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The National Endowment for the Arts Appropriation Act

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2101-2110 (Purdon Supp. 1990); R.I. GEN. LAWS §§ 5-62-2 to 5-62-6 (1986).

6. *See generally* H.R. Rep. No. 101-514, 101st Cong., 2nd Sess. (1990).

7. WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) (1978).

8. When the United States implemented the Berne Convention, Congress determined that domestic law amply afforded protection for an artist's moral right in a work. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

9. Due to the limited scope of this legislative update, the following sections of the Visual Artists Rights Act will not be discussed in the body of the article: (1) Sec. 604. REMOVAL OF WORKS OF VISUAL ART FROM BUILDINGS (amending § 113 of the Copyright Act); (2) Sec. 606. INFRINGEMENT ACTIONS (amending §§ 501(a), 506, 411(a), and 412 of the Copyright Act); (3) Sec. 607. FAIR USE (amending § 107 of the Copyright Act); (4) Sec. 608. STUDIES BY COPYRIGHT OFFICE (instructing the Register of Copyrights to conduct studies on the waiver of rights provision of the Act and the feasibility of implementing a resale royalty - "droit de suite" - requirement); (5) Sec. 609. FIRST AMENDMENT APPLICATION (reemphasizing the premise that the government may not take actions or enforce restrictions prohibited by the first amendment); and (6) Sec. 610. EFFECTIVE DATE (setting forth that the Act will take effect six months after the date of enactment - June 1, 1991 - and will be applicable to works created after the effective date or to works which were created before the effective date as long as authorship rights in those works have not been transferred).

10. Visual Artists Rights Act, § 602, 104 Stat. at 5128 (to be codified at 17 U.S.C. § 101).

11. *Id.*

12. *Id.*

13. *Id.* The purpose of the requirement that limited editions be signed and numbered is to afford notice to potential buyers that the works are protected under the Visual Artists Rights Act.

14. Parachini, *For Artists, A Measure of Protection*, Wash. Post, Nov. 7, 1990, at D9, col. 6.

15. *See* H.R. Rep. No. 101-514, 2nd. Sess. 21 (1990).

16. *Id.* at 11.

17. *Id.* at 12. "The nature or location of the exhibition is not relevant to the determination of whether the photograph is produced only for exhibition purposes. In addition, it is the initial purposes for which the image is produced that controls whether a photograph is covered. Thus a qualifying photograph will not fall outside the ambit of the bill's protection simply because it is later used for non-exhibition purposes." *Id.*

18. *Id.*

19. Visual Artists Rights Act, § 603, 104 Stat. at 5128 (to be codified at 17 U.S.C. § 106(a)). The rights of attribution and integrity are independent of the exclusive rights provided to owners of copyrights set forth in section 106 of the Copyright Act. H.R. Rep. No. 101-514, 101st Cong., 2nd Sess. 14 (1990).

20. *Id.*

21. *Id.*

22. *Id.* This provision is subject to the limitations stated in section 604 of the Visual Artists Rights Act (to be codified at 17 U.S.C. § 113(d)(1)) relating to works attached to buildings.

23. *Id.*

24. H.R. Rep. No. 101-514, 101st Cong., 2nd Sess. 15-16 (1990).

25. *Id.* at 18.

26. Visual Artists Rights Act, § 603, 104 Stat. at 5129 (to be codified at 17 U.S.C. § 106A(c)(1)). *See also* Corr, *Protection of Art Through Artist' Rights: An Analysis of State Law And Proposal For Change*, 38 AM. U. L. REV. 855 (1989).

27. Visual Artists Rights Act, § 603, 104 Stat. at 5129 (to be codified at 17 U.S.C. § 106A(c)(2)).

28. The effective date of The Visual Artists Rights Act.

29. Visual Artists Rights Act, § 603, 104 Stat. at 5129 (to be codified at 17 U.S.C. § 106A(d)(1)).

30. Visual Artists Rights Act, § 603, 104 Stat. at 5129 (to be codified at 17 U.S.C. § 106A(d)(2)).

31. Visual Artists Rights Act, § 603, 104 Stat. at 5129 (to be codified at 17 U.S.C. § 106A(d)(3)).

32. Visual Artists Rights Act, § 603, 104 Stat. at 5129 (to be codified at 17 U.S.C. § 106A(e)(1)). The distinction between a transfer and a waiver was not amply clarified in the legislative history of the Visual Artists Rights Act and will more than likely be the subject of a significant amount of litigation. *See* H.R. Rep. No. 101-540, 101st Cong., 2nd Sess. 19 (1990).

