

§ 106A. Rights of certain authors to attribution and integrity

(a) **Rights of Attribution and Integrity.**— Subject to section [107](#) and independent of the exclusive rights provided in section [106](#), the author of a work of visual art—

(1) 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;

(2) 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; and

(3) subject to the limitations set forth in section [113 \(d\)](#), shall have 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.

(b) **Scope and Exercise of Rights.**— Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) **Exceptions.**—

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section [101](#), and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) Duration of Rights.—

(1) 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.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section [106](#).

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) Transfer and Waiver.—

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

§ 101. Definitions

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A “work of visual art” is—

(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.

A work of visual art does not include—

(A)

(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(d) (1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section [106A \(a\)\(3\)](#), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section [106A \(a\)](#) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section [106A \(a\)\(3\)](#), the author's rights under paragraphs (2) and (3) of section [106A \(a\)](#) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

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Perspective
BAD LAWS MAKE HARD CASES
Thomas F. Berner

OTTO VON BISMARCK once compared legislation to sausage. In order to find the end product palatable, he said, it is best not to observe the process of its creation.

Unfortunately, there is no alternative to such a process. When legislation fails to go through the democratic meatgrinder of opposition, debate and compromise, the end product is often indigestible.

A good example of unprocessed legislation is the Visual Artist's Rights Act of 1990 (VARA). Proposed by Senator Edward M. Kennedy, praised by an uncritical media, passed without debate by a somnolent Congress and signed into law by an oblivious President George Bush, VARA is intended to give painters and sculptors "moral rights" in their creations, rights which continue for the lifetime of the artist, regardless of how often the art has changed hands. Under VARA, artists may prevent the alteration or destruction of their work. Since such alteration or destruction rarely occurs unless the art is installed in a building which is itself undergoing alteration or demolition, it is in the real estate arena that controversies between collector and creator are played out.

The best part of VARA merely federalized a carefully debated law first passed in California and adopted by a number of other states. It required a building owner to notify the artist before altering or destroying a work of art which had been installed in the building. The artist had the right to remove the work within a specified period at the artist's cost. If this were done, the work then belonged to the artist. The building owner's rights were not significantly harmed and the artist had the opportunity to find a more appreciative buyer.

But VARA also created a new right, the ramifications of which were not examined by Congress. If a work of art cannot be removed without altering or destroying it, the artist now has the right to block its alteration or destruction by court order and force the building owner to keep the artwork in place for the artist's lifetime. This means that in certain circumstances the artist has control over what a building owner may do with the building. Although no court has yet ruled on the issue, it also seems likely that so-called "site specific" art, designed especially for a single location, cannot now be moved without the artist's permission, since a move would alter the work of art.

LAST AUGUST, in VARA's first court test, *Carter v. Helmsley-Spear Inc.*, federal Judge David N. Edelstein supported the rights of three artists, John Carter, John Swing and John Veronis against Helmsley-Spear, the owner of a former Macy's warehouse in Queens, which had been converted to other commercial uses. Judge Edelstein ordered

Helmsley-Spear to permit the completion and display of the work and to refrain from all attempts to dismantle or alter it.

There are three aspects of the case which deserve mention:

First, the sculpture is, quite literally, garbage. It is made from tin cans, hubcaps and assorted "found objects" salvaged from dumps. Although testimony differed as to the artistic merit of the work, there is no question about its obtrusiveness. It dominates the lobby, with a tin can astronaut dangling from the ceiling, a huge scrap metal fish leaping from the floor, a fluorescent snake slithering out of the walls and mounds of trash pouring from the corners. The elevator, which now resembles an enormous mouth, has penis-shaped call buttons. If the sculpture does not render the building unrentable, it surely makes it more difficult to rent and reduces its rental value. There are few building owners who would willingly burden a capital asset with such a concoction for a lifetime.

Second, the owner did not commission the work. In 1990, the owner, an affiliate of Helmsley-Spear, leased the building to an unrelated limited partnership, which hired the artists. The partnership went bankrupt in 1994 and surrendered the lease to the owner. The owner, upon regaining possession, attempted to remove the sculpture. Contrary to the common law rule that a tenant cannot bind a property beyond the term of its lease, Judge Edelstein found that, under VARA, if a tenant has commissioned art which cannot be removed without altering the work of art, the property is burdened with that artwork long after the tenants' right to use the property has terminated. This will cause landlords to restrict the freedom of tenants to charter artwork.

