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Articles

**REVISITING THE VISUAL ARTISTS RIGHTS ACT OF 1990: A FOLLOW-UP SURVEY ABOUT AWARENESS  
AND WAIVER**

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U.S. intellectual property law is primarily utilitarian in nature and, consequently, traditional copyright law has focused on providing rights that center on the economic interests of authors.<sup>1</sup> Yet there are rights that extend beyond the economic interests of an author that protect the author's personal interest in a work. These non-economic rights are often referred to as "moral rights,"<sup>2</sup> which consist primarily of the right of attribution and the right of integrity.<sup>3</sup> U.S. copyright law nominally included moral rights when the U.S. joined the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").<sup>4</sup> After the U.S.'s accession to the Berne Convention, Congress decided to supplement pre-existing moral rights by incorporating moral rights-specific legislation into American copyright law when enacting the Visual Artists Rights Act of 1990 ("VARA").<sup>5</sup>

More than thirteen years have passed since VARA was enacted. It is unclear whether VARA's waiver provisions have had any effect, detrimental or otherwise. There are a number of indications that VARA is still not well known and is little used. The Copyright Office currently has a total of two registrations in the now 13- \*132 year old VARA Visual Arts Registry,<sup>6</sup> which is a stark contrast to the over six hundred thousand copyright registration applications that the Copyright Office receives annually.<sup>7</sup> There have only been a small number of reported cases, and of those reported cases, a VARA artist succeeded in recovering damages in just one.<sup>8</sup> Scattered newspaper and magazine articles have reported approximately a dozen settlements and threatened lawsuits involving VARA claims since VARA's enactment.<sup>9</sup>

When Congress passed VARA, it ordered the Copyright Office to conduct a study to gauge the effect of waiver provisions in VARA on visual artists because of its concern over the lack of artists' bargaining power.<sup>10</sup> The study was due five years after the enactment of the act. The Copyright Office decided to conduct the study by studying case law, surveying the art community, and holding hearings about VARA.<sup>11</sup> The main focus of the Copyright Office's study was on the effects of VARA waiver provisions.<sup>12</sup> The Copyright Office issued its final report on March 1, 1996 and found that because of low awareness of VARA "assessments of the impact of VARA's moral rights waiver provisions will necessarily be inconclusive."<sup>13</sup> The Copyright Office recommended:

Given the widespread lack of knowledge in the artistic community about moral rights, the low level of contractual experience with waivers, and the absence of judicial guidance on VARA interpretation, Congress may decide to reexamine the impact of waiver of moral rights and other related policy issues at some future time.<sup>14</sup>

In order to gain a more accurate measure of the state of VARA today, the author of this article decided to follow up on the Copyright Office's 1995 study by conducting a new survey regarding VARA to discover whether the circumstances surrounding VARA have changed. The author of this article conducted the new \*133 survey in 2003 ("2003 Survey"). The 2003 survey was almost identical in substance to the Copyright Office's 1995 VARA survey ("1995 Survey").

Part II discusses moral rights generally and provides an overview of the VARA statute, VARA case law, and news accounts of asserted VARA claims. Part III analyzes the results of the 2003 Survey, compares the result with the results from the 1995 Survey, and discusses the implications of the survey. Part IV offers recommendations to practitioners and to Congress. Appendix A contains an explanation of how the survey was structured, administered and analyzed. Appendix A also presents the results of the 2003 Survey in tabular form alongside the results from the 1995 Survey.

## **I. An Overview of the Visual Artists Rights Act of 1990**

### **A. Moral Rights and American Law**

Moral rights originated with the French legal concept of *le droit moral*.<sup>15</sup> The concept of *droit moral* focuses on the personal and spiritual, rather than economic, interests of an author.<sup>16</sup> *Droit moral* considers an author's creation to be an extension of her self because a person who creates a work invests something more than just time and money.<sup>17</sup> Moral rights consist primarily of the right of integrity and the right of attribution.<sup>18</sup> The right of attribution is the right to claim or disclaim authorship in a work.<sup>19</sup> The right of integrity is the right of protection against mutilation, alteration, or destruction of a work, even after title has been transferred.<sup>20</sup>

When Congress consented to and the President ratified the Berne Convention, the Government asserted that U.S. intellectual property laws already complied with the minimal level of moral rights protection mandated by Article 6bis<sup>21</sup> of the \*134

Berne Convention.<sup>22</sup> In 1990, Congress decided to slightly expand the scope of protection of moral rights in the U.S. by enacting VARA.<sup>23</sup> VARA is the only moral rights-specific federal legislation in the United States.<sup>24</sup>

## B. VARA

The Visual Artists Rights Act of 1990 amended the Copyright Act and gave moral rights protection to certain artists.<sup>25</sup> The primary section of VARA is codified at 17 U.S.C. § 106A. VARA gives artists (1) the right of attribution; (2) the right of integrity; and (3) the right to prevent destruction of works of “recognized stature.”<sup>26</sup> The scope of VARA is very narrow, protecting only certain types of visual art including paintings, drawings, prints, and sculptures produced in limited editions of 200 or fewer copies.<sup>27</sup> This means that posters, books, videos and other \*135 types of art that may commonly be considered “visual art” are not protected by VARA.<sup>28</sup> VARA does not cover advertisements<sup>29</sup> or “works made for hire,” defined in 17 U.S.C. § 101 as works “prepared by an employee within the scope of his or her employment.”<sup>30</sup> The media or materials used in the creation of the artwork are not dispositive of whether the artwork is covered by VARA.<sup>31</sup> The work does not have to be “final” to be covered by VARA; “preliminary” work such as drafts and sketches are covered.<sup>32</sup>

The duration of protection for works created after June 1, 1991 is the life of the author.<sup>33</sup> For works created before June 1, 1991, VARA protection is available only to an artist who has not transferred title in her work and the duration of that protection equals the duration of normal copyright protection, which is currently \*136 life plus 70 years.<sup>34</sup> For jointly authored works, protection endures until the end of the last surviving author’s life.<sup>35</sup>

VARA contains special provisions for visual art installed in buildings.<sup>36</sup> If the work cannot be removed from a building without mutilation or destruction, then a waiver is needed stating that the work may be destroyed; if a waiver is not obtained, then § 106A applies.<sup>37</sup> If a work that is incorporated in a building can be removed, then § 106A applies unless an owner makes a good faith attempt to notify the artist and the artist ignores notification.<sup>38</sup>

There are three important exceptions to the rights granted by § 106A. The first is that “[t]he 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 violation of the integrity right.<sup>39</sup> The second exception is that “[t]he 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” does not violate the right of integrity or the right to prevent destruction of a work of recognized stature.<sup>40</sup> The third exception is that the right of attribution does 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; any such reproduction, depiction, portrayal, or other use of a work” is not a violation of the right of integrity or right to prevent destruction.<sup>41</sup>

The Copyright Office maintains a Visual Arts Registry that allows visual artists and owners of buildings to submit statements for recordation.<sup>42</sup> Similar to works protected by §106, there is no mandatory registration/recordation requirement for protection under VARA.<sup>43</sup> A visual artist does not need to submit a statement with the Copyright Office in order to sue under VARA.<sup>44</sup> Significantly, a Visual Arts Registry recordation does not constitute prima facie evidence of a \*137 VARA right.<sup>45</sup> This creates little incentive for visual arts recordations, and only two have been registered by the Copyright Office.<sup>46</sup>

The damages under VARA are identical to those for copyright infringement under 17 U.S.C. § 106 because 17 U.S.C. § 501(a) includes VARA violations among the actions that infringe a copyright.<sup>47</sup> The Seventh Amendment right to a jury trial might not apply to VARA claims and courts have not yet considered that question.<sup>48</sup>

When VARA was enacted, ten states had statutes that protected artists’ moral rights to differing degrees.<sup>49</sup> VARA preempts these statutes to the extent that those statutes provide equivalent rights to those in 17 U.S.C. § 106A.<sup>50</sup> State statutes may provide protection beyond VARA for non-equivalent rights and beyond the duration of VARA rights.<sup>51</sup>

Though an artist’s rights under VARA may not be transferred, an artist may waive her VARA rights if she “expressly agrees to such waiver in a written instrument signed by the author.”<sup>52</sup> The written instrument must specifically identify the \*138 work and the uses of the work in order to be valid,<sup>53</sup> “[b]lanket waivers are not permitted.”<sup>54</sup>

Congress expressed concern about the waiver provision and uneven bargaining power:

The Committee recognizes that these rights are personal to the author and that, because of a relatively weak economic position, the author may be required to bargain away those rights. It also recognizes that

routine waivers of the rights will eviscerate the law. On the other hand, the Committee believes that to proscribe waiver would be to inhibit normal commercial practices.<sup>55</sup> There is no record of Congress revisiting the issue of VARA waivers after the Copyright office issued its final report in 1995.

