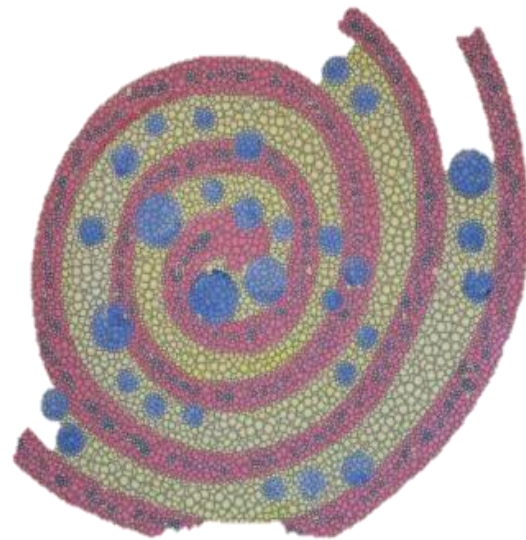


# SELECTED ART LAWS

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## Introduction

*This is a compilation of various laws regulating art. It is not all-encompassing. It is intended to be used as a general reference and not to convey legal advice. Carolann Austin Swanson is a member of The Florida Bar and art lover who lives in Miami, Florida.*

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## Chapter One: The Laws of Florida

### FLORIDA ART WARRANTY STATUTE

#### **686.501 Definitions; ss. 686.501-686.506.**

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As used in ss. 686.501-686.506:

(1)

“Art” means a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame, quilt, print, photograph, or craft work executed in materials including, but not limited to, clay, textile, paper, fiber, wood, tile, metal, plastic, or glass. The term shall also include a rare map which is offered as a limited edition or a map 80 years old or older; or a rare document or rare print which includes, but is not limited to, a print, engraving, etching, woodcut, lithograph, or serigraph which is offered as a limited edition, or one 80 years old or older.

(2)

“Artist” means the creator of a work of art or, if she or he is deceased, the artist’s heirs or personal representative.

(3)

“Art dealer” means a person engaged in the business of selling works of art, a person who is a consignee of a work of art, or a person who, by occupation, holds herself or himself out as having knowledge or skill peculiar to works of art or rare documents or prints, or to whom such knowledge or skill may be attributed by her or his employment of an agent or broker or other intermediary who, by occupation, holds herself or himself out as having such knowledge or skill. The term “art dealer” includes an auctioneer who sells works of art, rare maps, rare documents, or rare prints at public auction as well as the auctioneer’s consignor or principal. The term “art dealer” does not include a cooperative which is totally owned by artist members.

(4)

“Creditor” means a “creditor” as defined in s. 671.201.

(5)

“Person” means an individual, partnership, corporation, or association.

(6)

“Author” or “authorship” refers to the creator or creation of a work of art or to the period, culture, source, or origin with which the creation of the work is identified in the description of the work.

(7)

“Counterfeit” means a work of art made or altered with intent to deceive in such a manner that it appears to have an authorship which it does not in fact possess. The term “counterfeit” includes any work of art made, altered, or copied in such a manner that it appears to have an authorship which it does not in fact possess, even though the work may not have been made with intent to deceive.

(8)

“Written instrument” means a written or printed agreement, bill of sale, or any other written or printed note or memorandum of the sale or exchange of a work of art by an art dealer, and includes a written or printed catalog or other prospectus of a forthcoming sale as well as any written or printed corrections or amendments thereof.

(9)

“Consignor” means an artist or any person, partnership, firm, association, or corporation which delivers a work of art to an art dealer for the purpose of sale, or exhibition and sale, to the public on a commission, fee, or other basis of compensation.

(10)

“Consignee” means an art dealer who receives and accepts a work of art from a consignor for the purpose of sale, or exhibition and sale, to the public on a commission, fee, or other basis of compensation.

#### **686.502**

#### **Consignment relationship; notice; proceeds of sales held in trust; contract requirements.**

—

(1)

Whenever a consignor delivers, or causes to be delivered, a work of art to a consignee for the purpose of sale, or exhibition and sale, to the public on a commission, fee, or other basis of compensation, the delivery to and acceptance thereof by the art dealer is deemed to be “on consignment”; and, with respect to the work of art, such consignee shall thereafter be deemed to be the agent of such consignor.

(2)

Whenever a consignor delivers or causes to be delivered a work of art to a consignee, such consignor shall give notice to the public by affixing to such work of art a sign or tag which states that such work of art is being sold subject to a contract of consignment, or such consignee shall post a clear and conspicuous sign in the consignee’s place of business giving notice that some works of art are being sold subject to a contract of consignment.

(3)

The proceeds of sale of a work of art shall be held in trust by the consignee for the benefit of the consignor. Such proceeds shall be applied first in payment of any amount due to the consignor.

(4)

Any provision of a contract or agreement whereby the consignor waives any of the provisions of this section is void.

### **686.503**

#### **Contract provisions.**

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Whenever a consignee accepts a work of art for the purpose of sale, or exhibition and sale, to the public on a commission, fee, or other basis of compensation, there shall be a written contract or agreement between the consignor and consignee which shall include, but not be limited to, the following provisions:

(1)

The proceeds of the sale of the work of art shall be delivered to the consignor at a schedule agreed upon by the consignor and consignee.

(2)

The consignee shall be responsible for the stated value of the work of art in the event of the loss of or damage to such work of art while it is in the possession of such consignee.

(3)

The work of art shall only be sold by the consignee for an amount at least equal to the amount agreed upon by the consignor in writing.

(4)

The work of art may be used or displayed by the consignee or others only with the prior written consent of the consignor and only if the artist is acknowledged in such use or display.

(5)

A work of art delivered to an art dealer by an artist for the purpose of exhibition or sale and the artist's share of the proceeds of the sale of the work by the dealer, whether to the dealer on his or her own account or to a third person, shall create a priority in favor of the artist over the claims, liens, or security interests of the creditors of the art dealer, notwithstanding any provisions of the Uniform Commercial Code.

### **686.504**

#### **Warranties by art dealers; written statement; terminology.**

Any provision in any other law to the contrary notwithstanding:

(1)

When an art dealer, in selling or changing a work of art, furnishes to a buyer of such work who is not an art dealer a written instrument which, in describing the work, identifies it with any authorship, the description shall be presumed to be part of the basis of the transaction and shall create an express warranty of the authenticity of the authorship as of the date of the sale or exchange. The warranty shall not be negated or limited because the art dealer in the written instrument did not use formal words such

as “warrant” or “guarantee,” because the art dealer did not have a specific intention or authorization to make the warranty, or because any statement relevant to authorship is, reports to be, or is capable of being, merely the art dealer’s opinion.

(2)

In construing the degree of authenticity of authorship warranted, due regard shall be given to the terminology used in describing the authorship and the meaning accorded to such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place. A written instrument delivered pursuant to a sale which took place in this state which, in describing the work, states, for example:

(a)

That the work is by a named author or has a named authorship without any other limiting words: means unequivocally that the work is by the named author or has the named authorship.

