Nova Law Review

Volume 14, *Issue* 2 1990 *Article* 4

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Abstract

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The United States government destroyed "Tilted Arc" on March 15, 1989.[1] Exercising proprietary rights, authorities of the General Services Administration (GSA) ordered the destruction of the public sculpture that their own agency had commissioned ten years earlier.[2] The Government's position, which was affirmed by the courts, was that: "As a threshold matter, Serra sold his 'speech' to the Government . . . . As such, his 'speech' became Government property in 1981, when he received full payment for his work . . . An owner's '[p]roperty rights in a physical thing [allow him] to possess, use and dispose of it.' "[3] This is an incredible statement by the government. If nothing else, it affirms the government's commitment to private property over the interests of art or free expression. It means that if the government owns the book, it can burn it; if the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right to property supercedes all other rights: the right to freedom of speech, the right to freedom of expression, the right to protection of one's creative work.

In the United States, property rights are afforded protection, but moral rights are not.[4] Until last year, the United States adamantly re-

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* This article is based on a speech given by Mr. Serra in Des Moines, Iowa, on October 25, 1989, and which was reproduced in the Des Moines Sunday Register on October 29, 1989.

 Richard Serra, born in 1939 in San Francisco, lives and works in New York City and Cape Breton, Nova Scotia.

1. On March 15, 1989, Mr. Serra's sculpture, "Tilted Arc," was dismantled and removed from its site at the Federal Plaza in New York City, New York. "Tilted Arc" was specifically created for this sight and its removal from this location resulted in the work of art's destruction; no relocation was possible.

2. *See* Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1051 (2d Cir. 1988) (the sculpture was considered government property and thus its fate was within the government's control).

3. Brief for Appellee (edited version), *reprinted in* RICHARD SERRA'S TILTED ARC 253 (C. Weyergraf-Serra & M. Buskirk eds. 1988).

4. *See* Note, *Moral Rights: The Long and Winding Road Toward Recognition*, 14 NOVA L. REV. 435 (1990).

fused to join the Berne Copyright Convention, the first multilateral copyright treaty, now ratified by seventy-eight countries.[5] The American refusal was based on the fact that the Berne Convention grants moral rights to authors. Such a policy was—and is—incompatible with United States Copyright law, which recognizes only economic rights. Although ten states[6] have enacted some form of moral rights legislation, federal copyright laws tend to prevail and those are still wholly economic in their motivation. Indeed, the recent pressure for the United States to agree—at least in part—to the terms of the Berne Convention—came only as a result of a dramatic increase in the international piracy of American records and films.

In September, 1986, Senator Edward M. Kennedy of Massachusetts first introduced a bill called the Visual Artist's Rights Act.[7] This bill attempts to amend federal copyright laws to incorporate some aspects of international moral rights protection. The Kennedy bill would prohibit the intentional distortion, mutilation, or destruction of works of art after they have been sold.[8] Moreover, the act would empower artists to claim authorship,[9] to receive royalties on subsequent sales,[10] and to disclaim their authorship if the work were distorted.[11] This legislation would have prevented Clement Greenberg and the executors of David Smith's estate from authorizing the stripping of paint from several of Smith's later sculptures so that they would resemble his earlier—and more marketable—unpainted sculptures. Such moral rights legislation would have prevented a Japanese bank in New York from removing and destroying a sculpture by Isamu Noguchi, simply because the bank president did not like it. And such legislation would have prevented the United States government from destroying "Tilted Arc." More importantly, under the proposed bill—still not passed in over two years—the destruction or mutilation of art would be a federal crime.[12]

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5. *See infra* notes 12-13 and accompanying text; *see also* Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407 (1990).

6. *See* Note, *supra* note 4, at 444.

7. For a reproduction of the proposed billed Kennedy Bill, *see Appendix-Senate Bill* S. 1198 (the Kennedy Bill), 14 NOVA L. REV. 451 (1990).

8. *Id.* at 452, §3(a)(3)(B).

9. *Id.* at 452, §3(a)(1)(A).

10. Although this section appeared in the original version of the Kennedy Bill, the current version of this Bill provides for a study of resale royalties in § 9.

11. *Kennedy Bill* at 452, § 3(a)(2).

12. Since this article was originally prepared, the Kennedy Bill has been

If Senator Kennedy's bill were enacted, it would be a legal acknowledgment that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by United States copyright law is insufficient. The bill recognizes that moral rights are independent from the work as property and these rights supercede—or at least coincide with—any pecuniary interest in the work.[13] Moreover, the bill acknowledges that granting protection to moral rights serves society's interests in maintaining the integrity of its art works and in promoting accurate information about authorship and art.

