



**A Brief Overview of  
The Visual Artists Rights Act of 1990 (VARA)**

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- *What Is VARA?*

The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C.S. § 101 et seq., grants three essential rights to authors of visual works of art: the right of attribution, the right of integrity, and in the case of works of visual art of recognized stature, the right to prevent destruction.<sup>1</sup> VARA was enacted by Congress in 1990 as an amendment to the Copyright Act, and “was designed to protect the moral rights of artists in their works. Moral rights protect an artist’s interest in the proper use of the artist’s name and in maintaining the physical integrity of the artist’s work.”<sup>2</sup> Section 106A of VARA speaks to the moral rights of authors. These moral rights are distinguished from economic rights, which are only held by an individual who holds the copyright of a work.<sup>3</sup>

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<sup>1</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

<sup>2</sup> *Berrios Nogueras v. Home Depot*, 330 F. Supp. 2d 48, 50 (D.P.R. 2004).

<sup>3</sup> *Ibid.*

In essence, VARA “secures an author’s lifetime right to protect against intentional distortion, mutilation, or other modification of a work of visual art and against any intentional or grossly negligent destruction of a work of visual art having recognized stature.”<sup>4</sup> The three rights granted by VARA are conferred upon the author of a work of visual art, whether or not the author is the copyright owner of the work.<sup>5</sup> In a situation in which there are joint authors of a work of visual art, VARA deems those individuals to be co-owners of the rights conferred by the statute.<sup>6</sup>

- *What Constitutes a “Work of Visual Art” under VARA?*

With the enactment of VARA, a new category of “works of visual art” was established. This category is defined under the statute 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 two hundred 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>7</sup>

- *What Does Not Constitute a “Work of Visual Art” under VARA?*

In defining what is and what is not a “work of visual art,” Congress sought to distinguish works of visual art from other forms of media. It is imperative to note that under VARA, posters, charts, maps, technical drawings, diagrams, applied art, motion

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<sup>4</sup> *Pollara v. Seymour*, 344 F.3d 265, 265-266 (2d Cir. 2003) (citing 17 U.S.C. § 106A, § 101 (internal quotations omitted)).

<sup>5</sup> 17 U.S.C.S. § 106A(b).

<sup>6</sup> *Id.*

<sup>7</sup> 17 U.S.C.S. § 101.

pictures, audiovisual works, books, magazines, newspapers, periodicals, electronic publications, advertisements, promotional materials, and any works made for hire are *excluded* from the definition of “work of visual art.”<sup>8</sup> It has been held that Congress “chose to exclude from the scope of VARA all advertising and promotional materials, regardless of whether the thing being promoted or advertised was a commercial product...and regardless of whether the work being used to promote or advertise might otherwise be called a painting, drawing, or sculpture.”<sup>9</sup> As a result, any items created for the purpose of promotion or advertisement will not constitute a work of visual art subject to the protection granted under VARA.

In Berrios Nogueras v. Home Depot, the Court found it clear that VARA did not afford a right of action to an individual “for the unauthorized reproduction of his work upon the posters...[and other such] advertising or promotional material that were printed or published by the defendants in their stores.”<sup>10</sup> Similarly, in NASCAR v. Scharle, the Court held that the defendant’s technical drawings, diagrams, and models for a trophy did not fall within the definition of works of visual art.<sup>11</sup>

- *The Right of Attribution*

The terms of VARA provide that the author of a work of visual art has the right to claim authorship of that work, and additionally, has the right 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.<sup>12</sup> The statute further provides that the author of a work of visual art has the right to “prevent the

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<sup>8</sup> Pollara, *supra*, 344 F.3d at 265-266.

<sup>9</sup> *Id.* at 270.

<sup>10</sup> Berrios Nogueras, *supra*, 330 F. Supp. 2d at 50 (internal quotations omitted).

<sup>11</sup> NASCAR v. Scharle, 184 Fed. Appx. 270, 276 (3d Cir. 2006).

<sup>12</sup> 17 U.S.C.S. § 106A(a)(1)(A-B).

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>13</sup> The right of attribution effectually “ensures that artists are correctly identified with the works of art they create, [and] that they are not identified with works created by others.”<sup>14</sup>

Courts have held that the right of attribution “generally consists of the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously the right to prevent the author’s work from being attributed to someone else, and to prevent the use of the author’s name on works created by others, including distorted editions of the author’s original work.”<sup>15</sup>

In essence, the right of attribution “enables an artist to claim authorship of his or her work, to preclude the use of the artists’ names as author if not the creator of the work, and to disavow authorship of a work that has been distorted, mutilated, or otherwise modified if prejudice to the author’s honor or reputation would otherwise result.”<sup>16</sup>

- *The Right of Integrity*

Under VARA, the author of a visual work of art is permitted “to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred.”<sup>17</sup> The statute expressly mandates that the author has the right “to prevent any intentional distortion, mutilation, or other modification of that work which would be

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<sup>13</sup> 17 U.S.C.S. § 106A(a)(2).

<sup>14</sup> *Pavia v. 1120 Ave. of the Arts Assocs.*, 901 F. Supp. 620, 628 (S.D.N.Y. 1995).

<sup>15</sup> *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 133 (1<sup>st</sup> Cir. 2006).

<sup>16</sup> Dana L. Burton, *Artists’ Moral Rights: Controversy and the Visual Artists Rights Act*, 48 *SMU L. Rev.* 639, 643 (1995).

<sup>17</sup> *Phillips*, *supra*, 459 F.3d at 133.

prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.<sup>18</sup>

The right of integrity “enables an artist to prevent distortion, mutilation, or other modification of his or her work if done intentionally and if it would be prejudiced to the artist’s honor or reputation.”<sup>19</sup>

- *The Right to Prevent Destruction*

Lastly, the terms of VARA provide that the author of a visual work of art has the right 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>20</sup>

- *The Public Presentation Exception to the Statute*

Under VARA, “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...unless the modification is caused by gross negligence.”<sup>21</sup>

- *How VARA Can Protect Your Visual Work of Art?*

Artists are entitled to VARA protection where their works of visual art falls within the scope of VARA. First, your piece of artwork must meet the definition of “work of visual art” as set forth in the terms of the statute. To meet this definition, your

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<sup>18</sup> 17 U.S.C.S. § 106A(a)(3)(A).

<sup>19</sup> Dana L. Burton, Artists’ Moral Rights: Controversy and the Visual Artists Rights Act, 48 SMUL Rev. 639, 643 (1995).

<sup>20</sup> 17 U.S.C.S. § 106A(a)(3)(B).

<sup>21</sup> 17.U.S.C. § 106A(c)(2).

artwork must not constitute a technical drawing, motion picture, periodical, electronic publication, work made for hire, or any form of advertising or promotional material.

The purpose of the rights granted by VARA, particularly the moral rights of attribution and integrity, is to protect “both the reputations of certain visual artists and the works of art they create.”<sup>22</sup> These rights encourage visual artists to create, knowing full well that they will be granted the protections afforded to them under VARA.

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<sup>22</sup> *Carter, supra*, 71 F.3d at 83 (internal citations omitted).