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Keep Your Filthy Hands Off My Painting! The Visual Artists Rights Act of 1990 and the Fifth Amendment Takings Clause

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KEEP YOUR FILTHY HANDS OFF MY PAINTING! THE VISUAL ARTISTS RIGHTS ACT OF 1990 AND THE FIFTH AMENDMENT TAKINGS CLAUSE

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I. INTRODUCTION

On December 1, 1990, President Bush signed the Visual Artists' Rights Act of 1990 (VARA) into law.[1] VARA provides rights akin to the *droit moral* enjoyed by European artists to certain groups of artists in the United

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* *Editor's note:* This note was selected as the best note for Spring 1997.

** This note is dedicated to my loving parents, Kiran and Shrikeshi Amin, without whom, nothing I do would be possible. Thanks to the editorial staff of the *Journal* for this opportunity and for their assistance in the editing process. All errors which remain are mine.

1. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) [hereinafter VARA Implementation Act] (codified in scattered sections of 17 U.S.C. (1994)). The Visual Artists Rights Act of 1990 was signed into law as a part of the Judicial Improvements Act of 1990. It was passed by both the House of Representatives and the Senate on October 27, 1990. *See Legislation: President Signs Bill on Software Rental, Architectural Works and Artist's Rights*, PAT. TRADEMARK & COPYRIGHT J. (BNA), Dec. 6, 1990, at 123.

States.[2] VARA was a begrudging concession to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), which the United States ratified in 1989.[3] That treaty acknowledges that artists have a moral right to their creations, which does not terminate upon first sale.[4] The Berne Convention mandates:

> (1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of, or any other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation . . . .[5]

VARA grants certain artists many of the rights enumerated in the Berne Convention, such as the right to claim ownership and to prevent intentional or reckless distortion, mutilation, or destruction of their work.[6] This recognition of an artist's ongoing right runs against the currents of U.S. legal and cultural traditions.

One of the most notable criticisms of VARA is that it offends the Fifth Amendment's ban on deprivation of property without due process of law.[7] Critics contend that VARA prevents owners of artwork from exercising full control over their property.[8] Proponents counter that the restrictions on property rights under VARA are no more intrusive than historic preservation ordinances, which prohibit modification of buildings in some areas.[9] This note will develop moral rights jurisprudence from nineteenth-century Europe to present-day United States, provide a brief synopsis of Fifth Amendment

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2. *See* DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 4E(6)(b) (1992).

3. Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9. 1886, revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (Paris Text, 1971) [hereinafter Berne Convention], *cited in* CHISUM & JACOBS, *supra* note 2, § 4E(6). In the United States, treaties are approved by both the legislative and executive branches of government. *See generally* U.S. CONST. arts. I & II. The President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II § 2, cl. 2. Any treaty signed by the executive but not approved by a two-thirds majority of the Senate is considered unratified and ineffective. *See id.*

4. Berne Convention, *supra* note 3, art. 6*bis*.

5. *Id.*

6. 17 U.S.C. § 106A (1994).

7. "No Person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

8. Eric Felten, *New Law Gives Rights to Artist After Work Is Sold*, WASH. TIMES (D.C.), Nov. 28, 1990, at E1.

9. Edward J. Damich, *New Law Protects Rights of Artists, Owners of Artworks*, WASH. TIMES (D.C.), Dec. 7, 1990, at F2.

"takings" jurisprudence, and apply the "takings" doctrines elucidated by the Supreme Court to moral rights issues under VARA.

II. BACKGROUND: THE MORAL RIGHTS AND "TAKINGS" FRAMEWORKS

A. *The Moral Rights Tradition*

Droit moral, or moral rights,[10] derive from continental European notions of personality based on the writings of Georg Wilhelm Friedrich Hegel.[11]

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10. Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 379 (1995). Although "moral rights" is a literal translation of the French phrase *droit moral* (and the most common appellation of the concept), these words do not accurately reflect the idea. Moral rights have nothing to do with decency or morality. The concept of moral rights is more correctly, yet much less often, referred to as "authors' rights," the "incorporeal, personal connection with one's art work" and has been recognized by European legal tradition for some time. *Id.*

11. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288-89 (1988). A background of the life of Hegel is provided by Paul Harrison, *Hegel: Philosophy and History as Theology* (visited Jan. 27, 1998) (last modified Feb. 11, 1997) <http://members.aol.com/pantheism0/hegel.htm>.

> Georg Wilhelm Friedrich Hegel was born in Stuttgart in 1770, the son of a revenue officer.
>
> His career at school and university was undistinguished — his certificate mentioned his "inadequate grasp of philosophy." At Tübingen university he studied not philosophy but theology — and in a sense all his philosophy was essentially a theology, an exploration of the workings of the world-spirit which he identified with God.
>
> On graduation he became a family tutor in Berne and Frankfurt, with plenty of time for private study. In 1801 he won his first university post at the University of Jena. After the Battle of Jena in 1806 when Napoleon defeated the Prussians, Hegel saw the emperor riding past.
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> The encounter had a profound impact. "I saw the Emperor — this world-spirit — go out from the city to survey his realm," he wrote on October 13, 1806. "It is a truly wonderful experience to see such an individual, on horseback, concentrating on one point, stretching over the world and dominating it[.]" For Hegel, Napoleon embodied the world-historical hero of the age, driving forward the self-realization of God in history.
>
> After the battle the university fell on bad times, and Hegel left his post. Facing destitution, he took a job editing a newspaper in Bamberg, and then was headmaster of a secondary school in Nürnberg. In 1816 he became professor of philosophy at Heidelberg. Two years later he accepted the chair of philosophy at Berlin, where he remained till his death in 1831.
>
> Hegel's philosophical system was perhaps the most ambitious since Aristotle, comprising logic, psychology, religion, aesthetics, history, law. As well as his published works, many volumes were compiled from the notes of his long-suffering students. Though they laboriously took down almost every word, one wonders how much they understood. Hegel's language is abstruse and sometimes tortuous, and makes great demands on the reader.

Id.

Central to Hegel's philosophy of property is the will of the individual.[12] The most abstract though visible manifestation of that individual will is the personality.[13] Bound up with the Hegelian notion of property is the notion of personality. According to Hegel, intellectual property consists of "[a]ttainments, eruditions, talents, and so forth, [which] are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them [the creator] may embody them in something external and alienate them."[14] Thus, artistic and literary creations retain the personality of their creator, even after the sale of the physical work. This "ghost image" of artists' personalities in their creations then provides the impetus to protect moral rights in their art.[15]

Droit moral was introduced into French civil law in the nineteenth century, but was not founded upon any written law.[16] The theory has evolved from decisions handed down by the French judiciary over the past 200 years.[17] These rights are based on the Hegelian philosophy that an "intimate bond . . . [exists] between a literary or artistic work and its author's personality."[18] Moral rights protect four fundamental interests of the artist: (1) the right of attribution, (2) the right of disclosure, (3) the right of withdrawal, and (4) the right of integrity.[19] The right of attribution is the right to claim authorship of the work.[20] The right of disclosure is the right of an author to either display or conceal his or her work.[21] The right of withdrawal is the right of an author to remove a work from public circulation upon payment of compensation to the publisher when the author is dissatisfied with it.[22] Finally, the right of integrity involves the assurance

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12. Hughes, *supra* note 11, at 331-32.

