States should adopt artists' rights laws and it did enact such a law in 1990; through VARA it created a uniform Federal system of rights for certain visual artists.

The scope of VARA is very narrow; it applies only to works of fine art which are identified as "works of visual art." A "work of visual art" as defined in the Copyright Code includes any painting, drawing, print, sculpture, or still photographic image produced for exhibition purposes, produced in a single copy or an edition of 200 or fewer if signed and consecutively numbered by the artist. 17 U.S.C. 101 (1990). VARA specifically excludes works for hire, motion pictures and other audiovisual works, and works of applied art.²

If a work qualifies as a "work of visual art" the author of that work is granted two rights: the right of attribution and the right of integrity. The

right of attribution gives the visual artist the right to be named as author of a work; the right to prevent use of his or her name as author of a work he or she did not create; and the right to prevent the use of his or her name if the work has been distorted, mutilated or modified in a manner that would be prejudicial to the artist's honor or reputation. 17 U.S.C. 106A(a) (1990). The right of integrity allows the artist to prevent intentional distortion or modification of the work that would be prejudicial to the artist's honor or reputation, and to prevent destruction of a work of recognized stature. *Id.*

The rights granted by VARA are not absolute. The integrity rights are subject to special provisions if the work of visual art is incorporated into or otherwise made part of a building. Where such a work of visual art cannot be removed from the building without being damaged or otherwise modified, the moral right of integrity in section 106A will apply unless the work was installed in the building before the effective date of VARA or the artist signed a written agreement acknowledging that the work may be damaged or modified when it is removed from the building. 17 U.S.C. 113(d)(1) (1990). If the work of visual art can be removed from the building without damage or modification, the moral rights in section 106A will apply unless the owner of the building complies with special notice requirements. See 17 U.S.C. 113(d)(2) (1990).

Another limitation on the rights granted by VARA concerns their duration. Despite Berne's general requirement that the term of protection for moral rights be at least coextensive with the term of protection for economic rights, which is the life of the author and fifty years after the author's death, VARA rights endure only for the life of the artist, or where the work is a joint work, the life of the last surviving artist. 17 U.S.C. 106A(d)(1990).

The subject of the study is waiver of the rights of integrity and attribution. Congress explicitly provided that the moral rights of integrity and attribution may be waived. 17 U.S.C. 106A(e) (1990). For a waiver to be valid it must be expressly agreed to in a written instrument that is signed by the artist and that specifically identifies the work and the uses of the work to which the waiver applies. 17 U.S.C. 106A(e)(1) (1990). A waiver will apply only to the work and uses identified in the written instrument. *Id.*³ In the case of a joint

³VARA does not permit blanket waivers and prohibits the specific person to whom the waiver is made from transferring the waiver to a third party. H.R. Rep. No. 514, 101st Cong., 2d Sess. 18-19 (1990).

work, a valid waiver by one author constitutes a waiver of the rights for all joint authors. *Id.*

The Copyright Office published a Federal Register notice on June 10, 1992, requesting information and inviting public comment on the moral rights waiver provision in VARA. 57 FR 24659 (1992). In response to this notice, the Copyright Office received a total of seven comments.⁴ Although the comments were helpful, most of them were very brief. At the time of the interim report, VARA had been in effect for only two years and there were few, if any, measurable effects of the waiver provision. The comments of the seven parties are summarized in the interim report, submitted to Congress on December 1, 1992.

II. Current Status of the Copyright Office Study

The results of the interim study demonstrated that obtaining information from artists on their experience with the waiver provision for the final report would be a major challenge. The Copyright Office thus began an extensive outreach program aimed at getting factual information on the effects of VARA's waiver provision.

To reach individual artists, the Copyright Office developed a survey questionnaire designed to reveal the effect of VARA waiver provisions on the visual arts community. The survey was modeled in part after the "Volunteer Lawyers for the Arts Visual Artists Rights Act of 1990 Questionnaire" submitted by the Massachusetts Volunteer Lawyers for the Arts in response to the June 1992 Federal Register notice.

One goal of the survey was to determine whether waiver of moral rights provisions are routinely included in art contracts; and, if so, whether this occurs because of the parties' relative bargaining power or for other reasons. Another goal of the survey was to ascertain whether waivers occur only in the context of a written contract, as required by statute, or whether waivers also occur orally.

Following review of the survey by a group consisting of copyright experts and representatives of the art community, the Office revised and distributed the survey questionnaire to hundreds of visual art-related

⁴Comments were received from the Nebraska Arts Council; Professor of Law, John Henry Merryman; the Capital Arts Center/BG-WC Arts Commission; the General Services Administration; the Committee for America's Copyright Community; Volunteer Lawyers for the Arts of Massachusetts, Inc.; and Volunteer Lawyers for the Arts of New York.

organizations. These organizations consisted primarily of state art councils, volunteer lawyers for the arts associations, and art schools and universities. Altogether, the Copyright Office mailed out more than 6,800 surveys. The actual number of surveys distributed was far greater, however, because many of the surveys were duplicated by the recipient organizations and distributed to still others in the visual arts community.