### C. VARA Case Law

There have been few reported cases involving VARA claims brought before federal courts. All but one of the reported opinions in which a VARA claim was asserted involved the mutilation or destruction of artwork.<sup>56</sup> The following is a brief overview of VARA cases to date.

The first reported case with a VARA claim was *Carter v. Helmsley-Spear, Inc.*, which examined several important aspects of VARA.<sup>57</sup> In *Carter*, a real estate management company wanted to remove a large sculpture installed in the lobby of a building.<sup>58</sup> The artists who installed the work initially won a permanent injunction from the district court.<sup>59</sup> The Second Circuit vacated the injunction.<sup>60</sup> The Second Circuit found that the work was actually a work for hire not covered by **\*139** VARA because, among other reasons, the artists were paid a weekly salary and were furnished the material for the sculpture.<sup>61</sup>

The only reported case where a VARA artist obtained relief was *Martin v. City of Indianapolis*.<sup>62</sup> *Martin* involved the City's destruction of a large stainless steel sculpture.<sup>63</sup> The artist built the sculpture so that it could be disassembled and reassembled.<sup>64</sup> A zoning variance agreement between the owner of the land and the city stipulated that the city would give the artist and the owner of the land notice if the land was acquired by the city or if the city withdrew its approval and ninety days to remove the sculpture.<sup>65</sup> The city demolished the sculpture without giving prior notice to the artist.<sup>66</sup> The court found that the sculpture was not a work made for hire because the artist retained ownership of the sculpture.<sup>67</sup> The district court's test required that "Martin must show that (1) he was the author (2) of a work of visual art (3) within the scope of VARA (4) which was of recognized stature and (5) which was intentionally destroyed."<sup>68</sup> The district court found that Martin satisfied all the elements of that test.<sup>69</sup> The Seventh Circuit examined whether the sculpture qualified as a work of "recognized" stature and upheld the district court's use of hearsay evidence, newspaper articles and letters about the sculpture, in determining that the sculpture was indeed a work of "recognized stature."<sup>70</sup> The artist was awarded \$20,000 in damages, the statutory maximum for non-willful infringement, plus attorney's fees<sup>71</sup> which totaled \$131,000.<sup>72</sup> The infringement was non-willful because the court decided that "[t]his appears to be a case of bureaucratic failure within the City government."<sup>73</sup>

Only seven other reported federal cases have involved VARA claims. The Southern District of New York dismissed an artist's VARA claim in *Pavia v. 1120 Ave. of the Americas Associates* because the actual mutilation occurred before **\*140** VARA's effective date and the court held that continued display of a mutilated work, in and of itself, does not give rise to a VARA claim.<sup>74</sup> In *Peker v. Masters Collection*, the Eastern District of New York found that the works in question were posters and therefore were not covered by VARA.<sup>75</sup> The Southern District of New York held that there was a valid VARA claim in *Flack v. Friends of Queen Catherine, Inc.*, for the mutilation of the clay sculpture used in creating a bronze statue.<sup>76</sup> The Second Circuit held in *Pollara v. Seymour* that the artist was not entitled to relief because the banner was an advertisement and not covered by VARA.<sup>77</sup> The District of Massachusetts in *Phillips v. Pembroke Real Estate, Inc.*<sup>78</sup> was not convinced by the artist's argument that his work was so site specific that moving the work would be an intentional destruction or mutilation of the work under VARA because of the 17 U.S.C. § 106A(c)(2) exception that allows the modification of a work as a result of public presentation.<sup>79</sup> In *Scott v. Dixon*, a sculptor alleged that the defendants who purchased her swan sculpture destroyed her work because they stored the work improperly and allowed it to rust away.<sup>80</sup> The Eastern District of New York held that Scott had no claim for relief for the destruction of her sculpture because her work was not of "recognized stature."<sup>81</sup>

In *Berrios Nogueras v. Home Depot*,<sup>82</sup> the most recent case where a VARA claim was asserted, Home Depot reproduced images of the plaintiff's artwork in brochures and advertisements. The court dismissed the artist's claims because of **\*141** the 17 U.S.C. § 106A(c)(3) exception that "the rights of attribution and integrity do not apply to reproduction, depiction, portrayal, or other uses of the otherwise protected work when used in connection with those works specifically excluded from the definition of 'works of visual art' under 17 U.S.C. § 101."<sup>83</sup> Promotional material and advertisements are excluded from the definition of "works of visual art."<sup>84</sup>

These few reported cases involving VARA flesh out some of the limits of VARA. In five of the nine VARA suits to date, the

artists' claims were unsuccessful because the work in question did not fall within the scope of VARA. An artist prevailed in only one case. The low success rate of artists litigating VARA claims suggests that VARA has limited applicability and limited potential, yet the case law does not reveal the full scope of VARA's effects and potential; the next section will further explore the scope of VARA by surveying news accounts.

#### **D. VARA in the News**

Newspaper accounts and magazine articles are sources of information, albeit hearsay, that shed additional light on the scope of VARA's effect. There have been scattered reports of controversies, settlements, and negotiations arising from VARA claims in the national media since VARA's enactment. Surprisingly, only one news account focused on a violation of the right of attribution and the other accounts all involved the alteration, mutilation, or destruction of a work.<sup>85</sup>

The first mention of a possible VARA claim came a few days after VARA was signed into law and involved the government-ordered removal of two nude sculptures from a Government Services Administration ("GSA") administered building.<sup>86</sup> In 1992, a Seattle area artist asserted that his sculpture was altered because it was moved; his lawyer expected the suit to settle.<sup>87</sup> Four years later, several artists sued over use of an image of a sculpture of a troll in Seattle; the artists reached settlement with two magazines and the University of Washington and were seeking \$100,000 in damages from another company.<sup>88</sup> In 1998, the Fresno Art \*142 Museum in California settled a lawsuit for \$10,000 for painting over a mural when a new exhibit went on display.<sup>89</sup>

There was also a news story from 1999 about a Northwestern University student who painted a replica of Michelangelo's Sistine Chapel on his dormitory room ceiling and was ordered to remove it.<sup>90</sup> The student sued Northwestern University in federal court under VARA and reached a settlement that the painting could stay for the school year but had to be either removed or painted white at the end of the year.<sup>91</sup> The Northwestern case brought VARA fleetingly into the national spotlight when the student was interviewed on National Public Radio, and was invited to speak on news and late night shows.<sup>92</sup>

In 2000, a developer destroyed a fountain in Santa Monica and the artists received a \$220,000 settlement.<sup>93</sup> Also in 2000, twelve sculptures were discarded by a South Florida museum and the artist received a \$25,000 settlement.<sup>94</sup> In 2001, there was a news account of negotiations to save murals at San Francisco's juvenile hall and a mention of a \$200,000 settlement from several years ago for the whitewashing of a mural in San Francisco.<sup>95</sup>

More recently, there have been several accounts of disputes where a VARA claim was asserted during 2004. The Temple Beth-El of St. Petersburg, Florida, was reportedly sued under VARA for the destruction of a sculpture on its property.<sup>96</sup> An artist in Detroit, Michigan was reportedly prepared to sue General Motors Corp. if it placed a billboard over a mural he painted on the side of a building, \*143 but General Motors withdrew its plans.<sup>97</sup> In Chicago, Illinois, an artist sued the Chicago Park District for reducing the size of a wildflower garden that he planted 20 years ago.<sup>98</sup>

There has been only one newspaper account, from 1997, of a threatened VARA suit over the right of attribution. A sculptor threatened to sue the firm that commissioned her work because she did not believe she was appropriately credited as the sculptor of a statue in Fort Lauderdale, Florida.<sup>99</sup> The plaque at the base of the statue originally listed the studio that designed the statue in large letters and in smaller letters listed the sculptor as the portraitist.<sup>100</sup> The dispute resulted in a settlement and the plaque at the base of the statue was replaced with a plaque that identified the person who sculpted the work as the true sculptor.<sup>101</sup>

While the frequency of accounts of disputes in which a VARA claim is asserted has risen in the years since the enactment of VARA, news accounts and case law still provide only a spotty picture.