13. *Id.* at 331.

14. *Id.* at 337-38 (quoting GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT ¶ 43 (T.M. Knox trans., Oxford Univ. Press 1967) (1821)).

15. *Id.* at 338-40.

16. *See* Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 466 (1968).

17. *Id.*

18. *Id.* at 465.

19. Sherman, *supra* note 10, at 381. The Berne Convention recognizes only the rights of attribution and integrity, and further limits the right of integrity to those acts that "would be prejudicial to [the artist's] honor or reputation." Berne Convention, *supra* note 3, art. 6*bis*.

20. Berne Convention, *supra* note 3, art. 6*bis*; *see also* Sarraute, *supra* note 16, at 478.

21. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 27-29 (1994). In France, the right of disclosure also entails the right to determine when to place the work into circulation. Sarraute, *supra* note 16, at 467. Furthermore, the right of disclosure includes the right to withhold a work from circulation until the author is satisfied with it. *Id.* at 467-68.

22. James M. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487, 499-500 (1968). An author enjoys the right of modification or withdrawal "even after his work has been published" in order to retouch or destroy the work. Sarraute,

that an author's work will not be altered or destroyed.[23] Although moral rights germinate in judicial opinions, their roots have been firmly planted in French legislation.[24]

The "moral rights" protection afforded Continental artists has made them the envy of their U.S. counterparts. Artists in other nations have been able to seek protection of their moral rights in the courts for some time.[25] For example, in 1955, a French artist, Bernard Buffet, created a painting to be sold for charity.[26] The work was painted on six panels of a refrigerator and was signed only once, the author intending for it to be viewed as a whole.[27] After auction, the work was dismantled for individual sale of the panels.[28] Through the French courts, Buffet was able to stop the sale.[29]

B. *The Development of Moral Rights in the United States*

In the United States, however, artists traditionally have been denied moral rights protection. In *Crimi v. Rutgers Presbyterian Church*,[30] a 1949 New York case, the plaintiff was hired to paint a fresco on the wall of the Rutgers Presbyterian Church in Manhattan.[31] The fresco was a depiction of a barechested Jesus and became the subject of much controversy in the parish.[32] By 1946, the mural fell into disfavor with the parishioners because the bare chest was thought to place too great an importance on Jesus' physical rather than his spiritual attributes.[33] During a 1946 redecoration of the church, the mural was painted over.[34] The plaintiff brought an action for damages or to compel the church to remove the paint that covered the mural.[35] The defendant church asserted that the plaintiff had relinquished whatever rights he may have had in the painting once he sold it.[36]

The issue facing the court was "whether the sale by an artist of a work wipes out any interest he might have therein."[37] The court held that

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supra note 16, at 476-77.

23. Treece, *supra* note 22, at 496.

24. Sarraute, *supra* note 16, at 465; *see also* John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976).

25. Sarraute, *supra* note 16, at 465.

26. Merryman, *supra* note 24, at 1023.

27. *Id.*

28. *Id.*

29. *Id.* (citing Buffet v. Fersing, CA Paris, 1962 D. Jur. 570, 571).

30. 89 N.Y.S.2d 813 (1949).

31. *Id.* at 814.

32. *Id.* at 815.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

because moral rights, as they have existed in Europe, do not exist in the United States, the plaintiff artist had relinquished all his rights in the painting upon its sale.[38] The court noted several European cases that applied moral rights principles to similar situations.[39] However, it found that those decisions were designed to protect the honor and reputation of the artist, and that "even in France, . . . it was held that the artist could not recover when murals painted by him on the walls of a church were destroyed, without notice, by the abbe."[40] The French court reasoned that moral rights are designed to protect reputation by preventing deformation of artistic works, but that destruction of works did not lead to harm to the artist's reputation.[41] The New York court went on to point out that

> "[t]he conception of 'moral rights' of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers.
>
> What the plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries."[42]

Thus, the court found that it could not uphold the plaintiff's moral rights claim.[43] The court concluded the claim "that an artist retains rights in his work after it has been unconditionally sold, where such rights are related to the protection of his artistic reputation" did not have a basis in U.S. law.[44]

Crimi is typical of U.S. decisions of that time.[45] In later years, courts began to recognize that "the economic incentive . . . that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief" for violation of their moral rights.[46] Courts began to award artist's damages for violation of their moral rights under a variety of noncopyright theories, including contract and tort.[47]

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38. *Id.* at 819.

39. *Id.* at 816-17.

40. *Id.* (citing Lacasse et Welcome c. Abbé Quénard, CA Paris, Apr. 27, 1934, D.H. [1934], 385).

41. *Id.* at 816.

42. *Id.* at 818 (quoting Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) (quoting 2 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 802 (1938))).

43. *Id.* at 819.

44. *Id.*

45. *See, e.g., Vargas*, 164 F.2d at 526 (dismissing the artist's moral rights claim out-of-hand).

46. Gilliam v. American Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) (citing Goldstein v. California, 412 U.S. 546 (1973); Mazer v. Stein, 347 U.S. 201 (1954)).

47. *See* Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (contract); Prouty v. National Broad. Co., 26 F. Supp. 265, 266 (D. Mass. 1939).

In 1976, the Second Circuit, in *Gilliam v. American Broadcasting Cos.*,[48] decided that the moral right of attribution can be protected under section 43(a) of the Lanham Act.[49] *Gilliam* was a watershed event in U.S. intellectual property law because for the first time, a U.S. court recognized a moral rights cause of action.[50] In *Gilliam*, members of a comedy group called Monty Python sued the American Broadcasting Companies (ABC) for deforming or mutilating a television show.[51]

The *Monty Python's Flying Circus* television show, produced by the BBC and written and performed by the group, was a phenomenal hit in England in the early 1970s.[52] By this time, *Flying Circus* also had gained a cult following in the United States through exposure on public television.[53] Hoping to capitalize and reach a broader market, ABC obtained the U.S. rights to broadcast *Flying Circus*.[54] ABC's license from the BBC allowed editing the program for " 'insertion of commercials, applicable censorship [laws] or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements.' "[55] However, the BBC's agreement with Monty Python had no such clause.[56] ABC broadcast its first show, omitting twenty-four minutes of the original ninety-minute recording.[57] The group sued ABC for an injunction against further broadcast, alleging that the network had violated Monty Python's copyright, and that the broadcast was a "mutilation" of the original work and had caused harm to the reputation of Monty Python.[58]

One of the issues before the court was whether section 43(a) of the Lanham Act permitted a cause of action for mutilation of the television show.[59] Section 43(a) was originally designed to protect unfair commercial competition.[60] Gilliam argued that the representation of the show as a

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48. 538 F.2d 14 (2d Cir. 1976).

49. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1994) (The Lanham Act is the U.S. Federal Trademark and Unfair Competition Law.).

50. *Gilliam*, 538 F.2d at 24-25. The *Gilliam* court noted that U.S. courts had been vindicating certain moral rights on the basis of contract and tort law for years. *Id.* at 24 (citing Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (contract); *Prouty*, 26 F. Supp. at 265 (tort)).

51. *Id.* at 18.

52. *Id.* at 17.

53. *Id.*

54. *Id.* at 18.

55. *Id.* (quoting the contract between ABC and Monty Python) (alteration in the original).

56. *Id.* at 17-18.

57. *Id.* at 18.

58. *Id.*

59. *Id.* at 23-24.

60. 15 U.S.C § 1125(a) (1994) provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or

product of Monty Python, "although technically true, create[d] a false impression of the product's origin."[61] The *Gilliam* court accepted the argument, finding that the edited work omitted key elements of several skits, leaving out the entire points of some jokes.[62]

> A single example will illustrate the extent of the distortion engendered by the editing. In one skit, an upper class English family is engaged in a discussion of the tonal quality of certain words as "woody" or "tinny." The father soon begins to suggest certain words with sexual connotations as either "woody" or "tinny," whereupon the mother fetches a bucket of water and pours it over his head. The skit continues from this point. The ABC edit eliminates this middle sequence so that the father is comfortably dressed at one moment and, in the next moment, is shown in a soaked condition without any explanation for the change in his appearance.[63]

The court also found that ABC had removed the climax to several jokes. The court held that "the situation in which a television network broadcasts a program . . . which has been edited . . . into a form that departs substantially from the original work" and which is essentially a misattribution of origin, or authorship, is actionable under section 43(a).[64]

Thus, in *Gilliam*, the court carved out an exception to the general rule that U.S. copyright law protects only economic rights. The decision added a moral rights cause of action to the Lanham Act, which was originally conceived as protecting only commerce, and opened the door further for moral rights philosophies to gain entry into U.S. law.

Despite *Gilliam*, the federal courts have not embraced moral rights as

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any combination thereof, or any false designation of origin, false misleading description of fact, or false or misleading representation of fact, which —

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

61. *Gilliam*, 538 F.2d at 24 (citing Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975)).

62. *Id.* at 25.

63. *Id.* at 25 n.12.

64. *Id.* at 24-25.

fully as many proponents would like. However, state courts and legislatures have been increasingly sympathetic to the needs of artists for protection.[65] As of 1990, California, Connecticut, Illinois, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island have enacted moral rights legislation.[66]

Wojnarowicz v. American Family Ass'n[67] applied the New York Artists' Authorship Rights Act.[68] In *Wojnarowicz*, the defendant group, the American Family Association (AFA), was engaged in a public campaign against the National Endowment for the Arts (NEA).[69] The AFA characterized the NEA's programs as supporting "blasphemous" and "offensive" art which put American decency at peril.[70] In its campaign, the AFA distributed a pamphlet to members of Congress, newspapers, and Christian groups.[71] This pamphlet contained a few of the plaintiff's works of art selected from an exhibit known as "Tongues of Flame."[72] Plaintiff's work selected by the AFA explicitly depicted sexual acts and homosexual themes.[73] Wojnarowicz claimed that the selective copying and distribution of his work amounted to a mutilation or deformation of his work as displayed to the recipients of the AFA pamphlet.[74] The issue before the court was whether such selective copying and distribution was a violation of the right of integrity as guaranteed by the New York statute.[75]

The N.Y. Artists' Rights Act provides a right of integrity for artists.[76]

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65. *See* H.R. REP. NO. 101-514, at 9 (1990). The House Report for the VARA enactment bill cites 11 state statutes that support artists' rights in some way. *Id.* at 9 n.18.

66. *Id.* at 9 n.18.

67. 745 F. Supp. 130 (S.D.N.Y. 1990). The opinion dismissed the artist's misappropriation claims under the Lanham Act and denied remedy under the copyright laws because it found Defendant's actions amounted to fair use. *Id.* at 141-47; *see* CHISUM & JACOBS, *supra* note 2, at § 4E(6)(a).

68. *Wojnarowicz*, 745 F. Supp. at 134-41 (citing New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1990) [hereinafter N.Y. Artists' Right Act].

69. *Id.* at 133.

70. *Id.*

71. *Id.* at 134.

72. *Id.*

73. *Id.*

74. *Id.* at 134-35.

75. *Id.*

76. The New York Artists' Rights Act provides:

> [N]o Person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art or limited edition multiple of not more than three hundred copies by th[e] artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom . . . .

Based on this law, the court held that Wojnarowicz had a valid claim against the AFA.[77] The court held that deliberate actions constituted violations of the Act.[78] The court found that the AFA "largely reduced plaintiff's multi-imaged works of art to solely sexual images, devoid of any political and artistic context."[79] The court further found that this depiction of the plaintiff's work could cause harm to the artist's professional reputation.[80] The court reasoned that even museums and galleries familiar with Wojnarowicz's work may be reluctant to show his art because of a perceived connection with pornography.[81]

Because the Act was intended to protect the reputation of the artist, the court found that Wojnarowicz had an actionable claim against the AFA for violating the integrity of his artistic work.[82] The court awarded an injunction against the AFA as allowed by the Act,[83] but found that Wojnarowicz had not proven actual damages and therefore awarded only nominal damages.[84] Thus, in *Wojnarowicz*, the artist was able to vindicate his moral right of integrity by relying on a state statute.[85] However, states may protect moral rights to varying degrees, or if they choose, not at all. VARA was passed by Congress partly to remedy the disparity in protection offered by the various states.[86]

N.Y. Artists' Rights Act § 14.03(1).

77. *Wojnarowicz*, 745 F. Supp. at 141.

78. *Id.* at 137.

79. *Id.* at 138.

80. *Id.* at 139.

81. *Id.*

82. *Id.* at 141.

83. *Id.* at 148 (citing N.Y. Artists' Rights Act § 14.03(4)(a)).

84. *Id.*, 745 F. Supp. at 148-49.

85. Wojnarowicz's complaint also listed causes of action under the Lanham Act, the Copyright Act, and defamation theories. *Id.* at 132-33. However, the court found against the artist on these grounds. *Id.* at 133. The court reasoned that the Lanham Act claim was unfounded because it was not based on any sort of commercial competition between the plaintiff and defendant. *Id.* at 141-42. It denied relief under defamation law because the "actual malice" test of *New York Times Co. v. Sullivan* was not met. *Id.* at 148; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279-81 (1964). Finally, the court held for the defendant on the copyright count because it found the copying to be fair use under the Copyright Act of 1976. *Wojnarowicz*, 745 F. Supp. at 143; *see also* Copyright Act of 1976, 17 U.S.C. § 107 (1994).