(b)

That the work is attributed to a named author: means a work of the period of the author, attributed to her or him, but not with certainty by her or him.

(c)

That the work is of a school of a named author: means a work of the period of the author, by a pupil or close follower of the author but not by the author.

(d)

That the rare map, rare print, sculpture, drawing, or other work of art is of the authorship or from the period or date attributed to the work of art.

**686.505 Construction of language.**

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Words relevant to the creation of an express warranty of authenticity of authorship of a work of art and words tending to negate or limit warranty shall be construed where reasonable as consistent with each other by parol or extrinsic evidence; negation or limitation is inoperative to the extent that the construction is unreasonable. Subject to the limitations hereinafter set forth, the construction shall be deemed unreasonable in any of the following cases:

(1)

The language tending to negate or limit the warranty is not conspicuous, written, and contained in a provision separate and apart from any language relevant to the creation of the warranty, in words which would clearly and specifically apprise the buyer that the seller assumes no risk, liability, or responsibility for the authenticity of the authorship of a work of art. Words of general disclaimer like “all warranties, express or implied, are excluded” are not sufficient to negate or limit express warranty of authenticity of the authorship of a work of art created under s. 686.504 or otherwise.



(2)

The work of art is proved to be a counterfeit, and this was not clearly indicated in the description of the work.

(3)

The work of art is unqualifiedly stated to be the work of a named author or authorship, or date or period or limited edition, and it is proved that, as of the date of sale or exchange, the statement was false, mistaken, or erroneous.

**686.506 Rights and liabilities, additional; merchant's liability.**

(1)

The rights and liabilities created by ss. 686.501-686.506 shall be construed to be in addition to and not in substitution, exclusion, or displacement of other rights and liabilities provided by law, including the law of principal and agent except where the construction would, as a matter of law, be unreasonable.

(2)

An art dealer who, as buyer, is excluded from obtaining the benefits of an express warranty under ss. 686.501-686.506 shall not be deprived of the benefits of any other provisions of law.

(3)

An art dealer whose warranty of authenticity of authorship was made in good faith shall not be liable for damages beyond the return of the purchase price which he or she received, together with any attorney's fees and costs incurred by reason of the art dealer's refusal to comply with ss. 686.501-686.506.

(4)

Any person who violates ss. 686.501-686.506 is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(5)

Nothing in ss. 686.501-686.506 shall apply to any work of art, when offered for sale or sold at wholesale or retail, framed or unframed, at a price of \$100 or less.

(6)

Nothing in ss. 686.501-686.506 shall apply to works of art sold by artists who produce the same directly to a consumer, without the intervention of a wholesale or retail art dealer.

## Chapter Two: The Laws of California

### CALIFORNIA FINE PRINTS AND MULTIPLE MARKET STATUTE

#### Chapter 1 General Provisions [1740. - 1741.]

#### CAL. CIV. CODE § 1740 : California Code - Section 1740

As used in this title:

(a)"Fine art multiple" or "multiple" for the purposes of this title means any fine print, photograph (positive or negative), sculpture cast, collage, or similar art object produced in more than one copy. Pages or sheets taken from books and magazines and offered for sale or sold as art objects shall be included, but books and magazines shall be excluded.

(b)"Fine print" or "print" means a multiple produced by, but not limited to, engraving, etching, woodcutting, lithography, and serigraphy, and means multiples produced or developed from photographic negatives, or any combination thereof.

(c)"Master" is used in lieu of and has the same meaning as a printing plate, stone, block, screen, photographic negative, or mold or other process as to a sculpture, which contains an image used to produce fine art objects in multiples.

(d)"Artist" means the person who created the image which is contained in, or constitutes, the master or conceived of, and approved the image which is contained in, or constitutes, the master.

(e)Whether a multiple is "signed" or "unsigned" as these terms are used in this title relating to prints and photographs, depends upon whether or not the multiple was autographed by the artist's own hand, and not by mechanical means, after the multiple was produced, irrespective of whether it was signed or unsigned in the plate.

(f)"Impression" means each individual fine art multiple made by printing, stamping, casting, or any other process.

(g)"Art dealer" means a person who is in the business of dealing, exclusively or nonexclusively, in the fine art multiples to which this title is applicable, or a person who by his or her occupation holds himself or herself out as having knowledge or skill peculiar to these works, or to whom that knowledge or skill may be attributed by his or her employment of an agent or other intermediary who by his or her occupation holds himself or herself out as having that knowledge or skill. The term "art dealer" includes an auctioneer who sells these works at public auction, but excludes persons, not otherwise defined or treated as art dealers herein, who are consignors or principals of auctioneers.

(h)"Limited edition" means fine art multiples produced from a master, all of which are the same image and bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples, or are otherwise held out as limited to a maximum number of multiples.

(i)"Proofs" means multiples which are the same as, and which are produced from the same master as, the multiples in a limited edition, but which, whether so designated or not, are set aside from and are in addition to the limited edition to which they relate.

(j)"Certificate of authenticity" means a written or printed description of the multiple which is to be sold, exchanged, or consigned by an art dealer. Every certificate shall contain the following statement:

"This is to certify that all information and the statements contained herein are true and correct."

(k)"Person" means an individual, partnership, corporation, limited liability company, association, or other entity, however organized.

### **CAL. CIV. CODE § 1741 : California Code - Section 1741**

This title shall apply to any fine art multiple when offered for sale or sold at wholesale or retail for one hundred dollars (\$100) or more, exclusive of any frame.

### **Chapter 2 Full Disclosure in the Sale of Fine Prints [1742. - 1744.9.]**

### **CAL. CIV. CODE § 1742 : California Code - Section 1742**

(a)An art dealer shall not sell or consign a multiple into or from this state unless a certificate of authenticity is furnished to the purchaser or consignee, at his or her request, or in any event prior to a sale or consignment, which sets forth as to each multiple, the descriptive information required by Section 1744 for any period. If a prospective purchaser so requests, the certificate shall be transmitted to him or her prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of such a multiple, this certificate shall be supplied at the time of or prior to delivery. With respect to auctions, this information may be furnished in catalogues or other written materials which are made readily available for consultation and purchase prior to sale, provided that a bill of sale, receipt, or invoice describing the transaction is then provided which makes reference to the catalogue and lot number in which this information is supplied. Information supplied pursuant to this subdivision shall be clearly, specifically and distinctly addressed to each of the items listed in Section 1744 unless the required data is not applicable. This section is applicable to transactions by and between art dealers and others considered to be art dealers for the purposes of this title.