## **II. The 2003 Survey**

### **A. Survey Design and Method of Computing Results**

The format of the questionnaire that was used for the 2003 Survey was almost identical to the 1995 Survey.<sup>102</sup> Unlike the 1995 survey which was conducted via mail or fax, the 2003 Survey was primarily conducted via the Internet. The 2003 Survey solicited respondents by email and surveys were completed on a website with the option of mailing a hard copy to the

author of this article.<sup>103</sup> The 2003 Survey targeted the same constituency as the 1995 Survey.<sup>104</sup>

The results of the 2003 Survey are tabulated in Part C of the Appendix alongside the 1995 Survey results. The respondents were categorized by whether they had representation, their income, amount of commissioned work, and state of residency. The method of computing the results was based on the method used by the \*144 Copyright Office for the 1995 Copyright Report and the results were supplemented with some statistical analysis.<sup>105</sup> A margin of error was calculated for each statistic. A p-value for each pair of statistics was also calculated to measure the significance of the differences between 1995 and 2003.<sup>106</sup>

The following sections will refer to differences between the 1995 Survey and 2003 Survey that have p-values of more than 0.05 and less than 0.1 (i.e.  $0.05 < p\text{-value} \leq 0.1$ ) as marginally significant.<sup>107</sup> Marginally significant differences may or may not be valid differences. Differences between the 1995 Survey and 2003 Survey that have p-values of less than 0.01 (i.e.  $p\text{-value} \leq 0.01$ ) will be referred to as “significant” or “strongly significant” .<sup>108</sup> Significant or strongly significant statistical differences indicate that there was a real change between 1995 and 2003.

## **B. General Results of the 2003 Survey**

The 2003 Survey received 379 submissions from persons living in at least thirty-six states and the District of Columbia, of which 308 respondents identified themselves as VARA visual artists.<sup>109</sup> In contrast, the 1995 Survey received 1061 responses from forty-seven states and the District of Columbia, of which 955 identified themselves as VARA artists.<sup>110</sup>

Most of the differences between the 1995 Survey results and the 2003 Survey results were insignificant. Seventy of the ninety-nine p-values calculated indicated that there was no statistically significant difference between the 1995 and 2003 surveys. Nine of the p-values indicated marginally significant differences. Twenty of the p-values indicated significant differences. The discussion below focuses on the twenty-nine significant or marginally significant differences between the 1995 and 2003 surveys.

## **C. Level of VARA awareness**

Generally, the level of awareness of moral rights has not changed much between the 1995 Survey and the 2003 Survey.<sup>111</sup> Seventy-eight percent of all VARA artist respondents in 2003 were aware of moral rights, but the rise of five percent \*145 from the 1995 Survey is only marginally significant and might not indicate any actual change in awareness. The changes in percentages for the other respondent categories are not significant because none of those p-values were below 0.1.

There was an eleven percent rise in awareness that moral rights can be waived amongst VARA artists generally. This is a significant increase, but the level of awareness of waiver remained low, rising to only fifty-two percent for all respondents. There were significant increases in awareness of waiver among those with no representative, those who earn less than \$25,000 annually from art, those whose art does not provide their sole income, and those who are annually commissioned to create artwork.

The level of awareness regarding the fact that waivers must be written and express rose very slightly from thirty-two percent to thirty-eight percent. Though statistically significant, this is a small increase. The level of awareness that waivers must be written and express is still low. There were marginal increases in awareness among those who earn more than \$25,000 annually from art, those who are annually commissioned to create art, and those who are annually commissioned to create more than fifteen works. Artists living in states with moral rights statutes enacted before VARA did not have significantly more awareness of moral rights.

In summary, there was a marginally significant change in the level of awareness of moral rights, a small increase in the level of awareness of waiver, and a small increase in the level of awareness that waivers must be written and express. The low level of awareness of waivers (fifty-two percent) and of the fact that waivers must be written and express (thirty-eight percent) suggest that the level of overall VARA awareness is still low.<sup>112</sup> In 1995, the Copyright Office interpreted similar results and came to the conclusion that VARA awareness was low.<sup>113</sup> Several respondents commented that they believed that there was a low level of awareness in the general artist community, and the dearth of case law and news accounts tends to support that proposition.

#### **D. Contract Types and Content**

Oral contracts are still the most common type of contract in the art world according to the respondents.<sup>114</sup> The frequency of waiver clauses in contracts in general seems to be low; only nine percent of respondents believed that waivers were routinely included in artists' contracts. There was a marginal increase in the percentage of respondents who indicated that waivers are routinely included in artist \*146 contracts, but the percentage (five percent) remains very low. There was a significant rise in the percentage of respondents who have seen waiver clauses, from seventeen percent to twenty-five percent. There was a marginally significant rise in the percentage, from eight percent to twelve percent, of VARA artists that have been asked to waive moral rights. There was a significant rise in the percentage, from twenty-three percent to thirty-one percent, of VARA artists who knew of other artists who have been asked to waive moral rights. These results indicate a definite rise in the frequency of waiver clauses, but the overall frequency of waiver clauses remains very low. The fact that most contracts are oral contracts probably contributes to the very low frequency of waiver clauses.

The content of waivers seems to have changed significantly.<sup>115</sup> The right of integrity is now much more likely to be waived than the right of attribution. The percentage of respondents stating that the right of integrity is waived more often than the right of attribution rose from forty-three percent to fifty-nine percent. The percentage of respondents stating that the right of attribution is waived more often than the right of integrity fell precipitously from thirty-four percent of 1995 respondents to nine percent of 2003 respondents. This large shift could be because of the low economic cost to art buyers of complying with an artist's decision to claim or disclaim a work. There were insignificant changes regarding a separate price for waivers and whether waivers were limited in time. Twenty-three percent of 2003 respondents stated that contracts included a separate price for waivers, and twenty percent of 2003 respondents stated that the waivers were usually limited in time.

There were insignificant changes regarding whether uses were sufficiently identified in waivers (fifty-nine percent in 2003) and whether the works were sufficiently identified waivers (fifty-one percent). Despite the lack of change when each condition is considered separately, there was a significant change as to whether a waiver sufficiently identifies both the uses and the works sufficiently (a drop from sixty percent to forty-eight percent.) This suggests that as many as half of the moral rights waivers extant are invalid under VARA.

#### **E. Impact of Waiver Provisions on Artists' Bargaining Power**

There was a surprising increase in the percentage of VARA artists that were willing to waive their moral rights in the future, doubling from eight percent to sixteen percent, but eighty-four percent of VARA artists still were not willing or did not know if they were willing to waive their moral rights in the future.<sup>116</sup> Most of \*147 the categories of respondents showed a significant increase in those willing to waive, especially among those whose income comes solely from art, rising from nine percent to twenty-eight percent, and those whose earn more than \$25,000 from art, rising from seven percent to twenty-seven percent. There were no significant changes regarding the percentages of those who did not know if they would be willing to waive their moral rights in the future, except those represented by a gallery now seem more certain that they would not waive their rights.

There was a significant rise in the percentage of those earning more than \$25,000 annually from art that have turned down an offer because of a waiver clause, but there was no significant change in the percentage of VARA artists that have turned down an offer because of a waiver clause in other categories. There were no significant changes in the percentages of respondents in any of the analyzed categories insisting that a waiver clause be struck. There appears to be a general tendency for those who derive more income from art to insist more often that a waiver be struck.

The percentage of those who believe that rejecting a waiver request results in no deal has not changed significantly. About forty percent of those expressing an opinion and fifty-five percent of those who have seen waiver clauses believe that rejecting a waiver results in no deal. There was no statistically significant change in the percentage of VARA Artists who were pressured or coerced into accepting a waiver clause. In 2003, only seven percent of VARA artists responded that they have been pressured. Of those who had seen contracts with waiver clauses, eighteen percent responded that they had been pressured. Waiver provisions seem to have little impact upon artists' bargaining power at this time. The percentage of those pressured or coerced into waiving seems extraordinarily low considering that Congress feared that purchasers would use their economic power to coerce artists into waiving their rights.



## **F. Implications of the 2003 Survey**

There was surprisingly little change between the 1995 Survey and the 2003 Survey regarding most of the issues addressed by the surveys, but the 2003 Survey did reveal some significant changes.

There is a slight increase in the level of awareness of moral rights, generally, and waiver of moral rights, specifically. The percentage of respondents who knew about VARA's specific waiver requirements rose to only thirty-eight percent. This indicates that VARA awareness remains low, having risen only slightly from the level of awareness in 1995, which the Copyright Office interpreted as being low.

A majority of contracts are still oral. The largest significant change was the drop from thirty-four percent to nine percent of respondents answering that the right of attribution was waived more often than the right of integrity. A larger percentage of respondents have seen waivers or knew people who were asked to waive moral rights, but those respondents are in the minority. According to respondents, \*148 about half of the waivers that have they encountered do not specify the works and uses being waived adequately, suggesting that many waivers are invalid.