On March 1, 1989, the Berne Convention Implementation Act[14] became U.S. law.[15] On March 13th, 1989, upon learning that the government had started to dismantle "Tilted Arc," I went before the United States District Court in New York City, seeking a stay for the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case. I expected--as would be the case in other countries that became signatories to the treaty—to be protected by the moral rights clause, which gives an artist the right to object to "any distortion, mutilation or other modification" that is "prejudicial to his honor and reputation," even after his work is sold. I learned, however, that in my case—and others like it—the treaty ratified by Congress is a virtually meaningless piece of paper in that it excludes the key moral rights clause. Those responsible for censorship of the treaty are the powerful lobbies of magazine, newspaper and book publishers. Fearful of losing economic control over authors and faced with the probability of numerous copyright suits, these lobbies pressured Congress into omitting that part of the Berne Convention Implementation Act which provided moral rights protection.[16] Thus, publish-

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amended to provide that such acts would not be a federal crime.

13. *See* Kennedy Billl, *supra* note 7 at 453, §3.

14. *See* Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407, 409 (1990).

15. Last October, both the United States Senate and the House of Representatives passed the Berne Convention Implementation Act of 1988, which made the necessary changes in the United States Copyright Law, 17 U.S.C. §§ 101-914 (1988), for adherence to the Berne Convention. On October 20, 1988, the Berne Convention was ratified, and on October 31, 1988, President Reagan signed into law the copyright amendments, making the United States the 78th member of the Convention. *See* Goldberg & Bernstein, *Berne, Baby, Berne!*, 7 PTC NEWSLETTER 5 (Winter 1989).

16. The moral rights provision of the Berne Convention states:

Article 6bis.

ers can continue to crop photographs, magazines and book publishers can continue to mutilate manuscripts, black and white films can continue to be colorized, and the federal government can continue to destroy art.

A key issue in my case, as in all first amendment cases, was the right of the defendant to curtail free speech based on dislike of the content.[17] Here the court stated that the aesthetic dislike is sufficient reason to destroy a work of art: "To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible."[18]

In his July 2, 1989 article, which appeared in the New York Times, Hilton Kramer asked, "Should public standards of decency and civility be observed in determining which works of art or art events are to be selected for the Government's support?"[19] He answers his rhetorical question with yes, and insinuates that "Tilted Arc" was uncivil comes to the conclusion that it was rightfully destroyed:

> What proved to be so bitterly offensive to the community that "Tilted Arc" was commissioned to serve was its total lack of amenity — indeed, its stated goal of provoking the most negative and disruptive response to the site the sculpture dominated with an arrogant disregard for the mental well-being and physical convenience of the people who were obliged to come into contact with

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1) Independently of the author's economic rights, and even after the transfer of the 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 other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights.

3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

This section of the Berne Convention Implementation Act was not ratified by Congress.

17. Brief for Appellant, *reprinted in* TILTED ARC, *supra* note 3 at 243-45, (for example, counsel analogized the case to Board of Educ. v. Pico, 638 F.2d 404 (2d Cir. 1980), which held that library books could not be removed simply because the board disliked the content of the texts.)

18. *Serra*, 847 F.2d at 1051.

19. Kramer, *Is Art Above the Laws of Decency?* N.Y. Times, July 2, 1989, § 2, (Arts & Leisure), at 1, col. 1.

the work in the course of their daily employment.[20]

Kramer goes on to say that it was my wish to "deconstruct and otherwise render uninhabitable the public site the sculpture was designed to occupy."[21]

All of Kramer's statements concerning my intentions and the effect of the sculpture are fabricated so that he can place blame on me for having violated an equally fabricated standard of civility. "Tilted Arc" was not destroyed because the sculpture was uncivil, but because the government wanted to set a precedent in which they could demonstrate their right to censor and destroy speech. What Kramer conveniently sweeps under the rug is the important fact that "Tilted Arc" was a first amendment case, and that the government by destroying "Tilted Arc" violated my right to free speech.

In the same New York Times article, Kramer applauds the Corcoran for having cancelled an exhibition of Mapplethorpe photographs.[22] The photos Kramer objects to are those which, in Kramer's words, render men "as nothing but sexual—which is to say—homosexual objects."[23] Images of this sort, according to Kramer, "cannot be regarded as anything but a violation of public decency."[24] For those reasons, Kramer concludes, the National Endowment for the Arts should not have contributed funds to support their public exhibition.[25] Once again he accused the artist of having violated a public standard, which in Mapplethorpe's case is the standard of decency. The penalty for this violation is the exclusion of his speech from public viewing and the withdrawal of public funds to make the work available to the public.