Finally, the court found that, because the artists were granted significant artistic freedom, the owner had no right to object to the end product. Had the owner or the partnership exercised more control over the artists, the work would have been outside the scope of VARA. This creates a clear incentive to restrict artistic freedom.

In the short term, there will be one winner: tenants with expensive leases from the 1980s who will be able to break those leases by threatening to have Christo wrap the premises with pink cellophane unless their lease is renegotiated. Most leases do not contemplate the impact of VARA, so tenants will have significant bargaining power. It would take a shortsighted landlord to preserve the last few years of a lucrative lease at the cost of rendering the leased premises unrentable for a lifetime.

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IN THE LONG RUN, artists will be the losers. There are several ways in which building owners will avoid the trap that caught Helmsley-Spear. Leases will be rewritten, limiting tenants' rights to install art. Other owners will avoid VARA by controlling the process of creation, treating artwork as just another construction contract and installing the bland corporate, so-called "plot art" which no one likes and no one would fight to preserve.

Finally, artists will be forced to surrender the rights which VARA gave them. VARA provides that an artist can waive his or her rights, thus reverting to the pre-VARA status quo where an artist's rights cease with an artwork's sale. Building owners who can afford expensive art can also afford expensive lawyers, who will see to it that no art is installed unless the artist has signed such a waiver. Many artists will find such a waiver to be a

humiliating surrender to their patrons, a tangible reminder that artists are subject to market forces, but they will either sign or forego a commission.

Indeed, this choice has already been imposed on artists by the public sector, which is one step ahead of the private sector for once. In 1992, Southern Oregon State College planned to move a sculpture created by an artist named William Harsey. Mr. Harsey objected on VARA grounds, claiming that the sculpture was "site specific" and, therefore, moving the sculpture was equivalent to its destruction. Southern Oregon State let the sculpture remain, but shortly thereafter, the college and many other public entities around the nation began to require waivers of VARA before allowing a sculpture to be displayed.

The first prominent casualty of this new procedure was Richard Serra, who refused to sign a waiver required by the San Francisco Fine Arts Museum. The waiver was limited in scope, permitting the museum to remove Serra's proposed sculpture for health and safety reasons, a not-unreasonable requirement since works of Mr. Serra have injured people in the past. Nevertheless, Mr. Serra felt that the waiver was offensive and would not sign it as a matter of principle. Because of his refusal, the sculpture will not be constructed.

There is a certain irony here, because the removal of Mr. Serra's sculpture, "Tilted Arc," from Federal Plaza in Manhattan in 1989 provided the impetus for passing VARA in the first place. "Tilted Arc," a much criticized rusted steel wall which prevented the public from using an outdoor plaza, enjoyed a seven-year run at its location before it was carefully dismantled and safely stored. With VARA, it now appears that the alternative to the risk of an artwork's dismantlement is not a perpetual exhibition of that art, but no art at all.

If Congress had been content to federalize the California law, the demand for serious art in public spaces would not have been harmed. The beauty of that law is that there was a built-in market mechanism. It forced the artist to put his money where his mouth was. If the art had no value, the artist would not spend money to reclaim it. And since it did not significantly interfere with a building owner's right to develop his or her property, the California law did not create an incentive for the real estate industry to replace serious art with "plot art." Instead of the California law, thanks to a failure of the legislative process, we get VARA and the already impoverished public forum for art will be further diminished.

Unexamined legislation, like the unexamined life, is guaranteed to disappoint.

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Computer Software Rental Amendments Act of 1990, Public Law 101-650. As required by that paragraph, the “Warning of Copyright for Software Rental” shall be affixed to the packaging that contains the computer program which is lent by a nonprofit library for nonprofit purposes.

(b) *Contents.* A Warning of Copyright for Software Rental shall consist of a verbatim reproduction of the following notice, printed in such size and form and affixed in such manner as to comply with paragraph (c) of this section.

Notice: Warning of Copyright
Restrictions

The copyright law of the United States (title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material.

Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the computer program, except as permitted by title 17 of the United States Code, may be liable for copyright infringement.

This institution reserves the right to refuse to fulfill a loan request if, in its judgment, fulfillment of the request would lead to violation of the copyright law.

(c) *Form and manner of use.* A Warning of Copyright for Software Rental shall be affixed to the packaging that contains the copy of the computer program, which is the subject of a library loan to patrons, by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual user of the computer program.

[56 FR 7812, Feb. 26, 1991, as amended at 66 FR 34373, June 28, 2001]

§ 201.25 Visual Arts Registry.

(a) *General.* This section prescribes the procedures relating to the submission of Visual Arts Registry Statements by visual artists and owners of

buildings, or their duly authorized representatives, for recordation in the Copyright Office under section 113(d)(3) of title 17 of the United States Code, as amended by Public Law 101-650, effective June 1, 1991. Statements recorded in the Copyright Office under this regulation will establish a public record of information relevant to an artist’s integrity right to prevent destruction or injury to works of visual art incorporated in or made part of a building.

(b) *Forms.* The Copyright Office does not provide forms for the use of persons recording statements regarding works of visual art that have been incorporated in or made part of a building.

(c) *Recordable statements—(1) General.* Any statement designated as a “Visual Arts Regulatory Statement” and which pertains to a work of visual art that has been incorporated in or made part of a building may be recorded in the Copyright Office provided the statement is accompanied by the fee for recordation of documents specified in section 708(a)(4) of title 17 of the United States Code. Upon their submission, the statements and an accompanying documentation or photographs become the property of the United States Government and will not be returned. Photocopies are acceptable if they are clear and legible. Information contained in the Visual Arts Registry Statement should be as complete as possible since the information may affect the enforceability of valuable rights under the copyright law. Visual Arts Registry Statements which are illegible or fall outside of the scope of section 113(d)(3) of title 17 may be refused recordation by the Copyright Office.

(2) *Statements by artists.* Statements by artists regarding a work of visual art incorporated or made part of a building should be filed in a document containing the head: “Registry of Visual Art Incorporated in a Building—Artist’s Statement.” The statement should contain the following information:

(i) Identification of the artist, including name, current address, age, and telephone number, if publicly listed.

(ii) Identification of the work or works, including the title, dimensions, and physical description of the work

and the copyright registration number, if known. Additionally, it is recommended that one or more 8×10 photographs of the work on good quality photographic paper be included in the submission; the images should be clear and in focus.

(iii) Identification of the building, including its name and address. This identification may additionally include 8×10 photographs of the building and the location of the artist's work in the building.

(iv) Identification of the owner of the building, if known.

(3) *Statements by the owner of the building.* Statements of owners of a building which incorporates a work of visual art should be filed in a document containing the heading: "Registry of Visual Art Incorporated in a Building—Building Owner's Statement." The statement should contain the following information:

(i) Identification of the ownership of the building, the name of a person who represents the owner, and a telephone number, if publicly listed.

(ii) Identification of the building, including the building's name and address. This identification may additionally include 8×10 photographs of the building and of the works of visual art which are incorporated in the building.

(iii) Identification of the work or works of visual art incorporated in the building, including the works' title(s), if known, and the dimensions and physical description of the work(s). This identification may include one or more 8×10 photographs of the work(s) on high quality photographic paper; the images should be clear and in focus.

(iv) Identification of the artist(s) who have works incorporated in the building, including the current address of each artist, if known.

(v) Photocopy of contracts, if any, between the artist and owners of the building regarding the rights of attribution and integrity.

(vi) Statement as to the measures taken by the owner to notify the artist(s) of the removal or pending removal of the work of visual art, and photocopies of any accompanying documents.

(4) *Updating statements.* Either the artist or owner of the building or both may record statements updating previously recorded information by submitting an updated statement and paying the recording fee specified in paragraph (d) of this section. Such statements should repeat the information disclosed in the previous filing as regarding the name of the artist(s), the name of the work(s) of visual art, the name and address of the building, and the name of the owner(s) of the building. The remaining portion of the statement should correct or supplement the information disclosed in the previously recorded statement.

(d) *Fee.* The fee for recording a Visual Arts Registry Statement, a Building Owner's Statement, or an updating statement is the recordation fee for a document, as prescribed in §201.3(c).