Perhaps the most striking change was the rise in percentage of VARA artists who were willing to waive their moral rights in the future, though the absolute percentage of artists willing to waive in the future remains very low.

The availability of waiver does not seem to have an adverse impact on artists' bargaining position. Few artists seem to be pressured or coerced into waiving: about seven percent for all VARA artists and eighteen percent for artists who have seen waiver provisions. The low percentage of those pressured into waiving could be because most contracts are oral.

## **III. Recommendations**

### **A. Practitioners Who Represent Those Who Purchase Artwork**

Practitioners should be aware that VARA is potentially applicable in a wide variety of contexts and could affect a wide range of individuals and legal entities. The effects of VARA are not limited to museums and galleries. VARA claims have been asserted over artwork appearing in places ranging from a college dormitory to a building lobby to a synagogue. Corporations buy millions of dollars worth of art,<sup>117</sup> much of which may be covered by VARA. Real estate owners and their representatives should be especially concerned about VARA if they install art on their property or purchase property with previously installed art. The unwary may be exposed to hundreds of thousands of dollars of potential VARA liability as evidenced by the \$151,000 awarded in *Martin I* and the news accounts of settlements ranging from \$10,000 to \$220,000.<sup>118</sup>

Practitioners representing art purchasers must know the limits of VARA in order to discern whether there is any potential liability. Generally the scope of VARA is very narrow.<sup>119</sup> VARA only covers paintings, drawings, prints, sculptures, or photographs existing in a single signed copy or in a signed and numbered limited edition of 200 or fewer copies.<sup>120</sup> The low level of specific awareness of the waiver provisions in the 2003 Survey suggests that artists probably do not know that the scope of VARA is very limited. In addition to the limited scope of VARA, there are three very important exceptions to VARA rights. The three exceptions are provided for in 17 U.S.C. § 106A(c), and exclude recovery for damage caused by the passage of time, the lighting or display, or any damages caused by reproduction. \*149<sup>121</sup> These three exceptions may be overlooked by artists zealously attempting to apply VARA.<sup>122</sup>

The 2003 Survey reveals that most art contracts are oral contracts. It is generally good practice to have written contracts, particularly when VARA rights may be implicated. VARA rights can only be waived in a written waiver.<sup>123</sup> The 2003 Survey also indicates that waivers have not been used very often in contracts. Most artists have not turned down an offer because of the inclusion of a waiver clause. Also, although the absolute percentages remain low, more artists are affirmatively willing to waive their VARA rights. Practitioners may wish to actively encourage their purchasing clients to obtain written contracts for all their artwork purchases and advise purchasers to consider including VARA waivers in written contracts.

The 2003 Survey indicates that as many as half of the VARA waivers extant are invalid because the waivers do not adequately specify the works or uses of the works. If a purchaser decides to include a waiver provision, the practitioner

should review carefully and confirm that the waiver provision contains adequate descriptions of the work(s) and the use(s).

Instead of using waivers when buying or commissioning artwork, purchasers may wish to hire artists as employees. Hiring artists as employees avoids any potential liability under VARA, because artwork created by employees is considered “work made for hire.”<sup>124</sup>

If a client purchases a work that is incorporated in a building, then the practitioner may wish to advise the client to submit a recordation to the Copyright Office Visual Arts Registry, especially if the work is very valuable.<sup>125</sup> Though not prima facie evidence, the recordation could serve as important evidence of the relationship between the artwork and the property upon which the artwork is installed.

It would be unwise to ignore the existence of VARA, because it potentially exposes purchasers of artwork to a good deal of liability. The frequency of VARA suits is likely to rise as more VARA protected art is created and as more artists learn about the act. Many of the complications that could arise because of VARA can be avoided with education, due diligence, and careful drafting of contracts.

#### **\*150 B. Practitioners Who Represent Artists**

VARA is a potentially powerful tool in asserting an artist’s interest in a work.<sup>126</sup> Uneducated artists and practitioners may be underutilizing it to protect their moral rights. Practitioners can take a number of measures that would maximize the protection available under VARA to an artist-client.<sup>127</sup> Practitioners should be also be aware of how purchasers and their representatives can nullify the protections of VARA through waiver, an employer-employee relationship, and other methods.

The 2003 Survey reveals that the level of overall VARA awareness is the same level it was in 1995, which was considered low at the time. This suggests that artists and their representatives need to learn more about VARA. Practitioners should be prepared to educate their artist clients about the existence of VARA, the possible applicability of VARA to the artists’ works, and the specific constraints of VARA protection.

It is essential to understand that the scope of protection under VARA is very narrow.<sup>128</sup> Most of the reported cases and news accounts involving VARA claims have involved sculptures.<sup>129</sup> Though VARA’s scope is narrow, it covers more than just sculptures; it also applies to paintings, drawings, prints, and photographs.<sup>130</sup> Practitioners who represent artists who create paintings, drawings, prints and photographs should be aware that art created in those media may be protected as well. Unfortunately, VARA does not cover other media that artists may regularly work with such as posters, magazines, and audiovisual media.<sup>131</sup> Practitioners should also note that VARA’s protections extend only to works that exist in a single copy or in a signed and numbered limited edition of 200 or fewer copies.<sup>132</sup> Therefore, it may be prudent for artists to regularly sign and number their works.

The financial arrangement under which an artist creates a work might also adversely affect her VARA rights, e.g., receiving a salary and using the purchaser’s material would create a work-for-hire.

**\*151** A major hurdle for artists trying to assert a VARA claim for the destruction of a work is the “recognized stature” requirement.<sup>133</sup> Practitioners should encourage their artist-clients to enter competitions, curry recognition from newspapers and magazines, and get opinions about their artwork from critics and art professors.<sup>134</sup>

An aspect of VARA that favors artists is the writing requirement of the waiver provisions because an artist cannot orally waive her VARA rights.<sup>135</sup> Even if an artist has signed a waiver, practitioners should review those waivers carefully because the 2003 Survey indicates that as many as half of the waivers in existence are invalid because the waivers do not sufficiently identify both the works and the uses to which the waiver applies.

For works incorporated in buildings, practitioners should consider advising artists to obtain a Visual Arts Registry recordation from the Copyright Office.<sup>136</sup> The recordation may not have the same legal effect as a copyright registration, but an applicant does obtain an official certificate that may be valuable in court and provide some convincing evidence regarding the relationship between the artwork and the building in which the artwork is installed.

Practitioners could also supplement the protections available under VARA through contract law. If a written contract is used

to memorialize a sale or commission of a work, then one may wish to include an additional notice provision such as the one in Martin.<sup>137</sup> For artwork that is not covered by VARA, a practitioner can still obtain VARA-like protections through contract provisions.<sup>138</sup>

### **C. Congress**

The 2003 Survey reveals that little has changed with this unique piece of legislation in the past eight years. Congress's concerns about waivers being forced on artists remain unrealized at this juncture, and VARA still seems to be obscure and little used. Case law and scattered news reports support the position that VARA has had little effect.

**\*152** In the Copyright Report, the Copyright Office made several recommendations to Congress: (1) that there should be an effort to raise awareness of VARA;<sup>139</sup> (2) that the statute be clarified to explicitly indicate how specific a waiver must be in specifying uses;<sup>140</sup> (3) that § 106A be amended to parallel §113(d)(2) in order to strengthen artists' integrity rights;<sup>141</sup> (4) that §106(e)(1) should be amended so one joint author may not waive the moral rights of another joint author without written consent;<sup>142</sup> and (5) that Congress may reexamine this issue in the future.<sup>143</sup>

The Copyright Office's recommendations were met with Congressional inaction. The Copyright Office's efforts to create more awareness apparently have had little success. The statute was not clarified or amended in any way. The time may be ripe for Congress to formally revisit the issue of moral rights and reevaluate the effects of VARA.

### **Conclusion**

In 1995, VARA was a young act that was obscure and little used. The 2003 Survey reveals that little has changed since 1995 in terms of awareness or in the use of waivers. There were some statistically significant differences: a slight rise in the level of VARA awareness, a doubling in the percentage of VARA artists willing to waive moral rights in the future, and a drop in the percentage of respondents that agreed that the right of attribution was waived more often than the right of integrity. The significance of these changes is tempered by the low overall level of VARA awareness, the small percentage of VARA artists willing to waive moral rights in the future, and the relative cost of remedying attribution violations versus integrity violations. The 2003 Survey results, in combination with VARA case law and accounts of VARA in the news, indicate that VARA is still somewhat obscure, but its use is increasing. Though VARA still seems fairly obscure, it has the potential to be a very powerful litigation tool for lawyers. Practitioners representing both artists and purchasers of art should be mindful of VARA and its provisions.