Kramer's article is part of a larger radical conservative agenda. The initiative Kramer took in the New York Times was called for by Buchanan in May and June in the New York Post and the Washington Times where he announced "a cultural revolution in the 90's as sweeping as the political revolution in the 80's."[26] It's worth quoting Buchanan at length:

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20. *Id.* at 7, col 1.
21. *Id.* at 7, col. 6.
22. *Id.* at 7, col. 1.
23. *Id.* at col. 2.
24. *Id.* at col. 3.
25. *Id.* at 7.
26. Buchanan, *Losing the War for America's Culture?* The Wash. Times, May 22, 1989, at D1.

> Culture — music, literature, art — is the visible expression of what is within a nation's soul, its deepest values, its cherished beliefs. America's soul simply cannot be so far gone in corruption as the trash and junk filling so many museums and defacing so many buildings would suggest. As with our rivers and lakes, we need to clean up our culture; for it is a well from which we all must drink. Just as poisoned land will yield up poisonous fruit, so a polluted culture, left to fester and stink can destroy a nation's soul . . . We should not subsidize decadence.[27]

Let me quote another leader of a cultural revolution:

> It is not only the task of art and artists to communicate, more than that it is their task to form and create, to eradicate the sick and to pave the way for the healthy. Art should not only be good art, art must reflect our national soul. In the end, art can only be good if it means something to the people for which it is made.[28]

What Buchanan called for and what Kramer helped to justify, Senator Jesse Helms brought in front of the Senate. He asked the Senate to accept an amendment that would bar Federal arts funds from being used "to promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion."[29] The Helms amendment was replaced by the supposedly more moderate Yates amendment. Nonetheless, Helms' fundamental diatribe was successful in that the Senate passed an amendment which gives the government the right to judge the content of art.

The Yates amendment, which was approved by the Senate, calls for denying Federal money for art deemed obscene. It is based on a definition of obscenity as given by a 1973 Supreme Court decision in *Miller v. California*.[30] In *Miller*, the Supreme Court prescribed three tests for obscenity: a work must appeal to prurient interests, contain patently offensive portrayals of specific sexual conduct, and lack serious

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27. *Id.*
28. Letter from Goebbels to Furtwangler (April 11, 1933), *reprinted in* H. BRENNER, DIE KUNSTPOLITIK DES NATIONALSOZIALISMUS 178-79 (1963).
29. 135 CONG. REC. S12210 (daily ed. Sept. 29, 1989).
30. 413 U.S. 15 (1973).

literary, artistic, political or scientific value.[31] The decision about whether something is obscene is to be made by a local jury, applying community standards. Does that mean that the material in question can be tolerated by one community and another community will criminalize its author? What about Salomon Rushdie?

Conservatives and democrats agree that taxpayers' money should not be spent on art which carries an obscene content. Kramer wants publicly funded art to conform to the standards of decency and civility; Helms does not want the National Endowment for the Arts (NEA) to fund indecency and obscenity; and the democratic majority in the Senate supported an amendment which will enable the government to deny Federal money for art deemed obscene. The basic underlying premise in all these statements, proposals and the amendment is that obscenity can be defined—that there is actually a standard of decency that excludes obscenity. The assumption of a universal standard is presumptuous. There aren't any homogenous standards in a heterogenous society. There is no univocal voice. Whose standards are we talking about? Who dictates these standards?[32]

It seems a rather extreme measure to impose an arbitrary standard of obscenity on the whole of society. Gays, as one group of this heterogenous society, for example, have the right to recognize themselves in any artform or manner they choose. You cannot deny gays their images of sexuality, and you cannot deny public funds to support the public presentation of these images. Gays are a part of this public. Why should heterosexuals impose their standard of "decency" or "obscenity" on homosexuals? The history of art is filled with images of the

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31. *Id.* at 24.

32. In early April, 1990, a preview exhibit of Robert Mapplethorpe's photographs opened in Cincinnati, Ohio, at the Contemporary Arts Center amidst great controversy and litigation. The Hamilton County (Ohio) Municipal judge dismissed a lawsuit by the exhibiting arts center seeking a ruling on whether the show was obscene. Subsequently a grand jury indicted the arts center and its director on obscenity charges. *Photos Promote Arts Indictment*, Ft. Lauderdale Sun Sentinel, April 8, 1990, §A, at 3, col. 2. Nonetheless, the controversial photographs, which depict partly nude children and homosexual acts, remained in the exhibit although the arts center did segregate the more controversial photographs. *Id.* A federal judge alter barred police from confiscating these photographs from the exhibit. *Judge Bans Confiscation of Art*, Ft. Lauderdale Sun Sentinel, April 19, 1990, §A, at 3, col. 2. United States District Judge Carl Rubin ordered the county and city authorities not to interfere with the exhibition while the obscenity charges were tried in state court.