III. Preliminary Analysis of VARA Survey

By May 15, 1995, the Copyright Office had received 1063 completed surveys. Our final report to Congress will include a detailed analysis of survey results, but a preliminary analysis of 985 surveys received by mid-April reveals the following data.

A. Knowledge of VARA.

Even five years after VARA's enactment, survey results indicated that educating artists about their new moral rights is perhaps as critical as the Congressional intent to study the extent to which artists waive these rights. The survey, therefore, fulfilled an educational need. Before receiving the survey, 73 percent of all respondents were aware of moral rights in certain works of visual art. Fifty-eight percent, however, previously were unaware such rights could be waived, and sixty-six percent did not know that waiver requires an express, written agreement. Seventy-nine percent of all respondents said they have not seen contracts that include a waiver provision. Eight percent have waived moral rights in a signed contract, but a full 77 percent have not, and five percent said they did not know.

B. Respondent Profile.

The majority of responses were from artists. Ninety percent of respondents believed they were covered by the survey's definition of "visual artist" (i.e., one who creates a "work of visual art" as defined by VARA). Of these, 58 percent identified themselves as painters (an artist could check as many media as applied). Only eight percent of respondents were not VARA artists: Of these, five percent created art works not covered by VARA, another two percent were art professors, and the remaining were others associated with the arts.

Most respondents did not earn a significant income from their art. More than half have worked under commission, but 68 percent earned less than \$10,000 from their art in an average year. Five percent claimed income between \$25,000 - \$40,000, and nine percent said their art-related income

exceeded that amount. Roughly half were represented by a gallery or agent, but 42 percent had no repression.****

C. Willingness to Waive Moral Rights.

Forty-four percent of artists indicated they were unwilling to waive moral rights in the future. Seven percent would waive such rights; 36 percent did not know whether they would waive these rights, and 123 artists declined to say.

Of seventy-nine individuals who had waived the right of integrity or attribution in a signed contract, 42 said they did so to gain exposure and 37 said they did so to make a sale. Eleven percent had declined a contract because it included a waiver clause, and 13 percent had insisted such a clause be struck before signing. Most artists (58%) did not know whether rejecting a waiver would cost them the contract, but some (15%) thought it would. Eighty-one percent had never been pressured to waive moral rights, but six percent had.

IV. Subject Matter to be Addressed at the Public Hearing

To supplement the information gathered through the survey, the Copyright Office will hold a public hearing to solicit comments on the effect of the waiver of moral rights provision in the Visual Artists Rights Act. We anticipate that the hearing will provide an opportunity to obtain more information on existing practices relating to waivers of moral rights in visual art.

The Copyright Office is also interested in studying actual or model contracts that contain language concerning waiver of moral rights. We would like to see examples of as many visual art contracts as possible, especially those with waivers, and would appreciate any party sending us such contracts.

The Copyright Office specifically invites comments on the following questions:

Awareness of rights. To what extent are artists aware of VARA and the rights of integrity and attribution provided by VARA? Has awareness of VARA increased? Please give examples.

Extent of waiver. Are waiver of moral rights provisions routinely included in artists' contracts? Do parties that obtain waiver of moral rights in a contract exercise the waiver or is a waiver secured merely as an "insurance policy"? Does waiver vary depending on the nature of the work? For example, are mobiles and sculptures treated differently than paintings and prints? Does it vary based on the location of the work, for example,

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murals that are part of buildings? What experiences have artists had with owners of buildings? Does it vary depending on the purchaser? Does it matter whether the purchaser is a national or regional institution, an owner of a public or private building, an art collector or investor? Please give examples where possible.

Contract specifics. What is the economic effect of a waiver in the course of contract negotiations? Is there any evidence on how much a waiver is worth—that is, how much more a purchaser would pay if the artist waived the right? Are there proportionately more waivers given for artistic works that are included in buildings than for other types of works? When a waiver is included in a contract, does the contract specifically identify the work and use for which the waiver applies? What types of contracts include waivers: contracts for sale of work? contracts for transfer of copyright ownership? contracts for commissioned works? contracts that include only a waiver provision? If a waiver is included in a contract, is that waiver limited in duration? If limited in duration, what is the typical term of the waiver?

Artists' concerns. What are the factors artists consider when determining whether to agree to a waiver of moral rights in a contract? Describe any instances where artists were coerced into waiving their moral rights. Has VARA had an effect on commission of visual art?

Do artists have unequal bargaining power when dealing with established galleries and other organizations? If the artist's selling power (demand for his or her works) or reputation affects or determines whether or not waiver will be required, how much experience or how well known does the artist have to be in order to avoid waiver? Give specific examples, if possible.

Experience in other countries. What types of experiences have artists had with moral rights abroad? Are artists asked to waive their moral rights in contracts entered into in foreign countries? If so, in what countries?

Experience with U.S. law. Should moral rights be waivable? Should the provisions of the Visual Artists Rights Act be amended or modified in any way?

The Copyright Office is interested in receiving public comment on these issues and any other issues relevant to the VARA study.

Dated: May 18, 1995

Marybeth Peters,

Register of Copyrights.

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