### **\*153 Appendix -The 2003 Survey Design, Analysis, and Results**

#### **I. Design of the Survey**

The content of the 2003 Survey was intentionally made almost identical to the 1995 Survey to highlight any changes that occurred in the intervening years.<sup>144</sup> The survey was divided into four parts. Part I inquired about respondents' knowledge of moral rights and VARA provisions generally. Part II, answered only by self-identified VARA artists, inquired about artists' backgrounds and experiences. Part III inquired about respondents' experiences with art contracts and waiver provisions. Part IV provided space for additional comments.

The major difference between the two surveys is that the 2003 survey was primarily conducted via an Internet website rather than by mail, though respondents did have the option of printing out a hard copy of the survey and responding via mail. Minor differences include the presentation of the answers (e.g. using drop down menus), a revised introduction, and slight grammatical changes. Survey responses given on the website were automatically recorded into a database, while surveys that were completed on hard copy were manually inputted into the database. The 2003 survey was not supplemented by public hearings or consultations with experts. The 2003 survey was conducted for about two months, from November 3, 2003 to December 31, 2003, while the 1995 survey was conducted for about a year.

The 2003 Survey attempted to reach the same constituency reached by the Copyright Office in 1995.<sup>145</sup> Hundreds of emails were sent that described the survey and included a link to the survey. The emails were sent to volunteer lawyers for the arts

groups,<sup>146</sup> state art councils, art schools and universities, other arts organizations, and individuals who expressed interest in participating. The 2003 Survey encouraged recipients of the email to forward the email to anyone who may have been interested in participating. Several recipients posted the survey solicitation on their web bulletin boards and websites.<sup>147</sup> The survey also encouraged recipients to fax the survey to colleagues or to duplicate copies of the survey for those who do not use the Internet.

## \*154 II. Method of Computing Results and Statistical Analysis

The method of computing results was modeled on the method the Copyright Office used in 1995.

To compute the results from the survey, the Office first produced a simple tabulation of the gross responses of each survey question. Responses to questions directed to only a particular respondent group were narrowed and ineligible responses were excluded from tabulation of that question. This broad tabulation provided a frame of reference for multiple choice comparisons. Next, we compared the tabulated responses to a variety of different questions. Several questions were analyzed within the scope of specific response groups, such as those whose art provides less than \$10,000 annually. From these comparisons, a set of tables was created to compare how responses to certain questions differed among the various response groups ... The final analysis is expressed in terms of percentages. To obtain as pure a percentage as possible, surveys which did not respond to a particular question were excluded from that particular percentage base. Where the number of non-responses was significant, or perhaps indicative of confusion or some other relevant attitude, those numbers were noted or analyzed in the tables. Occasionally a substantial number of respondents replied "don't know" to certain questions. In order to preserve the integrity of the percentage expression, these answers were sometimes excluded by identifying those respondents "expressing an opinion." However, where relevant, those responses were analyzed and included in the tables.<sup>148</sup>

The Copyright Office did not include a margin of error for each statistic in its Copyright Report. For this article, a margin of error was calculated for each statistic from the 1995 and 2003 surveys.<sup>149</sup> A "p-value," which measures whether the difference between the 2003 Survey and 1995 is statistically significant, was also calculated.<sup>150</sup>

The margin of error was based on a 95% confidence level. The equation used was  $\text{Margin of Error} = Z \times \{ [p(1-p)]/n \}^{1/2}$ .<sup>151</sup> The variable Z equals the Z-value of 1.96, which corresponds to a 95% confidence level; the variable p equals the sample proportion (percentage); and the variable n equals the sample size.<sup>152</sup> The margin of error was rounded off to the nearest whole percentage, which is consistent with the rounding of percentages by the 1995 Survey.

A "p-value" was calculated for each pair of statistics in order to determine whether the differences between the results of the 2003 survey and 1995 survey \*155 was statistically significant. First, a test statistic for comparing two proportions, z, was calculated using the formula

$$[(p_1 - p_2) - 0] / \{ p[1-p] / [(1/n_1) + (1/n_2)] \}^{1/2}$$
<sup>153</sup>

The variable  $p_1$  represents the proportion of the first population whose answer is being analyzed; the variable  $p_2$  represents the proportion of the second population whose answer is being analyzed; the variable p represents the proportion of the two populations combined;<sup>154</sup> the variable  $n_1$  represents the sample size of the first population; the variable  $n_2$  represents the sample size of the second population. The test statistic z is then cross-referenced with a standard normal distribution table and a one-sided p-value is obtained. Because this article analyzed the results for any statistically significant difference between the 1995 Survey and the 2003 Survey, the one-sided p-value was doubled in order to obtain a two-sided p-value.<sup>155</sup>

The p-value, once obtained, was used to measure statistical significance. If the p-value was small enough, then the null hypothesis,  $H_0$ , was false. The null hypothesis in this case was that there had been no change between the 1995 survey and the 2003 survey. For the purposes of this survey, a p-value that was greater than 0.05 and less than 0.1 was be considered to show some, albeit weak, evidence that there had been a significant change between the 1995 Survey and the 2003 Survey; a p-value that was greater than 0.01 and less than 0.05 showed convincing evidence that there had been a significant change; and a p-value of less than 0.01 showed strong evidence that there had been a significant change.<sup>156</sup>

There are some caveats to keep in mind. The sample was not random because the respondents are self-selecting. This should not affect the validity of the comparison between the 1995 Survey and the 2003 Survey because of the substantially similar survey design, but there was the possibility of a Type II error.<sup>157</sup> The populations of the surveys for the p-value calculations

were all over five, which is the minimum for a valid comparison, but the comparisons between populations with smaller sample sizes should be examined with more skepticism.

### \*156 III. Survey Results

The tables in this section address five broad categories:

(A) the general awareness of artists and those associated with the arts community of the moral rights granted by VARA and specifically of an artists’ ability to waive those rights in a written agreement;

(B) the frequency with which moral rights waiver clauses appear in written artists’ agreements;

(C) the effects of such waivers on artists’ bargaining positions;

(D) the actual content of existing waiver clauses; and

(E) how commission contracts compare to other artists’ contracts with respect to the previous categories.<sup>158</sup>

The organization of the subsections in this section was based on the organization of the Copyright Report section V.C., which detailed the results of the 1995 Survey.<sup>159</sup> The format of the tables was based on the standards described within the Publication Manual of the American Psychological Association.<sup>160</sup> Proportions are represented in percentage format rather than decimal format for ease of comprehension. The terminology used in these tables differs slightly from the tables in the Copyright Report. The Copyright Report referred to the size of samples as “base”, while this article refers to sample size as “n” or “sample size” .

#### \*157 A. Respondent Profile

The 2003 Survey received 379 submissions<sup>166</sup> from persons living in at least 36 states and the District of Columbia.<sup>167</sup> Three Hundred Eight respondents identified themselves as VARA visual artists. The sixty-six respondents who did not identify themselves as VARA artists each had some connection to the arts community.<sup>168</sup> In contrast, the 1995 Survey received 1061 responses from forty-seven states and the District of Columbia, of which 955 identified themselves as VARA artists.<sup>169</sup> The 1995 Survey also received 106 responses from non-VARA artists.<sup>170</sup> A greater percentage of respondents to the 2003 Survey chose not to report data regarding their income.

**Table 1: VARA Artist Average Annual Gross Income From Artwork**

Income Categories	1995 Survey (n = 955)	2003 Survey (n = 308)
\$1-10,000*	73%	64%
\$10,000-25,000#	11%	7%
\$25,000-40,000#	5%	1%
\$40,000+	4%	3%
None	3%	6%
No response	4%	17%

\*The 1995 category was \$0-10,000 and the 2003 survey range was \$1-10,000

# Several surveys contained two typographical errors. Two of the income range options were \$10,000-\$20,000 and

\$20,000-\$40,000 instead of \$10,000-\$25,000 and \$25,000-\$40,000. Two respondents that answered \$20,000-\$40,000 are analyzed with the \$25,000-\$40,000 group. Six respondents that answered \$10,000-\$20,000 are analyzed with the \$10,000-\$25,000 group.