(b)An art dealer shall not cause a catalogue, prospectus, flyer, or other written material or advertisement to be distributed in, into, or from this state which solicits a direct sale, by inviting transmittal of payment for a specific multiple, unless it clearly sets forth, in close physical proximity to the place in such material where the multiple is described, the descriptive information required by Section 1744 for any time period. In lieu of this required information, the written material or advertising may set forth the material contained in the following quoted passage, or the passage itself, if the art dealer then supplies the required information prior to or with delivery of the multiple. The nonobservance of the terms within the following passage shall constitute a violation of this title:

"California law provides for disclosure in writing of information concerning certain fine prints, photographs, and sculptures prior to effecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist's signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the plate which produced the multiple, and the number of multiples in a "limited edition." If a prospective purchaser so requests, the information shall be transmitted to him or her prior to payment, or the placing of an order for a multiple. If payment is made by a purchaser prior to delivery of the multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he or she returns the multiple in the condition in which received, within 30 days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect, the purchaser may be entitled to certain remedies, including refund upon return of the multiple in the condition in which received."

This requirement is not applicable to general written material or advertising which does not constitute an offer to effect a specific sale.

(c)In each place of business in the state where an art dealer is regularly engaged in sales of multiples, the art dealer shall post in a conspicuous place, a sign which, in a legible format, contains the information included in the following passage:

"California law provides for the disclosure in writing of certain information concerning prints, photographs, and sculpture casts. This information is available to you, and you may request to receive it prior to purchase."

(d)If an art dealer offering multiples by means of a catalogue, prospectus, flyer or other written material or advertisement distributed in, into or from this state disclaims knowledge as to any relevant detail referred to in Section 1744, he or she shall so state specifically and categorically with regard to each such detail to the end that the purchaser shall be enabled to judge the degree of uniqueness or scarcity of each multiple contained in the edition so offered. Describing the edition as an edition of "reproductions" eliminates the need to furnish further informational details unless the edition was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the informational details are required to be furnished.

(e)Whenever an artist sells or consigns a multiple of his or her own creation or conception, the artist shall disclose the information required by Section 1744, but an artist shall not otherwise be regarded as an art dealer.

### **CAL. CIV. CODE § 1742.6 : California Code - Section 1742.6**

Any charitable organization which conducts a sale or auction of fine art multiples shall be exempt from the disclosure requirements of this title if it posts in a conspicuous place, at the site of the sale or auction, a disclaimer of any knowledge of the information specified in Section 1744, and includes such a disclaimer in a catalogue, if any, distributed by the organization with respect to the sale or auction of fine art multiples. If a charitable organization uses or employs an art dealer to conduct a sale or auction of fine art

multiples, the art dealer shall be subject to all disclosure requirements otherwise required of an art dealer under this title.

**CAL. CIV. CODE § 1744 : California Code - Section 1744**

(a) Except as provided in subdivisions (c), (d), (e), and otherwise in this title, a certificate of authenticity containing the following informational details shall be required to be supplied in all transactions covered by subdivisions (a), (b), and (e) of Section 1742:

(1) The name of the artist.

(2) If the artist's name appears on the multiple, a statement whether the multiple was signed by the artist.

If the multiple was not signed by the artist, a statement of the source of the artist's name on the multiple, such as whether the artist placed his signature on the multiple or on the master, whether his name was stamped or estate stamped on the multiple or on the master, or was from some other source or in some other manner placed on the multiple or on the master.

(3) A description of the medium or process, and where pertinent to photographic processes, the material used in producing the multiple, such as whether the multiple was produced through the etching, engraving, lithographic, serigraphic, or a particular method or material used in photographic developing processes. If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description shall be made.

(4) If the multiple or the image on or in the master constitutes, as to prints and photographs, a photomechanical or photographic type of reproduction, or as to sculptures a surmoulage or other form of reproduction of sculpture cases, of an image produced in a different medium, for a purpose other than the creation of the multiple being described, a statement of this information and the respective mediums.

(5) If paragraph (4) is applicable, and the multiple is not signed, a statement whether the artist authorized or approved in writing the multiple or the edition of which the multiple being described is one.

(6) If the purported artist was deceased at the time the master was made which produced the multiple, this shall be stated.

(7) If the multiple is a "posthumous" multiple, that is, if the master was created during the life of the artist but the multiple was produced after the artist's death, this shall be stated.

(8) If the multiple was made from a master which produced a prior limited edition, or from a master which constitutes or was made from a reproduction or surmoulage of a prior multiple or the master which produced the prior limited edition, this shall be stated as shall the total number of multiples, including proofs, of all other editions produced from that master.

(9) As to multiples produced after 1949, the year, or approximate year, the multiple was produced shall be stated. As to multiples produced prior to 1950, state the year, approximate year or period when the master

was made which produced the multiple and when the particular multiple being described was produced. The requirements of this subdivision shall be satisfied when the year stated is approximately accurate.

(10) Whether the edition is being offered as a limited edition, and if so: (i) the authorized maximum number of signed or numbered impressions, or both, in the edition; (ii) the authorized maximum number of unsigned or unnumbered impressions, or both, in the edition; (iii) the authorized maximum number of artist's, publisher's or other proofs, if any, outside of the regular edition; and (iv) the total size of the edition.

(11) Whether or not the master has been destroyed, effaced, altered, defaced, or canceled after the current edition.

(b) If the multiple is part of a limited edition, and was printed after January 1, 1983, the statement of the size of the limited edition, as stated pursuant to paragraph (10) of subdivision (a) of Section 1744 shall also constitute an express warranty that no additional multiples of the same image, including proofs, have been produced in this or in any other limited edition.

(c) If the multiple was produced in the period from 1950 to the effective date of this section, the information required to be supplied need not include the information required by paragraphs (5) and (8) of subdivision (a).

(d) If the multiple was produced in the period from 1900 to 1949, the information required to be supplied need only consist of the information required by paragraphs (1), (2), (3), and (9) of subdivision (a).

(e) If the multiple was produced before the year 1900, the information to be supplied need only consist of the information required by paragraphs (1), (3), and (9) of subdivision (a).

#### **CAL. CIV. CODE § 1744.7 : California Code - Section 1744.7**

Whenever an art dealer furnishes the name of the artist pursuant to Section 1744 for any time period after 1949, and otherwise furnishes information required by any of the subdivisions of Section 1744 for any time period, as to transactions including offers, sales, or consignments made to other than art dealers, and to other art dealers, such information shall be a part of the basis of the bargain and shall create express warranties as to the information provided. Such warranties shall not be negated or limited because the art dealer in the written instrument did not use formal words such as "warrant" or "guarantee" or because the art dealer did not have a specific intention or authorization to make a warranty or because any required statement is, or purports to be, or is capable of being merely the seller's opinion. The existence of a basis in fact for information warranted by virtue of this subdivision shall not be a defense in an action to enforce such warranty. However, with respect to photographs and sculptures produced prior to 1950, and other multiples produced prior to 1900, as to information required by paragraphs (3), (4), (5), and (6) of subdivision (a) of Section 1744, the art dealer shall be deemed to have satisfied this section if a reasonable basis in fact existed for the information provided. When information is not supplied as to any subdivision or paragraph of Section 1744 because not applicable, this shall constitute the express warranty that the paragraph is not applicable.