86. H.R. REP. NO. 101-514, *supra* note 65, at 9-10. The House Report notes that the state laws " 'are a "patchwork" of rules which by itself vitiates somewhat the single, unified system of copyright. Artists, lawyers, courts, and even the owners of works deserve a single set of rules on this subject.' " *Id.* (quoting *Hearings on H.R. 2690 Before the Subcomm. on Courts, Intell. Prop., and the Admin. of Just. of the House Comm. on the Judiciary*, 101st Cong. 6 (1989) [hereinafter *Hearings*] (statement of John Koegel)).

C. *The Visual Artist Rights Act*

In spite of the acceptance of moral rights by foreign nations and several U.S. states, Congress did not embrace the concept until after it had ratified the Berne Convention in 1989.[87] Screen writers and motion picture directors, among others, argued that the adoption of the treaty would require wholesale changes to U.S. law.[88] However, because the United States has become a leading producer of intellectual property, and the ratification of the Berne Convention would further enhance its position in forming international intellectual property law, the Senate adopted the Berne Convention.[89] At the time, the Berne Convention's moral rights provision had no counterpart in U.S. law.[90] Nevertheless, to appease opponents of the moral rights doctrine embraced by the Berne Convention, Congress chose not to adopt further legislation to enforce moral rights.[91]

Nonetheless, the implementation of the Berne Convention opened a door for congressional friends of moral rights. In the summer of 1989, Representatives Robert W. Kastenmeier, Edward Markey, and Howard Berman introduced H.R. 2690, a bill "directed toward development of Federal rights that would enable visual artists to protect the integrity of their works."[92] Senator Edward Kennedy introduced a companion bill, S. 1198, in the Senate at approximately the same time.[93] Both bills were approved, and the reconciled act was signed into law by President Bush.[94]

In enacting VARA, the legislature noted that "critical factual and legal differences in the way visual arts and audiovisual works are created and disseminated have important practical consequences . . . [and] have led the Congress to consider the claims of these artists separately."[95] Thus, Congress found that visual artists deserve different protection compared to their audiovisual counterparts.[96] Therefore, unlike the Berne Convention's moral rights provision, VARA only touches certain narrowly defined classes

87. *Id.* at 5-6.
88. *Id.* at 7.
89. *Id.* at 6-7.
90. *Id.* at 8.
91. *Id.; see* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat 2853 (1988).
92. H.R. REP. NO. 101-514, *supra* note 65, at 5.
93. *Id.* at 6.
94. *See supra* note 1 and accompanying text.
95. H.R. REP. NO. 101-514, *supra* note 65, at 9.
96. Factors considered by Congress included that audiovisual works are generally made-for-hire, while visual works generally are not. *Id.* Congress also found that motion pictures and other audiovisual works are made and exploited in multiple copies, so when one copy is deformed or mutilated, other copies of the original remain, whereas, visual art is made in single copies or a limited series, and modifications cannot be so easily remedied. *Id.*

of visual art.[97] However, VARA is slightly broader than Berne Convention Article 6*bis* because it protects not only the rights of attribution and integrity guaranteed by the Convention, but also the right for artists of "recognized stature" to prevent destruction of their works.[98] So, although VARA is certainly a moral rights statute, it differs from the traditional European doctrine, both in applicability and rights conferred.[99]

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97. 17 U.S.C. §§ 101, 106A (1994). The Act limits the rights conferred by 17 U.S.C. § 106A to "visual art" as defined by 17 U.S.C. § 101. "Visual art" is defined as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 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.

Id. § 101.

98. *Id.* § 106A. The traditional moral rights doctrine does not recognize the right to prevent the destruction of a work. *See supra* text accompanying note 38.

99. Section 106A (Rights of certain authors to attribution and integrity) of VARA states:

> (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

VARA only covers certain classes of "visual art," as defined in section 101 of the Copyright Act.[100] A sponsor of the House bill, Representative Edward Markey, stated that Congress went to " 'extreme lengths to very narrowly define the works of art that [are] covered' " by VARA.[101] Under VARA, the "visual art" class is more narrowly defined than is the traditional copyright category of " 'pictorial, graphic, and sculptural works' "[102] and includes "certain paintings, drawings, prints, sculpture, and . . . still

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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 U.S.C. § 106A.

100. *Id.* § 101; *see supra* note 96 and accompanying text.

101. H.R. REP. NO. 101-514, *supra* note 65, at 11 (quoting *Hearings*, *supra* note 86, at 2 (statement of Rep. Edward Markey)).

102. *Id.* (quoting 17 U.S.C. § 101).

photographic images produced for exhibition purposes only."[103] This definition excludes pictorial and graphic works such as maps, diagrams, charts, and news photographs.[104] Congress has therefore carved out a narrow class of art that it found to be in need of greater protection than is provided by traditional copyright law.

Congress protected three distinct moral rights when it enacted VARA. The first is the right of attribution.[105] VARA guarantees the right of an artist to be identified as the author of his or her work, to prevent the use of his or her name on a work not his or hers, to prevent his or her name from being used in connection with work that has been modified in violation of the artist's right of integrity, and to publish work either anonymously or under a pseudonym.[106] This protection, while novel in the United States, is not groundbreaking; it simply imports to the United States rights afforded to artists under traditional moral rights principles. Such rights have been enjoyed in Europe for over a century.[107]

VARA also protects the right of integrity.[108] Section 106A(a)(3) ensures authors the right to prevent certain modifications of their work, but only if such modification would be prejudicial to their reputation or honor.[109] Here, the rationale is the Hegelian principle of personality embodied in the work, that is, " 'an artist's professional and personal identity is embodied in each work created by that artist.' "[110] This comports with the Berne Convention's protection of moral rights.[111] The original House legislation contained a *per se* standard of fault, but this was tempered somewhat by the addition of language requiring damage to reputation or honor.[112]

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103. *Id.*

104. *Id.*; 17 U.S.C. § 101(A)(i). The rationale for such a narrow subclass is that works, such as maps and news photographs, are works made for hire and do not posses the same "personality" characteristics that paintings and exhibition photographs do. H.R. REP. NO. 101-514, *supra* note 65, at 11-12. Congress was attempting to create a group of work that could be labeled as "art" in the strictest sense. *Id.*

105. 17 U.S.C. § 106A; H.R. REP. NO. 101-514, *supra* note 65, at 14.

106. 17 U.S.C. § 106A; H.R. REP. NO. 101-514, *supra* note 65, at 14.

107. Sarraute, *supra* note 16, at 465.

108. 17 U.S.C. § 106A; H.R. REP. NO. 101-514, *supra* note 65, at 14.

109. 17 U.S.C. § 106A(a)(3); H.R. REP. NO. 101-514, *supra* note 65, at 14-15.

110. H.R. REP. NO. 101-514, *supra* note 65, at 15 (quoting *Hearings*, *supra* note 86, at 8 (statement of John B. Koegel)).

111. *Id.* at 15; *see* Berne Convention, *supra* note 3, art. 6*bis*.