**Table 1-2: VARA Artist Responding with Artwork as Sole Source of Income**

Response	1995 survey % (n = 955)	2003 Survey % (n = 308)
Yes	10%	6%
No	87%	78%
No response	4%	16%

**\*158 B. VARA Awareness**

**Table 2-1: Aware of Moral Rights**

Category of Respondents	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total Respondents	73% ± 3%	1054	78% ± 4%	375	.064*
Those with no representative	70% ± 4%	420	75% ± 6%	184	.210
Those represented by an agent or artists' representative	77% ± 7%	148	80% ± 35%	5	.875
Those represented by a gallery	75% ± 4%	434	78% ± 10%	68	.639
Those whose art provides gross income exceeding \$25,000 annually	74% ± 9%	90	88% ± 16%	16	.244
Those whose art provides gross income less than \$25,000 annually (including no annual income)	72% ± 3%	820	74% ± 6%	219	.474
Those whose art provides their sole income	74% ± 9%	92	79% ± 18%	19	.651
Those whose art does not provide their sole income	73% ± 3%	822	76% ± 5%	239	.399
Those who have never been commissioned to create a work of art	74% ± 5%	259	74% ± 9%	93	.971
Those who are annually commissioned to create works of art	72% ± 3%	647	77% ± 7%	160	.214
Those who are annually commissioned to create more than fifteen works of art	72% ± 13%	47	100% ± 0%	6	.135
Visual artists residing in states with pre-VARA moral rights statutes	76% ± 5%	329	75% ± 9%	91	.802
Visual artists residing in states with pre-VARA moral rights statutes containing written waiver provisions	75% ± 6%	220	77% ± 12%	48	.762

\* n excludes surveys which did not respond to the particular question being analyzed.

\* indicates 0.05 < p-value ≤ 0.1; shows some evidence that there has been a significant change.

**\*159 Table 2-2: Aware that Moral Rights can be waived**

Category of Respondents	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total Respondents	41% ± 3%	1046	52% ± 5%	375	.000 <sup>aaa</sup>
Those with no representative	41% ± 5%	417	53% ± 7%	185	.006 <sup>aaa</sup>
Those represented by an agent or artists' representative	48% ± 8%	147	60% ± 43%	5	.598
Those represented by a gallery	40% ± 5%	430	42% ± 12%	67	.781
Those whose art provides gross income exceeding \$25,000 annually	56% ± 10%	90	81% ± 19%	16	.058 <sup>a</sup>
Those whose art provides gross income less than \$25,000 annually (including no annual income)	39% ± 3%	813	48% ± 7%	219	.012 <sup>aa</sup>
Those whose art provides their sole income	48% ± 10%	91	58% ± 22%	19	.433
Those whose art does not provide their sole income	40% ± 3%	816	50% ± 6%	239	.007 <sup>aaa</sup>
Those who have never been commissioned to create a work of art	37% ± 6%	259	39% ± 10%	92	.717
Those who are annually commissioned to create works of art	42% ± 4%	641	56% ± 8%	161	.002 <sup>aaa</sup>
Those who are annually commissioned to create more than fifteen works of art	50% ± 14%	46	100% ± 0%	6	.020 <sup>aaa</sup>
Visual artists residing in states with pre-VARA moral rights statutes	40% ± 5%	326	48% ± 10%	92	.179
Visual artists residing in states with pre-VARA moral rights statutes containing written waiver provisions	39% ± 6%	218	54% ± 14%	48	.054 <sup>a</sup>

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>a</sup> indicates  $0.05 < p\text{-value} \leq 0.1$ ; shows some evidence that there has been a significant change.

<sup>aa</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

<sup>aaa</sup> indicates  $p\text{-value} \leq 0.01$ ; shows strong evidence that there has been a significant change.

**\*161 Table 2-3: Aware that Waiver Must be Written and Express**

Category of Respondents	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total Respondents	32% ± 3%	1037	38% ± 5%	375	.025 <sup>aa</sup>
Those with no representative	33% ± 5%	414	35% ± 7%	185	.702
Those represented by an agent or artists' representative	42% ± 8%	147	40% ± 43%	5	.929
Those represented by a gallery	30% ± 4%	427	37% ± 12%	67	.229
Those whose art provides gross income exceeding \$25,000 annually	45% ± 10%	89	69% ± 23%	16	.080 <sup>a</sup>
Those whose art provides gross income less than \$25,000 annually (including no annual income)	31% ± 3%	797	34% ± 6%	219	.432
Those whose art provides their sole income	38% ± 10%	89	47% ± 22%	19	.449

Those whose art does not provide their sole income	31% ± 3%	811	35% ± 6%	239	.277
Those who have never been commissioned to create a work of art	28% ± 5%	262	26% ± 9%	93	.684
Those who are annually commissioned to create works of art	34% ± 4%	635	42% ± 8%	160	.063 <sup>a</sup>
Those who are annually commissioned to create more than fifteen works of art	41% ± 14%	46	83% ± 30%	6	.050 <sup>a</sup>
Visual artists residing in states with pre-VARA moral rights statutes	31% ± 5%	322	30% ± 9%	92	.918
Visual artists residing in states with pre-VARA moral rights statutes containing written waiver provisions	31% ± 6%	216	31% ± 13%	48	.973

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>a</sup> indicates  $0.05 < p\text{-value} \leq 0.1$ ; shows some evidence that there has been a significant change.

<sup>aa</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

### \*163 C. Frequency of Waiver Clauses

**Table 3-1: Frequency of Waiver Clauses**

Respondents who ...	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Have seen moral rights waiver clauses	17% ± 2%	1019	25% ± 4%	362	.000 <sup>aaa</sup>
Believe that waivers are routinely included in artists' contracts	7% ± 2%	489	9% ± 4%	192	.295
Have seen waivers and believe that waivers are routinely included in artists' contracts	13% ± 5%	177	15% ± 7%	91	.592
Say waivers are routinely included in artists' contracts	3% ± 1%	1017	5% ± 2%	350	.062 <sup>a</sup>
Say waivers are included in contracts for sales of existing artwork	20% ± 4%	373	16% ± 5%	188	.246
VARA artists who have waived moral rights	8% ± 2%	955	12% ± 4%	260	.074 <sup>a</sup>
VARA artists who know of other artists that have been asked to waive moral rights	23% ± 3%	955	31% ± 4%	247	.012 <sup>aa</sup>

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>a</sup> indicates  $0.05 < p\text{-value} \leq 0.1$ ; shows some evidence that there has been a significant change.

<sup>aa</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

<sup>aaa</sup> indicates  $p\text{-value} \leq 0.01$ ; shows strong evidence that there has been a significant change.

**Table 3-2: What kind of contracts are most common in the art world?**

Type	1995 Survey % (n = 754)*	2003 Survey % (n = 257)*	p-value
Oral	61% ± 3%	62% ± 6%	.721
Written	39% ± 3%	38% ± 6%	.721



\* n excludes surveys which did not respond to the particular question being analyzed and surveys which responded “don’t know.”

**\*164 D. Effect of Waiver on Artists’ Bargaining Position**

**Table 4-1-A: Affirmatively Know if Willing to Waive in the Future**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	8% ± 2%	888	16% ± 5%	243	.000 <sup>aaa</sup>
Those whose art provides their sole income	9% ± 6%	90	28% ± 21%	18	.026 <sup>aa</sup>
Those whose art does not provide their sole income	8% ± 2%	781	15% ± 5%	224	.003 <sup>aaa</sup>
Those whose art provides gross income exceeding \$25,000 annually	7% ± 5%	89	27% ± 22%	15	.001 <sup>aaa</sup>
Those whose art provides gross income less than \$25,000 annually (including no annual income)	8% ± 2%	779	15% ± 5%	207	.002 <sup>aaa</sup>
Those represented by an agent or artists’ representative	8% ± 4%	142	0% ± 0%	5	.510
Those represented by a gallery	7% ± 2%	410	9% ± 7%	64	.498
Those with no representation	9% ± 3%	406	18% ± 6%	173	.001 <sup>aaa</sup>
Those who have waived moral rights in a signed contract	25% ± 10%	73	34% ± 17%	29	.334

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>aa</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

<sup>aaa</sup> indicates  $p\text{-value} \leq 0.01$ ; shows strong evidence that there has been a significant change.