In June, 1989, the Mapplethorpe exhibit was canceled at the Corcoran Gallery of Art in Washington, D.C.

debasement, torture and rape of women.[33] Is that part of the accepted heterosexual definition of decency? It is obvious that the initiative against obscenity in the arts is not directed against heterosexual indecencies, but that its subtext is homophobia. That is particularly true for Jesse Helms, who makes no effort to hide the fact that part of his political program is based on homophobia: In an earlier amendment Helms wanted to prohibit federal funds from being used for AIDS education; he argued that the government would thereby encourage or condone homosexual acts. He also stated publicly that no matter what issue comes up, if you attack homosexuals, you can't lose.

The position that I am advocating is the same as Floyd Abrams, a noted constitutional lawyer, who stated:

> While Congress is legally entitled to withdraw endowment funding, the first amendment does not allow Congress to pick and choose who gets money and who doesn't. You can't punish people who don't adhere to Congress's version of art they like. Even if they want to protect the public, the basic legal reality is that funding cannot exclude constitutionally protected speech.[34]

The argument ought not to be about assumed standards. We should not get involved in line drawing and definitions of decency and obscenity. There is no reason to participate in this fundamentalist discourse. Taxpayers' dollars ought to support all forms of expression as guaranteed by the first amendment. Gays pay taxes. Taxation must include the right to representation. Ideas, images, descriptions of realities which are part of everyday language cannot be forbidden from entering into the discourse of art. All decisions regarding speech ought to be made in a non-discriminatory manner. Government agencies allocating funds for art cannot favor one form of speech over the other. Preferences or opinions, even if shared by a majority, are non-relevant judgments and improper grounds for exclusion. To repeat: If Government only allocates dollars for certain forms of art and not others, the Government abolishes the first amendment. If anything, the first amendment protects the diversity of speech. Government cannot exclude, because to exclude is to censor.

Kramer, as well as Helms and Yates, argued that the introduction

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33. *See, e.g.*, the French Baroque artist Nicholas Poussin's *The Rape of the Sabine Women.*

34. Glueck, *A Congressman Confronts a Hostile Art World*, N.Y. Times, Sept. 19, 1989, § 2, at 1.

of obscenity clauses into the NEA funding guidelines was not an attempt at censorship, because there was no effort to prevent publication or distribution of obscene material. Instead, they argued that they were just barring the use of taxpayers' money for such projects. Taxpayers' money ought to be spent to protect the standards of the Constitution and not to protect bogus standards of decency and civility.

Previously the NEA panels were required only to recognize "artistic and cultural significance" and "professional excellence." Now, the head of the NEA must add to these intentionally and exclusively art related criteria the politically charged criteria of obscenity. I question that obscenity is a matter for the judicial system, but I am certain that it is not for the NEA and politicians to determine. The political independence of the NEA does not exist any longer, and there is no doubt that it will erode even further once the commission that was instituted by the Senate conference committee begins to review the NEA's grant-making procedure and determine whether there should be new standards, other than the new obscenity standard which has been forced upon the NEA already. The twelve member commission which will review the NEA guidelines will be a purely political commission. It will have 4 members appointed by the speaker of the House, 4 by the president pro tempore of the Senate, and 4 by the President.

It is obvious that the Mapplethorpe case set in motion for the NEA what the "Tilted Arc" case set in motion for the GSA. The "Tilted Arc" case was used to fundamentally change the guidelines of the GSA's art-in-architecture program. The peer panel selection process was weakened because every panel will now select under community pressures, or will try to avoid community protest. The contract between the artist and the GSA was changed. The new guidelines now overtly favors the government, which can cancel the contract at any stage of the planning process, and it excludes the realization of site specific projects in that it explicitly states that the art works commissioned by the GSA can be removed from their federal sites at any time.

Other than censorship measures which were incorporated into the guidelines of federal art agencies, the cultural revolution has had yet another effect. It has now also co-opted the American flag.[35] The Senate has approved legislation intended to outlaw flagburning and other forms of flag defacement. Democratic leaders argued that the new statute was a compromise needed to avert an amendment to the Constitu-

35. *See* Comment, *Art and First Amendment Protection in Light of Texas v. Johnson*, 14 NOVA L. REV. 487, 501, n. 117 (1990) and accompanying text.

tion. The amendment to the Constitution was defeated, but the principles of the first amendment have been diluted. The symbol of the American flag has been depoliticized by prohibiting its use as an expression of political protest. The statute turns the flag from a symbol of freedom into a symbol of fear and oppression by limiting its meaning and use. The flag has become a form of political intimidation. The result is mandatory patriotism.

We can expect that the Flag Protection Act[36] will be challenged. Once a federal court rules that the Flag Protection Act is unconstitutional, this question will once again be brought before the United States Supreme Court. If the Court upholds its ruling—that destruction of the flag as a protest is a form of political expression that cannot be restricted—we are threatened by a constitutional amendment. Such an amendment which would ban desecration of the flag—if ratified—would be the sorely restrict the Bill of Rights.

36. *Id.*