(e) *Date of recordation.* The date of recordation is the date when all of the elements required for recordation, including the prescribed fee have been received in the Copyright Office. After recordation of the statement, the sender will receive a certificate of record from the Copyright Office. Any documentation or photographs accompanying any submission will be retained and filed by the Copyright Office. They may also be transferred to the Library of Congress, or destroyed after preparing suitable copies, in accordance with usual procedures.

(f) *Effect of recordation.* The Copyright Office will record statements in the Visual Arts Registry without examination or verification of the accuracy or completeness of the statement, if the statement is designated as a "Visual Arts Registry Statement" and pertains to a work of visual art incorporated in or made part of a building. Recordation of the statement and payment of the recording fee shall establish only the fact of recordation in the official record. Acceptance for recordation shall not be considered a determination that the statement is accurate, complete, and otherwise in compliance with section 113(d), title 17, U.S. Code. The accuracy and completeness of the statement is the responsibility of the artist or building owner who submits it for recordation. Artists and building owners are encouraged to

submit accurate and complete statements. Omission of any information, however, shall not itself invalidate the recordation, unless a court of competent jurisdiction finds the statement is materially deficient and fails to meet the minimum requirements of section 113(d) of title 17, U.S. Code.

[56 FR 38341, Aug. 13, 1991, as amended at 64 FR 29522, June 1, 1999; 65 FR 39819, June 28, 2000]

§ 201.26 Recordation of documents pertaining to computer shareware and donation of public domain computer software.

(a) *General.* This section prescribes the procedures for submission of legal documents pertaining to computer shareware and the deposit of public domain computer software under section 805 of Public Law 101-650, 104 Stat. 5089 (1990). Documents recorded in the Copyright Office under this regulation will be included in the Computer Shareware Registry. Recordation in this Registry will establish a public record of licenses or other legal documents governing the relationship between copyright owners of computer shareware and persons associated with the dissemination or other use of computer shareware. Documents transferring the ownership of some or all rights under the copyright law of computer shareware and security interests in such software should be recorded under 17 U.S.C. 205, as implemented by § 201.4.

(b) *Definitions*—(1) The term *computer shareware* is accorded its customary meaning within the software industry. In general, shareware is copyrighted software which is distributed for the purposes of testing and review, subject to the condition that payment to the copyright owner is required after a person who has secured a copy decides to use the software.

(2) A *document designated as pertaining to computer shareware* means licenses or other legal documents governing the relationship between copyright owners of computer shareware and persons associated with the dissemination or other use of computer shareware.

(3) *Public domain computer software* means software which has been publicly distributed with an explicit dis-

claimer of copyright protection by the copyright owner.

(c) *Forms.* The Copyright Office does not provide forms for the use of persons recording documents designated as pertaining to computer shareware or for the deposit of public domain computer software.

(d) *Recordable Documents*—(1) Any document clearly designated as a “Document Pertaining to Computer Shareware” and which governs the legal relationship between owners of computer shareware and persons associated with the dissemination or other use of computer shareware may be recorded in the Computer Shareware Registry.

(2) Submitted documents may be a duplicate original, a legible photocopy, or other legible facsimile reproduction of the document, and must be complete on its face.

(3) Submitted documents will not be returned, and the Copyright Office requests that if the document is considered valuable, that only copies of that document be submitted for recordation.

(4) The Copyright Office encourages the submission of a machine-readable copy of the document in the form of an IBM-PC compatible disk, in addition to a copy of the document itself.

(e) *Fee.* The fee for recording a document pertaining to computer shareware is the recordation fee for a document, as prescribed in § 201.3(c).

(f) *Date of recordation.* The date of recordation is the date when all of the elements required for recordation, including the prescribed fee have been received in the Copyright Office. After recordation of the statement, the sender will receive a certificate of record from the Copyright Office. The submission will be retained and filed by the Copyright Office, and may be destroyed at a later date after preparing suitable copies, in accordance with usual procedures.

(g) *Donation of public domain computer software.* (1) Any person may donate a copy of public domain computer software for the benefit of the Machine-Readable Collections Reading Room of the Library of Congress. Decision as to whether any public domain computer software is suitable for accession to the