**\*165 Table 4-1-B: Don’t Know If Willing to Waive in the Future**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	42% ± 3%	888	41% ± 6%	243	.812
Those whose art provides their sole income	34% ± 10%	90	33% ± 22%	18	.951
Those whose art does not provide their sole income	43% ± 3%	781	42% ± 6%	224	.693
Those whose art provides gross income exceeding \$25,000 annually	37% ± 10%	89	33% ± 24%	15	.785
Those whose art provides gross income less than \$25,000 annually (including no annual income)	43% ± 3%	779	42% ± 7%	207	.707
Those represented by an agent or artists’ representative	45% ± 8%	142	20% ± 35%	5	.269
Those represented by a gallery	42% ± 5%	410	25% ± 11%	64	.010 <sup>aa</sup>
Those with no representation	42% ± 5%	406	48% ± 7%	173	.185
Those who have waived moral rights in a signed contract	59% ± 11%	73	52% ± 18%	29	.503

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>a</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

**\*166 Table 4-1-C: Have Turned Down Offer Because of Waiver Clause**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	13% ± 2%	862	16% ± 5%	244	.231
Those whose art provides their sole income	34% ± 10%	89	32% ± 21%	19	.839
Those whose art does not provide their sole income	11% ± 2%	769	15% ± 5%	224	.128
Those whose art provides gross income exceeding \$25,000 annually	27% ± 9%	86	56% ± 24%	16	.021 <sup>a</sup>
Those whose art provides gross income less than \$25,000 annually (including no annual income)	12% ± 2%	768	14% ± 5%	208	.349
Those represented by an agent or artists' representative	24% ± 7%	144	80% ± 35%	5	.005 <sup>aaa</sup>
Those represented by a gallery	12% ± 3%	408	16% ± 9%	63	.387
Those with no representation	14% ± 3%	395	14% ± 5%	174	.948
Those who have waived moral rights in a signed contract	36% ± 11%	77	32% ± 17%	28	.714

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>a</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

<sup>aaa</sup> indicates  $p\text{-value} \leq 0.01$ ; shows strong evidence that there has been a significant change.

**\*167 Table 4-1-D: Have Insisted a Waiver Clause be Struckp**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	14% ± 2%	869	16% ± 5%	240	.381
Those whose art provides their sole income	30% ± 9%	91	33% ± 22%	18	.779
Those whose art does not provide their sole income	12% ± 2%	772	15% ± 5%	221	.248
Those whose art provides gross income exceeding \$25,000 annually	33% ± 10%	87	50% ± 25%	16	.192
Those whose art provides gross income less than \$25,000 annually (including no annual income)	12% ± 2%	772	15% ± 5%	204	.300
Those represented by an agent or artists' representative	23% ± 7%	140	60% ± 43%	5	.058 <sup>a</sup>
Those represented by a gallery	15% ± 3%	410	16% ± 9%	61	.777
Those with no representation	12% ± 3%	398	15% ± 5%	172	.309
Those who have waived moral rights in a signed contract	43% ± 11%	74	29% ± 17%	28	.183

\* n excludes surveys which did not respond to the particular question being analyzed.

<sup>a</sup> indicates  $0.05 < p\text{-value} \leq 0.1$ ; shows some evidence that there has been a significant change.

**\*168 Table 4-2-A: Those Affirmatively Believing That Rejection of a Waiver Request Results in No Deal**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	17% ± 3%	857	21% ± 5%	229	.164
Those expressing an opinion	55% ± 6%	269	62% ± 11%	78	.305
Those who had seen contracts containing moral rights waiver clauses	43% ± 8%	144	41% ± 12%	63	.817

\* n excludes surveys which did not respond to the particular question being analyzed.

**Table 4-2-B: Those That Do Not Know Whether a Rejection of a Waiver Request Results in No Deal**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	69% ± 3%	857	66% ± 6%	229	.376
Those expressing an opinion	n/a	n/a	n/a	n/a	n/a
Those who had seen contracts containing moral rights waiver clauses	30% ± 7%	144	38% ± 12%	63	.252

\* n excludes surveys which did not respond to the particular question being analyzed.

**Table 4-2-C: Those Pressured or Coerced Into Waiving**

Category of VARA Artists	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	
Total VARA Artists Responding	6% ± 2%	881	7% ± 3%	231	.449
Those expressing an opinion	n/a @	n/a	n/a	n/a	n/a
Those who had seen contracts containing moral rights waiver clauses	24% ± 7%	144	18% ± 9%	65	.373

\* n excludes surveys which did not respond to the particular question being analyzed.

@ The Copyright Report tabulation seems to contain a typographical error. 24% (144) was reported as a result of the 1995 Survey, but this category should be not applicable.

**\*169 E. Content of Waivers**

**Table 5-1: Respondents who had seen waivers and expressed an opinion**

Opinion	1995 Survey		2003 Survey		p-value
	%	n*	%	n*	

That moral rights waivers encountered specifically identified the works and uses to which the waiver applies	60% ± 8%	151	48% ± 8%	151	.032 <sup>aa</sup>
That moral rights waivers encountered sufficiently identified the works for which waivers are requested	66% ± 8%	134	59% ± 9%	103	.284
That moral rights waivers encountered sufficiently identified the uses of the works for which the waivers are requested	46% ± 8%	136	51% ± 9%	123	.401
That contracts include a separate price for waivers	35% ± 8%	136	26% ± 8%	130	.118
That waivers are usually limited in time	26% ± 9%	95	20% ± 9%	79	.372

\* n excludes surveys which did not respond to the particular question being analyzed, surveys which responded “don’t know,” and surveys that responded “N/A.”

<sup>aa</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

**Table 5-2: Is one right, e. g., the right to attribution or the right to integrity, waived more often than the other?**

Type	1995 Survey (n = 156)*	2003 Survey(n = 56)*	p-value
Right to Integrity	43% ± 8%	59% ± 13%	.041 <sup>aa</sup>
Right to Attribution	34% ± 7%	9% ± 7%	.000 <sup>aaa</sup>
Neither Right	23% ± 7%	32% ± 12%	.178

\* n excludes surveys which did not respond to the particular question being analyzed and surveys which responded “don’t know.”

<sup>aa</sup> indicates  $0.01 < p\text{-value} \leq 0.05$ ; shows evidence that there has been a significant change.

<sup>aaa</sup> indicates  $p\text{-value} \leq 0.01$ ; shows strong evidence that there has been a significant change.

#### Footnotes

<sup>a1</sup> © 2004 RayMing Chang. Mr. Chang is a third-year law student at The George Washington University Law School. Mr. Chang is the Executive Production Editor of the American Intellectual Property Law Association Quarterly Journal and a law clerk with the Library of Congress’ Office of the General Counsel. This article reflects the author’s then present views, which should not be attributed to either the Library of Congress or the AIPLA Quarterly Journal. Mr. Chang thanks Peter M. Vankevich for inspiring this article. Mr. Chang also thanks John Y. Lee and for his invaluable assistance in administering the 2003 Survey and developing the database for the 2003 Survey. He is grateful for Mr. Lee’s graciousness in hosting the 2003 survey at <http://www.demodulate.net/users/varasurvey/>.

<sup>1</sup> See, e.g., Roger E. Schechter & John R. Thomas, Intellectual Property: The Law of Copyrights, Patents and Trademarks, § 7.6.1 (2003); 74 Am. Jur. Proof of Facts 3d Proof of Infringement of the Visual Artists Rights Act of 1990 § 1 (2003).

<sup>2</sup> See, e.g., 74 Am. Jur. Proof of Facts 3d Proof of Infringement of the Visual Artists Rights Act of 1990 § 2 (2003).

<sup>3</sup> See id. at § 16; 17 U.S.C. § 106A (2003).

<sup>4</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended

1979), 25 U.S.T. 1341, 828 U.N.T.S. 221, Document IV-B. Recently, the existence of moral rights in other areas of American intellectual property law has come into doubt because of Justice Scalia's opinion in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (holding that Congress would have used specific language such as that used in VARA if Congress had wanted the Lanham Act to contain an attribution right for uncopyrighted material). See Janet Fries and Michael J. Remington, *Beware of Mutant Copyright: Justice Scalia issues a warning in the Dastar decision*, *IP Law & Bus.*, Sept. 2003, at 70.

5 Visual Artists' Rights Act of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506). Some commentators suggest that VARA was enacted in order to bring the U.S. closer to complying with the Berne Convention. Other commentators suggest that the enactment of VARA was merely part of a Senate compromise where a package of several bills including VARA was allowed to pass in exchange for a federal judgeship bill to pass. See Roberta Kwall, *How Fine Art Fares Post VARA*, 1 *Marq. Intell. Prop. L. Rev.* 1, 5 (1997).

6 According to the United States Copyright Office Public Information Office as of November 29, 2004. For a discussion of the Visual Arts Registry see *infra* Part II B and Part VI A.

7 United States Copyright Office, Circular 1 at 9 (Dec. 2004).

8 *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (*Martin II*), *aff'g* 982 F. Supp. 625 (S.D. Ind. 1997) (*Martin I*).