112. *See* H.R. REP. NO. 101-514, *supra* note 65, at 14-15. Congress reasoned that exposing any modification of a work of art to potential liability could prevent owners from engaging in routine or trivial actions such as framing a work. *Id.* at 15. The House Report on the VARA legislation notes that even the words "honor or reputation" leave substantial room for interpretation. *Id.* However, the Report instructs courts to focus primarily on the professional reputation of the artist, and admonishes that an analogy to defamation of "reputation" would be faulty and "irrelevant." *Id.* Evidence on adverse effects upon an artist's honor or reputation would be proved by expert testimony. *Id*; *see* Fed. R. Evid. 701-06; Carter v.

Finally, VARA protects the destruction of works of "recognized stature."[113] This protection extends the traditional moral rights doctrine. Many adherents to the Berne Convention do not advocate protection of works against destruction, because it is thought that "once the work no longer exists, there can be no effect on an artist's honor or reputation."[114] The House Report notes that the protection against destruction afforded by VARA is modeled after several state art preservation statutes.[115]

Furthermore, the acts causing the modification or destruction must be intentional or grossly negligent.[116] Thus, alterations that are merely negligent are not actionable under VARA. The House Report notes the intent of Congress to protect owners of works where the work is destroyed due to negligence or accident.[117] In this respect, VARA's reach is somewhat limited, in that, an artist may not sue because a work has deteriorated due to natural events, passage of time, or the inherent instability of the materials used in the art.[118] An artist also is precluded from suing because of objections to the framing, lighting, or presentation of the work of art.[119] Consequently, although VARA places restrictions upon what an owner of a work of art may do with his property, it provides exceptions for common or harmless acts which otherwise might be actionable.

D. *Takings Jurisprudence*

One of the major criticisms of VARA is that it allows an uncompensated taking of an owner's property interest in a work of art, which is expressly prohibited by the Fifth Amendment to the U.S. Constitution.[120] Generally, federal, state, and local governments may not take private property without reimbursing the owner for its fair market value.[121] However, under some circumstances, a governmental entity may restrict the use of property without

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Helmsley-Spear, Inc., 861 F. Supp 303, 323-25 (S.D.N.Y. 1994), *aff'd in part, rev'd and vacated in part on other grounds*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

113. *See* 17 U.S.C. § 106A. Although the House Report is silent, it may be assumed that the "recognized stature" standard, like the damage to "honor or reputation" standard, should be proved by expert testimony. *Carter*, 861 F. Supp. at 323-25.

114. H.R. REP. NO. 101-514, *supra* note 65, at 16.

115. *Id.*

116. 17 U.S.C. § 106A(a)(3).

117. H.R. REP. NO. 101-514, *supra* note 65, at 16.

118. 17 U.S.C. § 106A; H.R. REP. NO. 101-514, *supra* note 65, at 17.

119. 17 U.S.C. § 106A; H.R. REP. NO. 101-514, *supra* note 65, at 17.

120. U.S. CONST. amend. V ("No Person shall . . . be deprived of life, liberty, or property, without due process of law."); Felten, *supra* note 8, at E1.

121. Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

paying just compensation.[122] Examples of these regulations are zoning laws, environmental regulations, and historical preservation ordinances.[123]

Originally, the courts held that only a physical appropriation of property could qualify as a taking under the Fifth Amendment.[124] Later, the Supreme Court expanded the compensable takings doctrine to include a "practical ouster of [the owner's] possession."[125] The Court also has found the government to have "taken" when it effectively prevents the enjoyment of one of the "bundle of rights" of property ownership.[126] The physical appropriation and practical ouster theories involve traditional intrusion by the government into the possession interest of property owners. In such cases, the Court has not been friendly to government appropriation of private property.

The physical intrusion need not be substantially debilitating to the property interest.[127] For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[128] a law requiring landowners to allow cable television companies to place cable boxes on their property was deemed a taking by the Supreme Court.[129] Although the extent of the intrusion was small, the Court found that the property owners had suffered a physical invasion at the hands of the government.[130] Thus, even though no great harm had occurred from the intrusion of the cable boxes onto the property, the government was forced to compensate the owners for the loss of space.

Government intrusion need not impede all rights of property ownership in order to qualify as a "taking." Property ownership is a "bundle of rights," and when physical intrusion impedes the exercise of any of these rights, the government must compensate the property owner.[131] In *Kaiser Aetna v. United States*,[132] a property owner had made several improvements to a pond on his property.[133] One of the enhancements was the connecting of the pond to a navigable body of water.[134] The federal government then

122. *Lucas*, 505 U.S. at 1014 (citing the majority opinion of Justice Holmes in *Pennsylvania Coal*, 260 U.S. at 414-15); Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978).
123. Dolan v. City of Tigard, 512 U.S. 317 (1994); Damich, *supra* note 9, at F2.
124. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870).
125. *Lucas*, 505 U.S. at 1014 (quoting Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879)).
126. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).
127. *Lucas*, 505 U.S. at 1015.
128. 458 U.S. 419 (1982).
129. *Id.* at 436-37.
130. *Id.* at 435-40. The cable boxes took up about 1.5 cubic feet of space. *Id.* at 438 n.15.
131. *Kaiser Aetna*, 444 U.S. at 176.
132. *Id.*
133. *Id.*
134. *Id.*

required public access to the pond because of its connection to the navigable body of water.[135] The Supreme Court found this to be a taking, holding that the right to exclude cannot be taken without compensation.[136]

Thus, the intrusion doctrine is applied when governmental interference actually physically enters the subject property. The governmental interference need not be total or even substantial for a compensable taking to be found. Furthermore, these takings must be compensated for, even when they advance a substantial governmental interest.[137] However, when the governmental action is regulatory in nature, the Court has held that an advancement of governmental interest may ameliorate the need for compensation.[138]

While physical intrusions are generally compensable, regulatory takings are generally not.[139] The Supreme Court has held that reasonable regulations "imposed to arrest a significant threat to the common welfare" are not compensable takings.[140] The factors considered by the Court to determine whether a regulatory taking is compensable include the economic impact of the taking on the claimant, the interference with investment-backed expectations, and the governmental cause advanced.[141] For example, in *Agins v. City of Tiburon*,[142] the city limited the use of land owned by plaintiff.[143] The city contended that the zoning restriction "discourage[d] the 'premature and unnecessary conversion of open-space land to urban uses.' "[144] The Court balanced the public interest in preserving open-space lands against the restriction imposed on the private landowner.[145] It found that "[t]he specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization [and s]uch governmental purposes have long been recognized as legitimate."[146] Finding a legitimate, overriding state purpose, the it denied the plaintiff compensation for city regulation of plaintiff's property.[147]

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135. *Id.*
136. *Id.*
137. *Lucas*, 505 U.S. at 1015.
138. *E.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 592-93 (1962); Euclid v. Amber Realty Co., 272 U.S. 365, 387 (1926); Mugler v. Kansas, 123 U.S. 623 (1887).
139. *Penn Central*, 438 U.S. at 127.
140. *Lucas*, 505 U.S. at 1040 (Blackmun, J., dissenting).
141. *Id.* (discussing the economic impact); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).
142. 447 U.S. 255 (1980).
143. *Id.*
144. *Id.* at 261 (quoting CAL. GOV'T CODE § 65561(b) (West Supp. 1979)).
145. *Id.*
146. *Id.* (footnotes omitted).
147. *Id.* at 263.