33. H.R. Rep. No. 101-514, 101st Cong., 2nd Sess. 18 (1990).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407, 416 (1990).

39. Visual Artists Rights Act, § 605, 104 Stat. at 5131 (to be codified at 17 U.S.C. § 301).

40. H.R. Rep. No. 101-514, 101st Cong., 2nd Sess. 21 (1990).

41. *The Visual Artist Rights Act; Hearing on H.R. 2690 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., lst Sess. (1989) (Statement of Ralph Oman, Register of Copyrights).

42. Visual Artists Rights Act, § 605, 104 Stat. at 5131 (to be codified at 17 U.S.C. § 301(f)(2)).

43. Visual Artists Rights Act, § 605, 104 Stat. at 5131 (to be codified at 17 U.S.C. § 301(f)(2)(B)).

44. For example, Massachusetts' moral rights legislation states: "an original work of visual or graphic art of any media which shall include, but is not limited to, any painting, print, drawing, sculpture, craft, object, photograph, audio or video tape, film, hologram, or any combination thereof...." MASS. GEN. LAWS ANN. ch. 213, § 85s (West Supp. 1988).

45. *Id.*

The National Endowment for the Arts Appropriation Act

Introduction

On November 5, 1990 President Bush signed a bill reauthorizing the National Endowment for the Arts (NEA) for three years and reappropriating the NEA with roughly $174 million for fiscal year 1991. The debated legislation commenced a new chapter in the controversy surrounding the NEA and its funding of art works of questionable content. The most significant provision of the appropriation legislation requires that the determination of obscene art works be performed by the courts. Other provisions bolster the application procedures for funds dispensed from the NEA, alter the role of the Chairperson, and change the composition of the NEA panels. This update will provide a brief background

of the NEA followed by a discussion of the NEA's rise to controversy and Congress' response to this problem. Additionally, significant changes affecting the NEA as a result of the 1991 National Endowment for the Arts Appropriation Act will be discussed. Finally, the conclusion will provide a final overview of the effect that this legislation will have on the art world.

General Background of the NEA

In 1965, Congress organized the NEA to encourage and support national progress in the arts.[1] Through grants of federal funds, the NEA fosters excellence, diversity, and vitality in the arts in the United States. Grants for individual, project, and longer term institutional support have expanded to financing beyond the traditional areas of music, dance, and theater and have included appropriations for photography, film, animation, and crafts.[2]

The Chairperson of the NEA is head of the organization and approves applications for grants.[3] The Chairperson receives recommendations for funding by panels of experts and consultants in the field.[4] The Chairperson's recommendations are then presented to the National Council on the Arts (NCA) which acts as an advisory body to the Chairperson and the Endowment. The Council reviews the recommendations of the panels for grants[5] and sends them to the Chairperson for final approval.

NEA's Rise to Controversy

The Endowment remained relatively free of any major controversy for the first 25 years of its existence. However, in 1989, when Americans discovered $45,000 of the NEA budget was used to help fund the controversial projects of Robert Mapplethorpe and Andres Serrano, public furor mounted over the funding practices of the Endowment. "Robert Mapplethorpe: The Perfect Moment" was a retrospective of Mapplethorpe's works contributed from various museums. Part of the exhibit consisted of photographs which depicted nude children and photographs graphically illustrating homosexual sexual practices.[6] Serrano's controversial work, including his "Piss Christ" which depicted a photograph of a crucifix submerged in a jar of urine, was part of a touring exhibit arranged by the Southeastern Center for Contemporary Art (SECCA).[7] Some taxpayer's objected to the use of their tax money for art work that they considered obscene or sacrilegious. A number of individuals called for restrictions on the content of federally funded art. On the contrary, others opposed placing any type of restraints on art, believing that the artist's right to freedom of expression should not be restricted merely because federal funds are involved.

Response to the Controversy

In response to the Mapplethorpe and Serrano controversies, in the summer of 1989 during annual appropriation hearings, conservative Senator Jesse Helms (R-N.C.) headed a faction that proposed placing severe restrictions on the content of federally funded art work. The enacted 1990 NEA Appropriations Act, a watered down version of Helms' original proposal, placed the first content-based restrictions on federally funded art in the Endowment's history by banning funding of obscene work. According to the Act, the Endowment was to use its own judgment in determining whether art was considered obscene.[8] In making an obscenity determination the NEA was required to deny financial assistance to works with "depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[9] Such art was devoid of any first amendment protection and not proper material to be funded by the NEA. Therefore, in order to enforce this mandate, the Endowment required that each artist sign a pledge guaranteeing his work would not be found obscene by the NEA.[10]

In response, critics of the Act argued that Congress was overstepping its authority and restricting freedom of speech. About twenty grant recipients were so vehement in their convictions that they refused grants awarded by the Endowment because of the obscenity pledge.[11] The differing opinions of members of Congress on the matter were reflected in a conference committee report from the House and Senate which reviewed the Helms amendment. The committee declared that "the House and Senate have no wish to nor do they intend by expressing their views herein to censor the NEA or to impose their views on the NEA."[12] However, the committee also proclaimed that the "NEA erred in approving the grants for exhibiting publicly certain controversial photographs by Robert Mapplethorpe."[13] Although Congress declared in the conference committee report that it did not want to express its views to censor the NEA, in effect it was doing just that.