Whenever an art dealer disclaims knowledge as to a particular item about which information is required, such disclaimer shall be ineffective unless clearly, specifically, and categorically stated as to the particular item and contained in the physical context of other language setting forth the required information as to a specific multiple.

### **CAL. CIV. CODE § 1744.9 : California Code - Section 1744.9**

(a) An artist or art dealer who consigns a multiple to an art dealer for the purpose of effecting a sale of the multiple, shall have no liability to a purchaser under this article if the consignor, as to the consignee, has complied with the provisions of this title.

(b) When an art dealer has agreed to sell a multiple on behalf of a consignor, who is not an art dealer, or an artist has not consigned a multiple to an art dealer but the art dealer has agreed to act as the agent for an artist for the purpose of supplying the information required by this title, the art dealer shall incur the liabilities of other art dealers prescribed by this title, as to a purchaser.

### **Chapter 3. Remedies and Penalties CAL. CIV. CODE § 1745 : California Code - Section 1745 through 1745.5**

(a) An art dealer, including a dealer consignee, who offers or sells a multiple in, into or from this state without providing the certificate of authenticity required in Sections 1742 and 1744 of this title for any time period, or who provides information which is mistaken, erroneous or untrue, except for harmless errors, such as typographical errors, shall be liable to the purchaser of the multiple. The art dealer's liability shall consist of the consideration paid by the purchaser for the multiple, with interest at the legal rate thereon, upon the return of the multiple in the condition in which received by the purchaser.

(b) In any case in which an art dealer, including a dealer consignee, willfully offers or sells a multiple in violation of this title, the person purchasing such multiple may recover from the art dealer, including a dealer consignee, who offers or sells such multiple an amount equal to three times the amount required under subdivision (a).

(c) No action shall be maintained to enforce any liability under this section unless brought within one year after discovery of the violation upon which it is based and in no event more than three years after the multiple was sold.

(d) In any action to enforce any provision of this title, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith, it may allow such expenses to the seller as it deems appropriate.

(e) These remedies shall not bar or be deemed inconsistent with a claim for damages or with the exercise of additional remedies otherwise available to the purchaser.

(f) In any proceeding in which an art dealer relies upon a disclaimer of knowledge as to any relevant information set forth in Section 1744 for any time period, such disclaimer shall be effective unless the claimant is able to establish that the art dealer failed to make reasonable inquiries, according to the

custom and usage of the trade, to ascertain the relevant information or that such relevant information would have been ascertained as a result of such reasonable inquiries.

**CAL. CIV. CODE § 1745.5 : California Code - Section 1745.5**

(a) Any person performing or proposing to perform an act in violation of this title within this state may be enjoined in any court of competent jurisdiction.

(b) Actions for injunction pursuant to this title may be prosecuted by the following persons:

(1) The Attorney General.

(2) Any district attorney.

(3) Any city attorney.

(4) With the consent of the district attorney, a city prosecutor in any city or city and county having a full-time city prosecutor in the name of the people of the State of California upon their own complaint, or upon the complaint of any board, officer, person, corporation, or association.

(5) Any person acting in his or her own interests, or in the interests of the members of a corporation or association, or in the interests of the general public.

(c) Any person who violates any provision of this title may also be liable for a civil penalty not to exceed one thousand dollars (\$1,000) for each violation, which may be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor in any court of competent jurisdiction.

If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund. If brought by a district attorney, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) Any person who violates any provision of this title may also be liable for a civil penalty surcharge not to exceed one thousand dollars (\$1,000) for each violation which shall be assessed and recovered in the manner provided in subdivision (c). Any penalty surcharge collected shall be applied to the costs of enforcing this title by the prosecuting officer.



## CALIFORNIA PRODUCTS OF THE MIND STATUTE

### REPRODUCTION. CAL. CIV. CODE § 982 : California Code - Section 982

(a)The owner of any rights in any original works of authorship not fixed in any tangible medium of expression may transfer the ownership therein.

(b)The owner of any invention or design, or of any representation or expression thereof, may transfer his or her proprietary interest in it.

(c)Notwithstanding any other provision in this section, whenever a work of fine art is transferred, whether by sale or on commission or otherwise, by or on behalf of the artist who created it, or that artist's heir, legatee, or personal representative, the right of reproduction thereof is reserved to such artist or such heir, legatee, or personal representative until it passes into the public domain by act or operation of law, unless that right is expressly transferred by a document in writing in which reference is made to the specific right of reproduction, signed by the owner of the rights conveyed or that person's duly authorized agent. If the transfer is pursuant to an employment relationship, the right of reproduction is transferred to the employer, unless it is expressly reserved in writing. If the transfer is pursuant to a legacy or inheritance, the right of reproduction is transferred to the legatee or heir, unless it is expressly reserved by will or codicil. Nothing contained herein, however, shall be construed to prohibit the fair use of such work of fine art.

(d)As used in subdivision (c):

(1)"Fine art" means any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).

(2)"Artist" means the creator of a work of fine art.

(3)"Right of reproduction", at the present state of commerce and technology shall be interpreted as including, but shall not be limited to, the following: reproduction of works of fine art as prints suitable for framing; facsimile casts of sculpture; reproductions used for greeting cards; reproductions in general books and magazines not devoted primarily to art, and in newspapers in other than art or news sections, when such reproductions in books, magazines, and newspapers are used for purposes similar to those of material for which the publishers customarily pay; art films; television, except from stations operated for educational purposes, or on programs for educational purposes from all stations; and reproductions used in any form of advertising, including magazines, calendars, newspapers, posters, billboards, films or television.

(e)The amendments to this section made at the 1975-76 Regular Session shall only apply to transfers made on or after January 1, 1976.

## **Resale Rights. CAL. CIV. CODE § 986 : California Code - Section 986**

(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.

(1) When a work of fine art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

(2) If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

(3) If a seller or the seller's agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer. The prevailing party in any action brought under this paragraph shall be entitled to reasonable attorney fees, in an amount as determined by the court.

(4) Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

(5) The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the council for use in acquiring fine art pursuant to the Art in Public Buildings program set forth in Chapter 2.1 (commencing with Section 15813) of Part 10b of Division 3 of Title 2, of the Government Code.

(6) Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from enforcement of a money judgment by the creditors of the seller or agent.

(7) Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist. The provisions of this paragraph shall be applicable only with respect to an artist who dies after January 1, 1983.

(b) Subdivision (a) shall not apply to any of the following:

(1) To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

(2)To the resale of a work of fine art for a gross sales price of less than one thousand dollars (\$1,000).

(3)Except as provided in paragraph (7) of subdivision (a), to a resale after the death of such artist.

(4)To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

(5)To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars (\$1,000).

(6)To the resale of a work of fine art by an art dealer to a purchaser within 10 years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers.