The Supreme Court's holdings have acknowledged, however, that some actions may go too far, transforming regulatory measures into compensable takings.[148] The current members of the Court have been more amenable to protecting property owners from regulatory takings.[149] Recently, the Court held that a second category of takings does not require an inquiry into the level of governmental interest advanced.[150] In *Lucas v. South Carolina Coastal Commission*, petitioner owned beachfront property on a barrier island on the South Carolina coast.[151] Petitioner wished to erect single-family homes on the plots, which is what the owners of the adjacent property had done.[152] The plans ran afoul of the South Carolina Beachfront Management Act, which prohibits building on land designated as beyond "the landward-most 'point[s] of erosion . . . during the past forty years.'"[153] Lucas filed suit, claiming that the prohibition of building was a compensable taking of property.[154] The trial court agreed with Lucas, but was reversed by the South Carolina Supreme Court.[155]

The issue before the U.S. Supreme Court was whether the prohibition on building enforced by the South Carolina Coastal Commission was effectively an uncompensated taking of property prohibited by the Fifth Amendment.[156] The Court ruled that the prohibition was a taking because it deprived the owner "all economically beneficial uses [of the] land."[157] The Court cited previous decisions that comported with this view, including *Keystone Bituminous Coals Ass'n* and *Agins*.[158] Thus, the Court reached a decision labelling any regulatory action that leaves no economically viable use of property as a compensable taking.[159] The Court found that the prohibition on building rendered Lucas' property worthless, and that such a result warranted compensation.[160] Therefore, the Court reversed the

148. *Pennsylvania Coal*, 260 U.S. at 415.

149. The opinion in *Lucas* was delivered by Justice Scalia; only Justices Blackmun and Stevens dissented from the opinion. The dissenting opinions vigorously protested the categorical rule espoused by the majority. *See Lucas*, 505 U.S. 1036-75.

150. *Id.* at 1015.

151. *Id.* at 1008.

152. *Id.*

153. *Id.* (quoting S.C. CODE ANN. § 48-39-280(A)(2) (Law Co-op. Supp. 1988)).

154. *Id.* at 1009.

155. *Id.* at 1009-10.

156. *Id.* at 1010.

157. *Id.* at 1015.

158. *Id.* at 1015-16. "The test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" *Id.* at 1016 n.6 (quoting *Keystone*, 480 U.S. at 495 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981))).

159. *Id.* at 1019.

160. *Id.* at 1020 (noting the trial court's findings of fact).

judgment of the South Carolina Supreme Court and remanded the case.[161]

In general, federal, state, and local governments may not physically occupy private property without reimbursing the owner for fair market value.[162] However, a government entity may regulate the use of property without paying just compensation, provided that the regulation advances a legitimate state interest and does not deprive the owner of all economically viable uses of the property.[163] Zoning laws, historical preservation laws, and environmental laws are regulations on the use of private property. Like these laws, VARA is a regulatory measure designed to control the actions of art owners with respect to their property. Thus, "takings jurisprudence" must be applied to determine the constitutionality of uncompensated regulation under VARA.

III. ANALYSIS: IS VARA A "REASONABLE REGULATION" OR AN "UNCOMPENSATED TAKING" UNDER CURRENT TAKINGS JURISPRUDENCE?

One criticism voiced about VARA is that it violates the Constitution's ban on taking of property without just compensation.[164] One critic is quoted as saying, " '[U]nder our notions of what constitutes property, I have a real problem with the idea that a piece of property — which is ultimately what a work of art is — cannot be treated as other pieces of property by the owner of it. And that poses some serious constitutional problems.' "[165] Because of this criticism, the courts should conduct a Fifth Amendment takings inquiry in order to determine whether VARA is unconstitutional, either facially or as applied.

There are two basic branches of takings jurisprudence, physical invasion and regulatory takings. Physical invasions occur when the government actually or effectively appropriates private property. Regulatory takings occur when the government in its use of the police power lowers the value of private property. It is generally held that physical invasions are always compensable, while regulatory takings are compensable only upon a showing of either no legitimate government interest advanced or complete devaluation

161. *Id.* at 1032.

162. *Id.* at 1019.

163. *Id.* at 1014 (citing the majority opinion of Justice Holmes in *Pennsylvania Coal*, 260 U.S. at 414-15); *Penn Central*, 438 U.S. at 127.

164. Felten, *supra* note 8, at E1. Other criticisms include: Congress does not have the power to enforce moral rights under Article I of the Constitution; VARA violates the First Amendment to the Constitution; and VARA is bad public policy because it removes the art marketplace from the equation. *See generally* Eric E. Bensen, Note, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996).

165. Felten, *supra* note 8, at E1 (quoting John Egan, a Boston lawyer).

of property.[166]

Thus, the analysis of VARA under the takings cases first turns upon whether VARA may be characterized as a "physical invasion" or as a "regulation." If the answer to this question is a "physical invasion," then owners of art must be compensated under the rule of cases such as *Loretto*.[167] However, if the answer is "regulation," the devaluation of property is compensable only if the state interest is not shown to be legitimate or if there is a *total* devaluation of property.[168] So, the analysis must start with determining the nature of the taking under VARA.

A. *Is VARA a Physical Appropriation?*

VARA, on the most basic level, prevents the owner of a work of art from misattributing it, defacing it, or destroying it.[169] It would indeed be difficult to argue that VARA effects an invasion of private property by the government. For example, VARA neither forces an art owner to publicly display the art, nor separate the owner from possession of the art. If he does not like the work, an art owner may simply remove it from the wall and put it in the attic; he does not have to hand it over to a governmental entity. He still enjoys the rights of possession and exclusion under VARA. Proponents argue that the only right VARA abridges is the right to dispose of property.[170]

What would be the effect of VARA on a work of art incorporated into a building, such as in *Crimi*? In *Crimi*, the art could not be removed from the building without destroying the it.[171] Would requiring a dissatisfied building owner to live with a painting he no longer wanted be a governmental intrusion amounting to an effective "physical invasion"? Here the government is not physically entering or appropriating the property of the owner. Still, the art owner is losing an important "stick" in the "bundle of rights" of property ownership.[172] An argument can be made that VARA is an effective physical intrusion because it completely eliminates the owner's control over that part of his property.[173]

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166. *Lucas*, 505 U.S. at 1014-16.
167. *Id.* at 1015.
168. *Id.* at 1016 (citing *Agins*, 447 U.S. at 260).
169. 17 U.S.C. § 106A (1994).
170. Damich, *supra* note 9, at F2.
171. *Crimi*, 89 N.Y.S.2d at 815.
172. *Kaiser Aetna*, 444 U.S. at 176.
173. *Cf. Loretto*, 458 U.S. at 434-35 (holding that even a minimal invasion is compensable). An analogy can be drawn between the cable boxes and the fresco. In *Loretto*, the cable boxes occupied a minimal amount of space. In *Crimi*, the fresco occupied no space, and an injunction against painting over it would have intruded on only small portion of the church's property interest.