An additional critic of content-based restrictions was the court system. In separate actions, Bella Lewitzky Dance Company and the Newport Harbor Art Museum filed suit against the NEA and sued its Chairman, John Frohnmayer.[14] Each plaintiff

claimed that requiring applicants to sign the anti-obscenity pledge was unconstitutional.[15] After consolidating the two actions, the district court in California found that the anti-obscenity pledge was unconstitutionally vague and violated freedom of speech.[16]

Substance of the Legislation

Opponents of content-restricted art and advocates of restricting artistic content both had a stake in the hearings for the reauthorization and reappropriation of the NEA for fiscal year 1991. Some feared the restrictions on the NEA would be more severe and the NEA was moving toward a slippery slope in which Congressional interference in the Endowment would be stronger.[17] However, this did not come to pass. By instituting new standards for judging obscenity, Congress retained content restrictions on art, but relaxed some of the provisions that were enacted by the conservative act the year before.

The 1990 and 1991 NEA Appropriation Acts both clearly recognize that obscenity is not material that will be federally funded.[18] The determination of obscene work is no longer to be decided by the NEA. Rather, obscenity is to be adjudicated in a court of record and competent jurisdiction according to the guidelines set forth in *Miller v. California*.[19] Although changed slightly from *Miller*, obscenity is defined in the 1991 Appropriation Act as:

> (1) the average person applying contemporary community standards, would find that such project, production, workshop, or program, when taken as a whole appeals to the prurient interest;
>
> (2) such project, production, workshop or program depicts or describes sexual conduct in a patently offensive way; and
>
> (3) such project, production, workshop or program, when taken as a whole lacks serious literary, artistic, political, or scientific value.[20]

Although this standard imposes some content-based restrictions on artists as compared to zero restrictions in the first twenty-five years of the Endowment, the shopping list of restrictions including "sadomasochism, homo-eroticism, etc...." from the Helms legislation was deleted. However, unlike the Helms amendment, a new provision in the 1991 Appropriation Act delineates serious penalties if an artist's work is judged to be obscene. The artist must repay the amount of the grant and will not be eligible for Endowment grants until that grant is repaid.[21] Additionally, grant recipients are no longer required to sign an anti-obscenity pledge before receiving NEA funding. Instead, as a condition to receiving the grant, each applicant must assure the Endowment that his or her work meets the standard of artistic excellence and artistic merit that the NEA requires.[22]

The obscenity standard outlined in the legislation may infringe on an artist's constitutionally protected rights. Whether an artist's rights are implicated by funding decisions and whether Congress can grant funds conditionally are unresolved issues. If an artist's rights are implicated, the vagueness of this standard may cause a chilling effect on some artists. In addition, the standard may have a chilling effect on the Chairperson in considering whether to fund works that are controversial.

In order to assure that artists comply with the NEA standards, additional safeguards have been enacted. Applicants are required to submit a detailed description of the contemplated project[23] and a timetable for the completion of the project.[24] In addition, grant recipients must submit interim reports describing the artist's progress and compliance with the Act.[25] Site visitations by the panels, when necessary and feasible, will also be conducted.[26] Moreover, the Chairperson of the Endowment has been empowered with additional responsibilities in ensuring that artistic excellence is being pursued. When establishing regulations for the application procedures for grant recipients, the Chairperson must clearly indicate that obscenity is without artistic merit and will not be funded.[27] Additionally, in judging applications, the Chairperson must take "into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[28]

Another major change enacted was the modification of the membership of the panels. Panels shall be composed of "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view."[29] Membership on advisory panels must change substantially from year to year.[30] In addition, it is significant to note that panels will now include knowledgeable lay people.[31] When the Endowment was first created, panels were originally made up of experts and leaders in the field in order to allow the panels to remain free from the interference of censorship, bureaucratic control, and manipulation by political pressure groups.[32] By including more lay people, Congress may be encouraging the panels to be more sensitive to the average citizen's preferences. This is problematic because a knowledgeable lay person has not

acquired the background and training needed to judge what art work will encourage appreciation and growth in the arts. In addition, the panels may find it difficult to judge artistic creations independently and remain free of outside interference by being sensitive to the average citizen. By altering the composition that was originally intended for the panels, Congress may find an increase in censorship and a decrease in expertise on the panels. With this decrease in skilled members on the panel, the aesthetic value of many art works may not be realized.