(7)To a sale of a work of stained glass artistry where the work has been permanently attached to real property and is sold as part of the sale of the real property to which it is attached.

(c)For purposes of this section, the following terms have the following meanings:

(1)"Artist" means the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years .

(2)"Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass.

(3)"Art dealer" means a person who is actively and principally engaged in or conducting the business of selling works of fine art for which business such person validly holds a sales tax permit.

(d)This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e)If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.

(f)The amendments to this section enacted during the 1981-82 Regular Session of the Legislature shall apply to transfers of works of fine art, when created before or after January 1, 1983, that occur on or after that date.

### **Moral rights. CAL. CIV. CODE § 987 : California Code - Section 987**

(a)The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

(b)As used in this section:

(1)"Artist" means the individual or individuals who create a work of fine art.

(2)"Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(3)"Person" means an individual, partnership, corporation, limited liability company, association or other group, however organized.

(4)"Frame" means to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium.

(5)"Restore" means to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards.

(6)"Conserve" means to preserve, or cause to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the fullest extent possible in an unchanging state.

(7)"Commercial use" means fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.

(c)(1)No 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, alteration, or destruction of a work of fine art.

(2)In addition to the prohibitions contained in paragraph (1), 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. For purposes of this section, the term "gross negligence" shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.

(d)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.

(e)To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(1)Injunctive relief.

(2)Actual damages.

(3)Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive any punitive damages.

(4)Reasonable attorneys' and expert witness fees.

(5)Any other relief which the court deems proper.

(f)In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.

(g)The rights and duties created under this section:

(1)Shall, 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.

(2)Shall exist in addition to any other rights and duties which may now or in the future be applicable.

(3)Except as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

(h)(1)If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property and properly recorded, shall be deemed waived. The instrument, if properly recorded, shall be binding on subsequent owners of the building.

(2)If the owner of a building wishes to remove a work of fine art which is a part of the building but which can be removed from the building without substantial harm to the fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of his or her intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

(3)If a work of fine art can be removed from a building scheduled for demolition without substantial physical defacement, mutilation, alteration, or destruction of the work, and the owner of the building has notified the owner of the work of fine art of the scheduled demolition or the owner of the building is the owner of the work of fine art, and the owner of the work of fine art elects not to remove the work of fine art, the rights and duties created under this section shall apply, unless the owner of the building has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of the intended action affecting the work of fine

art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

(4) Nothing in this subdivision shall affect the rights of authorship created in subdivision (d) of this section.

(i) No action may be maintained to enforce any liability under this section unless brought within three years of the act complained of or one year after discovery of the act, whichever is longer.

(j) This section shall become operative on January 1, 1980, and shall apply to claims based on proscribed acts occurring on or after that date to works of fine art whenever created.

(k) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect any other provisions or applications of this section which can be effected without the invalid provision or application, and to this end the provisions of this section are severable.

### **COPYRIGHT. CAL. CIV. CODE § 988 : California Code - Section 988**

(a) For the purpose of this section:

(1) The term "artist" means the creator of a work of art.

(2) The term "work of art" means any work of visual or graphic art of any media including, but not limited to, a painting, print, drawing, sculpture, craft, photograph, or film.

(b) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, ownership of the physical work of art shall remain with and be reserved to the artist or owner, as the case may be, unless such right of ownership is expressly transferred by an instrument, note, memorandum, or other writing, signed by the artist, the owner, or their duly authorized agent.

(c) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, any ambiguity with respect to the nature or extent of the rights conveyed shall be resolved in favor of the reservation of rights by the artist or owner, unless in any given case the federal copyright law provides to the contrary.

## **Removal. CAL. CIV. CODE § 989 : California Code - Section 989**

(a)The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.

(b)As used in this section:

(1)"Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest.

(2)"Organization" means a public or private not-for-profit entity or association, in existence at least three years at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists.

(3)"Cost of removal" includes reasonable costs, if any, for the repair of damage to the real property caused by the removal of the work of fine art.

(c)An organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987.

(d)In determining whether a work of fine art is of recognized quality and of substantial public interest the trier of fact shall rely on the opinions of those described in subdivision (f) of Section 987.

(e)(1)If a work of fine art cannot be removed from real property without substantial physical defacement, mutilation, alteration, or destruction of such work, no action to preserve the integrity of the work of fine art may be brought under this section. However, if an organization offers some evidence giving rise to a reasonable likelihood that a work of art can be removed from the real property without substantial physical defacement, mutilation, alteration, or destruction of the work, and is prepared to pay the cost of removal of the work, it may bring a legal action for a determination of this issue. In that action the organization shall be entitled to injunctive relief to preserve the integrity of the work of fine art, but shall also have the burden of proof. The action shall commence within 30 days after filing. No action may be brought under this paragraph if the organization's interest in preserving the work of art is in conflict with an instrument described in paragraph (1) of subdivision (h) of Section 987.

(2)If the owner of the real property wishes to remove a work of fine art which is part of the real property, but which can be removed from the real property without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction the owner shall do the following:

(A)If the artist or artist's heir, legatee, or personal representative fails to take action to remove the work of fine art after the notice provided by paragraph (2) of subdivision (h) of Section 987, the owner shall provide 30 days' notice of his or her intended action affecting the work of art. The written notice shall be a display advertisement in a newspaper of general circulation in the area where the fine art is located. The

notice required by this paragraph may run concurrently with the notice required by subdivision (h) of Section 987.

(i) If within the 30-day period an organization agrees to remove the work of fine art and pay the cost of removal of the work, the payment and removal shall occur within 90 days of the first day of the 30-day notice.

(ii) If the work is removed at the expense of an organization, title to the fine art shall pass to that organization.

(B) If an organization does not agree to remove the work of fine art within the 30-day period or fails to remove and pay the cost of removal of the work of fine art within the 90-day period the owner may take the intended action affecting the work of fine art.

(f) To effectuate the rights created by this section, the court may do the following:

(1) Award reasonable attorney's and expert witness fees to the prevailing party, in an amount as determined by the court.

(2) Require the organization to post a bond in a reasonable amount as determined by the court.

(g) No action may be maintained under this section unless brought within three years of the act complained of or one year after discovery of such act, whichever is longer.

(h) This section shall become operative on January 1, 1983, and shall apply to claims based on acts occurring on or after that date to works of fine art, whenever created.

(i) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

### **Chapter Three: FEDERAL LAWS or The laws of the United States of America**

#### **VARA Visual Rights Act of 1990, 17 USC §601, *et seq.***

SEC. 601. SHORT TITLE. This title may be cited as the "Visual Artists Rights Act of 1990".

SEC. 602. WORK OF VISUAL ART DEFINED.

Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining "widow" the following:

"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."

## SEC. 603. RIGHTS OF ATTRIBUTION AND INTEGRITY.

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY. -- Chapter 1 of title 17, United States Code, is amended by inserting after section 106 the following new section:

"§ 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

[\*\*5129] "(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 [\*\*5130] 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."