However, VARA's modification to section 113 of the Copyright Act provides a solution to this problem.[174] Subsection (d) of section 113 allows artists and purchasers to contract out of the integrity right for works installed in buildings "in such a way that removing the work" would cause a loss of integrity.[175] Therefore, the church may have been able to place a waiver of the right of integrity directly into the contract with Mr. Crimi. Furthermore, it is likely that, even without a waiver, VARA would not apply in this case. Mr. Crimi's fresco could have been treated as a work for hire.[176] Works for hire are specifically excepted from the definition of "visual art" and as a result, are not covered by VARA.[177]

B. *Is VARA a Regulatory Taking?*

If VARA is not considered a physical invasion or an appropriation of property, it may still be held a compensable taking. The second test is a more subtle hurdle; it determines whether a government regulation "go[es] too far" and effectively, is a taking.[178] When applying this test, a court will be called upon to decide whether a law "does not substantially advance legitimate state interests or denies an owner economically viable use of his [property]."[179] Thus, a regulation may fail either part of the test and be held a compensable taking.[180]

1. Does VARA Advance a Legitimate State Interest?

A regulation goes too far in the "takings" context, if it does not advance a legitimate state interest. Generally, courts will defer to legislative findings unless they are challenged by a party to the suit.[181] The House Report on VARA is replete with factual findings pertaining to the interest of the state in protecting and preserving art.[182] Congress found that " 'the arts are an integral element of our civilization.' "[183] It also found that " '[a]rtists . . .

174. 17 U.S.C. § 113(d).

175. *Id.* § 113(d)(1).

176. *Id.* § 101. Courts most likely would apply the test in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), where the court applied 13 specific factors. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

177. 17 U.S.C. § 101.

178. *Lucas*, 550 U.S. at 1015.

179. *Agins*, 447 U.S. at 260 (citations omitted).

180. *Lucas*, 550 U.S. at 1003, 1031 (holding that although the prevention of beach erosion is a commendable state interest, the state must compensate a landowner when, through regulation, it deprives him of all economically viable uses of his property).

181. United States v. Carolene Products Co., 304 U.S. 144, 152 (1954) (stating that "the existence of facts supporting the legislative judgment is to be presumed").

182. *See generally* H.R. REP. 101-514, *supra* note 65.

183. *Id.* at 7 (quoting *Hearings*, *supra* note 86, at 1 (statement of Arnold L. Lehman)).

must sustain a belief in the importance of their work if they are to do their best,'" and that VARA will promote that belief.[184] Because of these findings, and because the legitimate state interest standard is extremely low, a court would probably find that VARA advances a legitimate state interest.

Once a legitimate state interest is found, the inquiry turns to whether the regulation renders the property valueless.[185] This inquiry is generally brought up in the context of real property, but it may occur with personal property as well.[186] This second prong espoused by the majority has its roots in *Penn Central Transportation Co. v. New York*, where the Supreme Court upheld a New York City preservation law.[187] The Court relied on its decision in *Pennsylvania Coal Co. v. Mahon* to assert that even regulatory takings that advance a legitimate state interest may amount to a taking if they "so frustrate distinct investment-backed expectations, as to render property valueless."[188]

2. Does VARA Render Property Valueless?

Does VARA effectively relieve the owner of all the property's value? The answer to this question turns on an highly factual inquiry. The basis of "value must be considered under the Takings Clause by reference to the owner's reasonable investment-backed expectations."[189] The *Lucas* opinion notes that the power to regulate may be subservient to the Takings Clause.[190] This standard is objective, that is, "value" is what a reasonable investor would expect it to be.[191] Thus, an investor in land zoned residential could not complain that he suffered a depletion in value because his permit to build a shopping mall was denied. Likewise, a reasonable investor would not expect to be allowed to demolish a building in a historic preservation zone.

It is arguable that the buyer of a piece of art covered under either sections 106A or 113 of the Copyright Act of 1976 is situated similarly to the above two examples.[192] VARA is not retroactive; it only affects works of art first transferred after its enactment.[193] Therefore, like an investor who buys property subject to zoning laws or historic preservation regulations,

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184. *Id.* at 6 (quoting *Hearings*, *supra* note 86, at 5 (statement of Weltzin B. Blix)) (alteration in the original).
185. *Lucas*, 550 U.S. at 1016.
186. *Id.* at 1015-16.
187. *Penn Central*, 438 U.S. at 127.
188. *Id.*
189. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).
190. *Id.*
191. *See id.*
192. 17 U.S.C. §§ 106A, 113.
193. *Id.* §§ 106A(d), 113(d); Pub. L. No. 101-650, § 610(a), 104 Stat. 5089 (1990).

an art buyer purchases a work of art subject to VARA. The art buyer's "reasonable investment-backed expectations" would be read to take into account the ramifications of VARA.[194] Therefore, under *Lucas*, the restrictions of VARA are seemingly not compensable takings.

However, as Justice Kennedy recognized in his opinion, such an argument is circular.[195] It allows a legislature to define what property is, because a reasonable investor must rely on those definitions and judicial interpretations.[196] According to Justice Kennedy, under this argument, "property tends to become what courts [and legislatures] say it is."[197] Because the Supreme Court has been reluctant to allow the government to dictate the definition of property, a better analytical tool is needed.[198] It may be more useful to consider what a prospective art purchaser wants to do with his new work of art.

Art owners buy works of art for two basic reasons, aesthetics and financial gain. Ostensibly, an art owner appreciates the inherent artistic value of the work. Perhaps, the owner is taken by the forms and colors and is enthralled by the message of the work. The expectations of such owners are that they will be able to display the art as they wish. Owners also consider art to be an investment. They seek art that promises to appreciate in value, providing financial gain for the owners. This interest would be protected by laws that allow free alienation of artwork.

The first interest, that of display, is not substantially hindered by VARA. Under the law, an owner has right to decide how to display artwork. Section 106A provides an integrity cause of action for artists only when their works are intentionally distorted or mutilated.[199] An artist would find it difficult to argue that a disagreeable placement or lighting scheme is an intentional distortion or mutilation of the work.[200] Furthermore, even if a court were to accept that argument, VARA provides an exception where any modification due to placement and lighting is *not* intentional mutilation, unless the exhibitor has been grossly negligent.[201] Also, any deterioration caused by the passage of time or the nature of the materials used in the work is excepted from VARA.[202] Therefore, even with VARA in force, an art owner would be free to display a piece of art without fear of the artist having

194. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).
195. *Id.*
196. *Id.*
197. *Id.*
198. *See id.*
199. 17 U.S.C. § 106A(a)(3)(B).
200. *See id.*
201. *Id.* § 106A(c)(2).
202. *Id.* § 106A(c)(1).

a cause of action for the right of integrity.[203]