The last major change in the Act was the increased amount of money appropriated to the states and local agencies from federal funds. By fiscal year 1993, the amount appropriated to the states will be 35% of NEA program funds, which is an increase of 15% from the 1990 Appropriation Act. By appropriating more money to the states, Congress may be shifting the burden to the states in undertaking responsibility for funding controversial art. Additionally, in response to a increase in funds, some states may cut funding for art from their state budgets.[33] These budget cuts will especially hurt smaller art groups and agencies who rely on state rather than federal funding.

Conclusion

The NEA's new legislation provides for a more equitable compromise for judging obscene art than the previously enacted Helms legislation because artists may now look to a court of law in order to decide whether their work is obscene. In addition, artists are no longer required to pledge that their work is not obscene. Other changes include additional responsibilities for the Chairperson of the NEA, procedural changes within the panel, and an increase in federal funds to state and local agencies. However, the new legislation has not stifled the controversy surrounding the issue of whether Congressional involvement in deciding artistic content is proper. Although no content-based restrictions is the ideal to some, others support the recently passed legislation which establishes a judicial safeguard to ensure obscene art is not federally funded.

The mechanism used to protect the public against obscene art has a potential to create a chilling effect on the NEA's support for controversial works and a chilling effect on artists to create those controversial works. Whether this mechanism will hamper artistic creativity and expression remains to be seen. One of the original drafters of the legislation stated during the 1975 Endowment reauthorization hearings that "for any program to be successful, it must take an occasional chance, and it must be willing to fund projects or proposals which could well backfire and arouse anti-intellectualism and negativism."[34] Truly great art may only be discoverable if artists are allowed to take these chances and endure possible controversies. Ω

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1. National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C.A. § 951(1) (West 1990).
2. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 COMM/ENT 353, 355 (1990).
3. 20 U.S.C.A. § 954(c) (West 1990).
4. *Id.* at § 959(a)(8).
5. *Id.* at § 955(f).
6. City of Cincinnati v. Contemporary Arts Center, 57 Ohio Misc. 2d 9, 566 N.E.2d 207 (1990).
7. Parachini, *Serrano Answers Congressional Critics*, L.A. Times, Aug. 2, 1989, § 6, at 1, col. 1.
8. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 738, 741 (1989).
9. *Id.*
10. Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774, (C.D. Cal. 1991).
11. *Art Agency Gets 'Out of the Obscenity Business' After Fighting Suits*, Chicago Tribune, February 14, 1991, § C, at 28.
12. H.R. CONF. REP. No. 264, 101st Cong., lst Sess. 77-78 (1989).
13. *Id.* Although definitely controversial, Mapplethorpe's photographs were later found not to be obscene by an Ohio jury. Kaufman, *Both Sides Battled for Cincinnati's Soul*, The National Law Journal, Oct. 15, 1990, at 8, col. 1.
14. *Art Agency Gets 'Out of the Obscenity Business' After Fighting Suits*, *supra* note 11, at 28.
15. *Id.*
16. *Id.*
17. Rohde, *supra* note 2, at 371-373.
18. Department of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, § 103(b), 104 Stat. 1961, 1963 (1990) (to be codified at 20 U.S.C. 954(l)(1) (1990)).
19. Miller v. California, 413 U.S. 15 (1973). The guidelines are the following: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
20. Department of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, § 102(c), 104 Stat. 1961, 1963 (to be codified at 20 U.S.C. 952(l) (1990)).
21. *Id.* at § 103(h), 104 Stat. at 1965 (to be codified at 20 U.S.C. 954(l)(3)(B) (1990)).
22. *Id.* at § 103(g), 104 Stat. 1965 (to be codified at 20 U.S.C. 954(i)(4) (1990)).
23. *Id.* at § 103(g) (to be codified at 20 U.S.C. 954(i)(1) (1990)).
24. *Id.* at § 103(g), 104 Stat. at 1965 (to be codified at 20 U.S.C. 954(i)(2) (1990)).
25. *Id.* at § 103(g), 104 Stat. at 1965 (to be codified at 20 U.S.C. 954(i)(2) (1990)).
26. *Id.* at § 109(1), 104 Stat. at 1971 (to be codified at 20 U.S.C. 959(c)(5) (1990)).