(b) CONFORMING AMENDMENT. -- The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 106 the following new item:

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

#### SEC. 604. REMOVAL OF WORKS OF VISUAL ART FROM BUILDINGS.

Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

"(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 [\*\*5131] 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."

#### SEC. 605. PREEMPTION.

Section 301 of title 17, United States Code, is amended by adding at the end the following:

"(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

"(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to --

"(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

"(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

"(C) activities violating legal or equitable rights which extend beyond the life of the author."

#### SEC. 606. INFRINGEMENT ACTIONS.

(a) IN GENERAL. -- Section 501(a) of title 17, United States Code, is amended --

(1) by inserting after "118" the following: "or of the author as provided in section 106A(a)"; and

(2) by striking out "copyright." and inserting in lieu thereof "copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a)."

(b) EXCLUSION OF CRIMINAL PENALTIES. -- Section 506 of title 17, United States Code, is amended by adding at the end thereof the following:

"(f) RIGHTS OF ATTRIBUTION AND INTEGRITY. -- Nothing in this section applies to infringement of the rights conferred by section 106A(a)."

(c) REGISTRATION NOT A PREREQUISITE TO SUIT AND CERTAIN REMEDIES. -- (1) Section 411(a) of title 17, United States Code, is amended in the first sentence by inserting after "United States" the following: "and an action brought for a violation of the rights of the author under section 106A(a)".

(2) Section 412 of title 17, United States Code, is amended by inserting "an action brought for a violation of the rights of the author under section 106A(a) or" after "other than".

#### SEC. 607. FAIR USE.

Section 107 of title 17, United States Code, is amended by striking out "section 106" and inserting in lieu thereof "sections 106 and 106A".

#### SEC. 608. STUDIES BY COPYRIGHT OFFICE.

(a) STUDY ON WAIVER OF RIGHTS PROVISION. --

(1) STUDY. -- The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of section 106A of title 17, United States Code, have been waived under subsection (e)(1) of such section.

(2) REPORT TO CONGRESS. -- Not later than 2 years after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report on the progress of the study conducted under

paragraph (1). Not later than 5 years after such date of enactment, the Register of Copyrights shall submit to the Congress a final report on the results of the study conducted under paragraph (1), and any recommendations that the Register may have as a result of the study.

**(b) STUDY ON RESALE ROYALTIES. --**

**(1) NATURE OF STUDY. --** The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing --

**(A)** a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

**(B)** other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

**(2) GROUPS TO BE CONSULTED. --** The study under paragraph (1) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

**(3) REPORT TO CONGRESS. --** Not later than 18 months after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report containing the results of the study conducted under this subsection.

**SEC. 609. FIRST AMENDMENT APPLICATION.**

This title does not authorize any governmental entity to take any action or enforce restrictions prohibited by the First Amendment to the United States Constitution.

**SEC. 610. EFFECTIVE DATE.**

**(a) IN GENERAL. --** Subject to subsection (b) and except as provided in subsection (c), this title and the amendments made by this title take effect 6 months after the date of the enactment of this Act.

**(b) APPLICABILITY. --** The rights created by section 106A of title 17, United States Code, shall apply to --  
**(1)** works created before the effective date set forth in subsection (a) but title to which has not, as of such effective date, been transferred from the author, and

**(2)** works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification [\*\*5133] (as described in section 106A(a)(3) of such title) of any work which occurred before such effective date.

**(c) SECTION 608. --** Section 608 takes effect on the date of the enactment of this Act.

**US COPYRIGHT OFFICE VARA REPORT**

**Waiver of Moral Rights in Visual Artworks**

**Executive Summary**

**Introduction**

The Visual Artists Rights Act of 1990 (VARA) directed the Copyright Office to conduct a study to assess for Congress the impact of the waiver provisions contained in that legislation.

On December 1, 1992, the Copyright Office submitted to Congress an Interim Report summarizing the responses to its earlier Request for Information and outlining other proposed inquiries and avenues of research it would undertake on this question. This final report represents the completed Office study responsive to Congress' request.

## **I. THE VISUAL ARTISTS RIGHTS ACT OF 1990**

In 1990, Congress for the first time legislated limited moral rights of attribution and integrity to authors of narrowly defined works of visual arts. These rights, following the model suggested in the international Berne Convention for the Protection of Literary and Artistic Works, mirror rights granted to authors by most industrialized nations of the world. They guarantee to authors of so-called fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation, or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building.

After hearing testimony from artists' representatives, commercial users and other interested parties, Congress determined that the artists' rights should not be absolute, but that they should be tempered by commercial realities, provided that provisions were enacted to insulate authors from being unduly influenced to give away their new-found rights. Thus, the legislation provides for waiver of these moral rights, but only by a signed, written agreement specifying the work and the precise uses to which a waiver applies.

The provision for two studies by the Copyright Office gave artists further assurance that Congress intended to review the waiver provision's operation to assure that artists were not coerced by unequal bargaining power to forfeit their moral rights.

An early step in the Office's research was to review state statutes to learn which, if any, afford moral rights protection. It found that nine states had enacted legislation before VARA to protect, to varying degrees, authors' moral rights. Those following a so-called preservation model protect an author's rights of attribution and integrity and generally protect artistic works against unauthorized destruction. The moral rights statutes do not protect against destruction but do ensure an author's rights of attribution and integrity in a class of works that is sometimes limited to visual or graphic works of recognized quality. A tenth state's law, enacted after VARA, follows a third model that protects against alteration or destruction and ensures proper attribution but applies only to works publicly displayed in state buildings.

Moral rights are also protected indirectly by state tort, privacy and publicity laws; by the federal protection of the Lanham Act; and by the Copyright Act's protection of an author's exclusive rights in his or her derivative works, and limits on a mechanical licensee's rights to arrange an author's musical composition.

The extent to which state common law and legislative protection will survive the federal Copyright Act's preemption provisions is unclear. Similarly, little information is available about the effectiveness of authors' protection under these laws.

## **II. MORAL RIGHTS IN OTHER COUNTRIES**

Nations that provide their authors and artists with protection in the nature of moral rights protection do so using various approaches. Some use statutory law to balance the interests of artists and their creations with the interests of copyright owners and other users of works. The statutes may be categorized as laws of copyright, design rights, passing-off, unfair competition, tort, or contract. In other countries, the personal rights of attribution, paternity, and integrity have been defined and shaped by the courts.

Nations that are members of the Berne Convention for the Protection of Literary and Artistic Works are required to meet a minimum level of protection, as set forth in the Berne Convention's Article 6bis. The multilateral treaty does not address waiver of moral rights; waiver is neither sanctioned nor prohibited, and individual member nations may implement the Berne Convention in their own ways.

However, since the inception of the Berne Convention, member nations have had intense interest in supporting not only authors' rights to exploit their works for profit, but also in preserving authors'

personal relationships with their works. The Copyright Office traces the history of Article 6b in Chapter II of this Report, examining its evolution to its present day form.