The other interest an art owner may have in a work of art is that it may be transferred freely. Although VARA is facially silent on this issue, implying that the right of alienation is unhindered, a closer look at the law's implications unearths a possible difficulty.[204] The trouble would be caused by the sale of a building with a mural that is protected under VARA. A prospective buyer of the building would be wary of entering a situation where "customizing" the building might result in a lawsuit. Thus, a building with such a mural would, all else being equal, command less market value. This sort of regulation would certainly impede the "reasonable investment-backed expectations" of the building's owner.[205] The owner would have to sell at a reduced price because any prospective buyer would be prevented by VARA from remodeling the building. Thus, VARA could reduce the market value of the owner's property. However, *Lucas* stresses that a regulation is a compensable taking only when it deprives a property owner of all value associated with the property.[206] It is difficult to imagine when VARA would deprive a property of all value in this context. While the value of the property might be reduced because of VARA's implications, the result probably would never be so harsh as to merit compensation under the *Lucas* line of cases.[207]

Although there appears to be room for argument, it seems as though VARA is not a compensable taking under current Takings Clause jurisprudence. VARA is not a physical appropriation of private property. It does not authorize the government to seize pieces of art. Likewise, VARA is most likely not a compensable regulatory taking. VARA advances a legitimate governmental interest by advancing the interests of artists. Furthermore, it does not deprive art owners of the entire value of their property and does not significantly hinder their reasonable expectations. Therefore, although a factual situation may present itself where an application of VARA results in a compensable taking, the law seems constitutionally sound in general.

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203. *Id.* § 106A. Of course, an artist might still demand that proper attribution be displayed. *Id.* § 106A(a)(1)(A).

204. VARA does not disturb the First Sale Doctrine, which states "that a copyright owner's authorized sale of an item 'exhausts' the exclusive intellectual property distribution right." CHISUM & JACOBS, *supra* note 2, § 4E(3)(c); *see* VARA Implementation Act, § 603, 104 Stat. 5089, 5130 (1990). The owner of a work of visual art subject to VARA may still sell the piece freely, without liability for infringement. CHISUM & JACOBS, *supra* note 2, § 4E(3)(c); *see* VARA Implementation Act, § 603, 104 Stat. at 5130.

205. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

206. *Id.*

207. VARA also provides mechanisms whereby the building owner can ask the artist to remove the artwork or contract with the artist to waive his or her rights. 17 U.S.C. § 113(d)(1)-(2).

C. Carter v. Helmsley-Spear, Inc.

Carter v. Helmsley-Spear, Inc.[208] is the only case dealing with VARA and its relationship with the Fifth Amendment Takings Clause. In *Carter*, plaintiffs, a group of artists, contracted with defendants, developers of a New York City property, to " 'design, create and install sculpture and other permanent installations' " in the lobby of a building.[209] After several years of financial hardship, the developers filed for Bankruptcy under Chapter 7 of U.S. Bankruptcy Code.[210] About that time, defendants' agents ordered plaintiffs to leave the property and made statements insinuating that plaintiffs' works of art would be altered or removed entirely.[211] Plaintiffs commenced an action to prevent the alteration or destruction of the art installed by them in the lobby.[212]

The *Carter* court found that VARA applied to the artwork created by plaintiffs.[213] In opposition to the action, defendants argued, among other things, that VARA was unconstitutional because it was an impermissible uncompensated taking in violation of the Fifth Amendment.[214] They contended that the law gives "a third party the right to control use of [their] property."[215] The court cited *Penn Central* in upholding the constitutionality of VARA.[216] The court found that Congress created a "comprehensive scheme" to advance a legitimate public interest in artists' moral rights.[217] Furthermore, the court found that the law "leaves substantially all of the commercial value of the [p]roperty intact."[218] So, because VARA did not deprive defendants of all value of the property, and because it advances a legitimate state interest, the court held that VARA was a permissible

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208. 861 F. Supp 303 (S.D.N.Y. 1994), *aff'd in part, rev'd and vacated in part on other grounds*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

209. *Id.* at 312.

210. *Id.*

211. *Id.*

212. *Id.* at 310-11.

213. *Id.* at 322-23. The reviewing court reversed the district court on the grounds that the artwork was a "work made for hire" specifically excepted from protection by VARA. *Carter*, 71 F.3d at 88; *see* 17 U.S.C. § 101(B).

214. *Carter*, 861 F. Supp. at 326.

215. *Id.*

216. *Id.* at 327. The factors weighing for permissibility, as announced by the Court in *Penn Central*, include (1) a scheme designed to further a public interest, (2) a generally applicable regulation, (3) lack of a complete deprivation of value, and (4) some reciprocity of benefits. *Id.*

217. *Id.* at 328.

218. *Id.* Thus, in the district court's eyes, VARA passes the test enunciated by *Lucas*. *See Lucas*, 505 U.S. at 1015. The *Carter* court also found that VARA did not specifically or disproportionately burden defendants, and that it included reciprocity of benefits. *Carter*, 861 F. Supp. at 328.

regulation rather than a compensable taking.

Defendants also argued that as applied, VARA permits permanent occupation of their building by a third party.[219] They cited *Loretto* in support of this argument.[220] The court found that VARA does not permit a "permanent physical occupation" of the defendants' property, as the cable converter law did in *Loretto*.[221] Noting that VARA only protects certain artworks installed in a building for a limited time, rather than allowing an intrusion, the court held that the law did not permit a physical invasion and thus, was not a compensable taking.[222] Therefore, the *Carter* court held that VARA was neither an impermissible regulation nor a physical invasion.[223]

IV. CONCLUSION: VARA IS NOT A COMPENSABLE TAKING UNDER CURRENT FIFTH AMENDMENT JURISPRUDENCE

The Visual Artist's Rights Act of 1990 is not a compensable taking under the line of cases including *Lucas*, *Loretto*, and *Penn Central*. A taking requiring compensation under the Fifth Amendment must either be a physical invasion of private property or an unreasonable regulation, which either deprives the owner of all value of the regulated property or serves no legitimate state interest. VARA does not effect a physical invasion of private property. The owner of artwork subject to VARA is free to display, transport, or sell his property without governmental intrusion. Furthermore, VARA serves a legitimate state interest: the promotion of art and artists. The government has a justifiable interest in the preservation of artwork and the protection of artists' rights. Finally, VARA does not render valueless the artwork it protects. The owner is still protected by the First Sale Doctrine and has the right to display, or not to display, the artwork as he or she sees fit. Therefore, VARA passes the tests announced by the Supreme Court in prior cases and is not a compensable taking under the Fifth Amendment.

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219. *Id.*

220. *Id.* Permanent physical occupations authorized by the government, even those that serve a public interest, are compensable takings. *Loretto*, 458 U.S. at 434.

221. *Carter*, 861 F. Supp. at 328.

222. *Id.* The district court differentiated VARA on the grounds that any restriction is only for a limited time. *Id.* However, "[i]t is well established that temporary takings are as protected by the Constitution as are permanent ones." *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring). The reviewing court declined to reach the Fifth Amendment question. Carter v. Helmsley-Spear, 71 F.3d 77, 88 (2d Cir. 1995), *cert. denied*, 116 St. Ct. 1824 (1996).

223. *Carter*, 861 F. Supp. at 327-29.