Also in Chapter II, the Office surveys a sampling of 14 individual nations and the European Community, selected to represent a wide range in size, culture, and economic development. The Copyright Office examines legislation and case law to determine how and to what extent the various nations protect authors' moral rights. Nations such as France provide broad protection for authors and their creations. In countries such as the United Kingdom, the artist relies more on contract law than copyright law for moral rights protection.

Examination of the evolution of Berne's Article 6b, together with a survey of legal protection of authors' moral rights worldwide, provides a perspective that allows us to view moral rights provisions in the United States law with the goal of informing Congress whether or not the Visual Artists Rights Act of 1990 is fulfilling the United States' treaty obligations this was not a direction to the Copyright Office under the Berne Convention, and whether or not the waiver provisions of 17 U.S.C. Section 106A are fulfilling Congress' intent in passing that legislation.

### **III.MORAL RIGHTS IN UNITED STATES CASE LAW**

This chapter first summarizes significant federal case law that assessed moral rights prior to enactment of the Visual Artists Rights Act, and then summarizes judicial decisions rendered since enactment of VARA.

Although moral rights were not recognized in U.S. copyright law prior to enactment of VARA, some state legislatures had enacted moral rights laws, and a number of judicial decisions accorded some moral rights protection under theories of copyright, unfair competition, defamation, invasion of privacy, and breach of contract. Such cases have continued relevance, not only for historical interest, but also for precedential value because state and common law moral rights protection was not entirely preempted by VARA. Arguably, state laws of defamation, invasion of privacy, contracts, and unfair competition by "passing off" are not preempted. Further, VARA rights endure only for the artist's life, after which preemption ceases.

In *Vargas v. Esquire*, artist Antonio Vargas created for *Esquire* magazine a series of calendar girl illustrations, some of which were published without his signature or credit-line. The U.S. Court of Appeals for the Seventh Circuit ruled that the rights of the parties were determined by the contract in which Vargas agreed as independent contractor to furnish pictures and granted all rights in the artwork to *Esquire*. The court rejected theories of implied contract, moral rights, and unfair competition. In *Granz v. Harris*, a jazz concert was re-recorded with a reduced playing time and content, such that a full eight minutes was omitted. The contract required the defendant to use a credit-line attributing the plaintiff-producer, who sued. The Second Circuit decided that selling abbreviated recordings with the original credit line constituted unfair competition and breach of contract. Whether by contract or by tort, the plaintiff could prevent publication "as his, of a garbled version of his uncopyrighted product." In *Gilliam v. American Broadcasting Cos.*, ABC broadcast the first of two 90-minute specials, consisting of three 30-minute Monty Python shows each, but cut 24 of the original 90 minutes. Monty Python sued for an injunction and damages. The Second Circuit ruled that ABC's actions contravened contractual provisions limiting the right to edit the program and that a licensee's unauthorized use of an underlying work by publication in a truncated version was a copyright infringement. In a theory akin to moral rights, the court said that a distorted version of a writer's or performer's work may violate rights protected by the Lanham Act and may present a cause of action under that statute. The concurrence cautioned against employing the Lanham Act as a substitute for moral rights, and believed the court should restrict its opinion to contract and copyright issues. Another case, *Wojnarowicz v. American Family Association*, involved a group that protested an artist's work by reproducing 14 fragments in a pamphlet. The U.S. District Court for the Southern District of New York found for the artist under the New York Artists' Authorship Rights Act, but dismissed claims under the Copyright and Lanham Acts.

A few decisions have been rendered since enactment of VARA, although none has yet focused on waiver. Most notable of recent cases is *Carter v. Helmsley-Spear, Inc.* A large art installation by three sculptors

was commissioned for a Queens warehouse, but the landlord, demanding the artists vacate the premises, indicated plans to remove the work. The artists sued in the district Court under VARA and prevailed. The trial court determined that the work was covered by VARA; it was a single work of art, was not a work of applied art, and was not a work-for-hire. The fact that the artists retained their copyright tipped the balance in favor of their independent contractor, rather than employee, status. The district court found that intentional alteration of the installation would injure the artists' reputation. Suggesting a two-tiered approach, that court found the work qualified as one of "recognized stature" in that it has "stature," i.e., is viewed as meritorious, and this stature is "recognized" by art experts, the art community, or some cross-section of society. Rejecting various constitutional attacks on VARA, the district court granted an injunction but said VARA conveyed no right to complete a work and did not justify damages in this case.

On appeal, the Second Circuit analyzed the facts of employment and concluded that the sculpture in question was a work made for hire and therefore was outside the scope of VARA's protection. It reversed the lower court's award of injunctive relief and nullified the only case that had awarded relief to an artist under VARA.

#### **IV. COPYRIGHT OFFICE INTERIM REPORT**

On June 10, 1992, eighteen months after VARA's enactment, the Office published a Request for Information in the Federal Register seeking comments on artists' bargaining power relative to that of commercial users of artworks, on parties' awareness of the VARA rights and their inclusion of waiver provisions in contracts, on the contractual compliance with the law's requirements that works and uses subject to waivers be specifically identified, on the actual exercise of waivers, and on the relative numbers of waivers granted for rights of attribution and integrity for moveable works of visual art and for art works incorporated into buildings. We asked for empirical evidence on the kinds of contracts that include waivers and on the economic impact of those waivers; and we requested parties' assessment of whether the artist's renown affected his or her waiver of rights, and on what factors influence artists' decisions to waive rights. Finally, we asked for comments on possible constitutional problems that might arise if waivers were prohibited. We also welcomed comments on how best to gather information for the Office's final report to Congress.

This initial inquiry on the impact of waiver provisions yielded seven comments. Respondents included purchasers of artworks, a law professor, and several groups who represent artists' interests. Most comments reflected the respondents' limited experience with contractual waiver of ARA rights. One respondent polled a sampling of its membership on VARA issues. That poll revealed that most artists surveyed had little or no experience with contracts incorporating moral rights.

#### **V. COPYRIGHT OFFICE SURVEY AND FINAL REPORT**

The most structured search for empirical evidence on the impact of waiver was the Office's survey, formulated with the assistance of a panel of copyright and visual arts experts and distributed to hundreds of art-related organizations on national, state and local levels. Many of those organizations, particularly state art councils, volunteer art lawyers and art schools, in turn disbursed hundreds of copies of the survey to their members. These efforts, coupled with organizational newsletters describing the VARA survey and Office discussions with artists and their representatives, assured widespread distribution of our survey.

The survey sought to educate and to elicit relevant information. It asked for objective responses to questions about participants' awareness of VARA rights, and their connection to the art world. It questioned visual artists about their professional experience and their contractual experience with waiver. All respondents were asked for specific information about art contracts, whether they had encountered any waiver provisions, and the effect of such provisions on relative bargaining power. Finally, the survey provided an opportunity for open-ended comments on VARA concerns.

More than 1,000 persons filed written responses to the survey. Responses were received from 47 states and the District of Columbia, and 955 respondents were self-described visual artists. Most artists grossed less than \$10,000 annually from their artwork and most had multiple sources of income.

About three-fourths of the respondents claimed awareness of moral rights, although many who elaborated in written comments stressed the need for more education of artists. Fewer than half knew that moral rights could be waived. Seven percent of those who answered the question said waiver clauses were routinely included in artists' contracts, but nearly 40 percent said waiver clauses were part of contracts for commissioned works.

Nearly one quarter of artists covered by VARA knew of artists who had been asked to waive their moral rights. Thirteen percent of artists covered by VARA said they had refused contracts because they included waivers and a similar number had insisted that a waiver clause be struck from a contract. These artists were generally those who earned more than \$25,000 annually from their art or who were represented by an agent. More than half of those who had rejected a request for waiver said such rejection voided the deal. In general, those participants who filed written commentary believe that VARA does little to enhance the artist's inferior bargaining position relative to the buyer.

More than half of the respondents who had experienced waivers said they complied with the specificity requirements of VARA, and about one-third said contracts contained a separate price for the waiver of moral rights. However, most art contracts continue to be oral and therefore cannot contain valid waiver clauses under the terms of VARA. Many artists decried the complexity of art contracts and stated that legal requirements were too burdensome and legal advice too costly.

Comments on the effectiveness of VARA were predictably varied. Some artists viewed the legislation as excessive regulation of the art business. Others affirmed the Act's goals, but considered the waiver provisions to be an "escape clause" for buyers to avoid honoring moral rights. A third group of artists was convinced that the law would not change the relatively weak bargaining power of artists. Some decried the limitation of statutory protection against destruction of works to those of "recognized stature" as being too narrow and incapable of definition. One commentator suggested that waivers should be valid only where the purchaser demonstrates a "compelling reason" for requiring one. Several comments remarked that the law was unenforceable, largely because enforcement is too costly.

## **VI. COPYRIGHT OFFICE PUBLIC HEARING**

On June 21, 1995, the Copyright Office held a public hearing to solicit comments on the effect of the waiver of moral rights provision of VARA. The Office also accepted written comments submitted by July 31, 1995.

Those responding to the Copyright Office Request for Comments through oral and written testimony were by no means unanimous in their views, but a few themes stood out. It is early to measure effects of VARA waiver provisions due to the low level of VARA awareness. VARA waivers are rare because written contracts for art transactions are rare. There is a distinction between "moveables," such as paintings and sculptures, and works incorporated into buildings. Waivers for the latter, as recognized in section 113(d), are likely to increase after the Carter case.

Some believed waiver should be repealed or modified for moveables (that is, for the majority of works addressed in section 106A). Most saw the need for the sec. 113 waiver provisions for works incorporated into buildings. For one attorney, however, the fact that most contracts for major commissions will now routinely require waivers means that the sec. 113 waiver provision should be tightened, if not repealed.

The discussion distinguished moveables from major commissioned works in general, and predicted pro forma waivers for the latter. The comments indicated that the latter category includes large, government-commissioned works as well as installed pieces, however, and sec. 113 deals only with works incorporated



into buildings; all other VARA works are addressed in sec. 106A. If waivability is desirable for installed works and ill-advised for moveables, therefore, the answer may not be so simple as repealing the sec. 106A waiver provisions and preserving those in sec. 113(d). The statute may need clarification on this point. A related question is whether removal of a site-specific work, even without damage, would infringe rights of integrity or attribution.

Many panelists believed that repeal of sec. 113 waiver would result in a chilling effect on creation of art, since property owners may be unwilling to commit to a permanent structure. On the other hand, there may be a chilling effect even if building owners have secured a waiver: several artists reported that, had they been operating under a waiver, they would have undertaken the project, but with a different scale and design. Some predicted a standard term in landlord-tenant contracts requiring tenants to get waivers or refrain from installing art.

Other recommendations were made for VARA. For example, several parties agreed that one joint author should not have the ability to waive for all co-authors. Others believed VARA should apply to print or broadcast reproductions of works, thus covering distortions in books, magazines and electronic media.

## **VII. WAIVER PROVISIONS IN ARTISTS' CONTRACTS**

The terms "gallery," "dealer" and "agent" are often used interchangeably in art contracts, but galleries, in their function as exclusive artists representatives, are more likely than dealers and agents to be involved in waiver of moral rights.

Visual Artists and Galleries Association Executive Director Robert Panzer stated that waivers will most often be initiated by purchasers, who may insist that a sale include a written contract waiving moral rights.

About a dozen examples of moral rights waivers from sample contracts were submitted in response to the Copyright Office's 1995 Request for Information. Other examples were found in the Nimmer copyright treatise. One Nimmer contract offers broad language to be used in a commission agreement or bill of sale if an artist is willing to waive moral rights. With respect to the VARA requirement that the use of the work for which rights are waived be specifically identified, Nimmer suggests simply that the work's use is as a work of visual art, and the waiver would apply to all applications in which either the attribution right or the integrity right may be implicated.

The contracts submitted included a variety of waiver provisions. A Campbell's Soup Art Contest demanded of entrants that they waive all moral rights as well as copyright. A Seattle Transit Project contract permitted the metro system to remove a work without the artist's approval if a designated arts committee so recommends and if the artist has the right of first refusal to purchase the work. A Massachusetts Bay Transportation Authority contract provided that state moral rights in a work that cannot be removed without substantial damage are "automatically waived" unless they are expressly reserved in a recorded instrument.

A 1994 agreement with the Los Angeles County transportation authority permitted removal of artwork in the Authority's sole discretion, even where removal could cause physical defacement, and an art installation at the Philadelphia Convention Center required complete waiver of VARA rights. Finally, some lease agreements between tenants and landlord are beginning to limit tenants' ability to install art without first obtaining waiver and/or landlord's permission.

## **VIII. RECOMMENDATIONS OF THE REGISTER OF COPYRIGHTS**

The Copyright Office examined and weighed carefully the varied opinions and experiences of artists, users and other interested parties reported in response to its Request for Information, formal survey and public hearing. It considered sample artists' contracts that contained waiver provisions, as well as evidence of

state case law and legislation on moral rights and the experience of representative foreign nations who have recognized moral rights for many years. These sources confirmed that because federal moral rights legislation is in its infancy in this country, and because artists, and often users, are frequently unaware of the international moral rights standard established by the Berne Convention, accurate predictions on the impact of VARA's waiver provisions are difficult to make at this time. However, some comments and conclusions are appropriate.

<http://www.copyright.gov/reports/exsum.html>

## FEDERAL COPYRIGHT IN VISUAL ART

### 17 USC § 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

### 17 USC § 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 co-owners 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.

#### 17 USC § 107. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1)** the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2)** the nature of the copyrighted work;
- (3)** the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4)** the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

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