9 See discussion *infra* Part II C.

10 Pub. L. No. 101-650, Title VI, § 608(a). Congress also ordered the Copyright Office to submit an interim report on the progress of the study due two years after VARA's enactment. *Id.* See U.S. Copyright Office, *Interim Report of the Register of Copyrights: Waiver of Moral Rights in Visual Art Works* (Dec. 1, 1992) [*hereinafter* Interim Report].

11 U.S. Copyright Office, *Final Report of the Register of Copyrights: Waiver of Moral Rights in Visual Art Works*, 123-126 (Mar. 1, 1996) [*hereinafter* Copyright Report].

12 *Id.* at 124.

13 *Id.* at 186.

14 *Id.* at 194.

15 *Id.* at 8. See also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2nd Cir. 1995) (*Carter II*), *aff'g* in part, *rev'g* in part and vacating on other grounds 861 F. Supp. 303 (S.D.N.Y. 1994) (*Carter I*).

16 *Carter II*, 71 F.3d at 81.

17 *Id.*

18 *Id.* Some commentators identify other varieties of moral rights such as the right of exposure, which allows an artist to determine how his work is distributed. See 30 *Am. Jur. Proof of Facts* 3d *Proof of Infringement of the Visual Artists Rights Act of 1990* §2 (2003).

19 *Carter II*, 71 F.3d at 81.

20 Id.

21 Berne Convention Article 6bis provides:

(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, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(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.

Berne Convention, *supra* note 4, at 6bis.

22 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law--(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the work, that would prejudice the author's honor or reputation.

*Id.* at § 3b. See also Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J.L. & Arts 547 (1986); Statement of Ralph Oman, Register of Copyrights on S. 1198 (S. Hrg. 101-694, 146).

23 Visual Artists Rights Act of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506, 608-610).

24 See Griffin Farrell, Frankly, We Do Give a ... Darn! Hollywood's Battle Against Unauthorized Editing of Motion Pictures: The "CleanFlicks" Case, 2003 Utah L. Rev. 1041, 1049 (2003).

25 Visual Artists Rights Act, §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506, 608-610.

26 17 U.S.C. § 106A (2003). VARA does not define "recognized stature." The Carter I court offered the following test: "a plaintiff must make a two-tiered showing: (1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." Carter I, 861 F. Supp. at 325.

27 17 U.S.C. § 101 (2002) specifically provides:

A 'work of visual art' is--(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

28 *Id.*

A work of visual art does not include--(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.

*Id.*

29 Id.

30 Id. The Martin I court used the test from § 228 of the Restatement (Second) of Agency to determine whether the work was made within the scope of employment:

“Conduct of servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master ....”

Martin I, 982 F. Supp at 633 (quoting Restatement (Second) of Agency § 228(1) (1958)).

31 H.R. Rep. No. 101-514, at 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6921.

The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.

32 See *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 534 (S.D.N.Y. 2001).

33 17 U.S.C. § 106A(d) (2003).

34 Id.

35 Id.

36 Id. § 113(d).

37 Id. § 113(d)(1). No waiver is necessary if the work was installed before June 1, 1991 with the author’s consent.

38 Id. § 113(d)(2).

39 17 U.S.C. § 106A(c)(1).

40 Id. § 106A(c)(2).

41 Id. § 106A(c)(3).

42 Id. § 113(d)(3). (Procedures are set forth in 37 C.F.R. § 201.25 (2002)).

43 See *Martin II*, 192 F.3d at 611.

44 17 U.S.C. § 411 (1998).

45 The Copyright Office explicitly states that recordation “shall establish only the fact of recordation in the official record.” 37 C.F.R. §201.25(f) (2002).

46 As of November 29, 2004. The first registration was filed on September 28, 1992 by an artist for three works installed in an office building in West Paterson, New Jersey. The second registration was filed by an artist on June 11, 2002 for a mural installed on an apartment building in Philadelphia, Pennsylvania.

47 17 U.S.C. § 501(a) (2002).

48 See *Pollara v. Seymour*, 344 F.3d 265, 268 (2d Cir. 2003).

49 Copyright Report, *supra* note 11, at 11-17. These states were California, Connecticut, Massachusetts, Pennsylvania, Louisiana, Maine, New Jersey, New York, Rhode Island, and New Mexico. *Id.* Some commentators assert that there were up to fourteen states that provided for some integrity protection. See 30 Am. Jur. Proof of Facts 3d 427 § 7 (2003). The 2003 Survey included only the ten states enumerated by the Copyright Report in the “states with pre-VARA moral rights statutes” category.

50 17 U.S.C. § 301(f) (1998). The Committee of the Judiciary suggested two criteria for preemption:  
“First, the rights sought to be vindicated under State law must be fixed in a tangible medium of expression and fall within the subject matter of copyright as specified in section 102 or 103 of title 17. Second, the rights must be equivalent to legal or equitable rights granted under section 106 of that title.”  
H.R. Rep. No. 101-514 at 6931 (1990).

51 See 17 U.S.C. § 301(f) (2003).

52 17 U.S.C. § 106A(e)(1) (2003).

53 *Id.*

54 Copyright Report, *supra* note 11, at 3 (citing H.R. Rep. No. 101-514 at 18 (1990)).

55 H.R. Rep. No. 101-514 at 18 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6928.

56 Compare *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003), *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (*Martin II*), *aff’g Martin v. City of Indianapolis*, 982 F. Supp. 625 (S.D. Ind. 1997) (*Martin I*), *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004), *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89 (D. Mass 2003), *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001), *Peker v. Masters Collection*, 96 F. Supp. 2d 216 (E.D.N.Y. 2000), *Pavia v. 1120 Ave. of the Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. Sep. 25, 1995), *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994) (*Carter I*) *aff’d in part, rev’d in part and vacated on other grounds* 71 F.3d 77, 81 (2d Cir. 1995) (*Carter II*), with *Berrios Noguerras v. Home Depot*, 330 F. Supp. 2d 48 (D.P.R. 2004).

57 *Carter I*, 861 F. Supp. at 303.

58 *Id.* at 312.

59 *Id.* at 329.

60 *Carter II*, 71 F.3d at 88.



61 Id. at 86-87. See supra text accompanying note 30.

62 Martin II, 192 F.3d at 608.

63 Id. at 610-11.

64 Id.

65 Id.

66 Id. at 611.

67 Id.

68 Martin I, 982 F. Supp. 625, 637 (S.D. Ind. 1997).

69 Id.

70 Martin II, 192 F.3d at 612-14.

71 Martin v. City of Indianapolis, 4 F. Supp. 2d 808, 812 (S.D. Ind. 1998) (damages opinion) (Martin III).

72 Hugh Eakin, Lost Symphony, ARTnews, Jan. 1, 1999, at 45.

73 Martin II, 192 F.3d at 614.

74 901 F. Supp. 620, 629 (S.D.N.Y. 1995).

75 96 F. Supp. 2d 216, 221-222 (E.D.N.Y. 2000) (defendant bought posters, which were authorized reproductions of several of the plaintiffs' oil paintings, and added paint to the posters to replicate the painting).

76 139 F. Supp. 2d 526 (S.D.N.Y. 2001). There is no record of further proceedings.

77 344 F.3d 265, 266-267 (2d Cir. 2003) (banner found to be an advertisement because it was commissioned by the legal services group; the content was determined by the group, the banner promoted a lobbying message, and the banner was to be installed next to the group's information table).

78 288 F. Supp. 2d 89 (D. Mass. 2003).

79 Id. at 99-100. The Phillips court also addressed two VARA related fact-based issues. The court, using its "common sense and generally accepted standards of the artistic community," found that sculptures that were arranged in a northwest to southeast axis of a park constituted a single "work of visual art" and that several sculptures outside the axis were not part of that work. Id. at

97-98. The court also found that the park that the sculptures were located in could not be considered a “work of visual art” because the artist was only responsible for the sculptures within the park. *Id.* at 99. The court granted a preliminary injunction after also considering claims under the Massachusetts Art Preservation Act, which provides broader protection than VARA. *Id.* at 102-05.

80 309 F. Supp. 2d 395 (E.D.N.Y. 2004). See also Leigh Jones, *Artistic Stature: Sculptor Loses Bid to Protect Work Under Federal Law*, 65 N.Y.L.J. 16 (2004) (Scott has decided not to pursue an appeal).

81 *Scott*, 309 F. Supp. 2d at 400-401 (relying in part on the test from *Carter I* and in part on *Martin I*).

82 *Berrios Nogueras v. Home Depot*, 330 F. Supp. 2d 48 (D.P.R. 2004).

83 *Id.* at 51.

84 17 U.S.C. § 101 (2002).

85 Westlaw search for “Visual Artists Rights Act” in the ALLNEWS database, as of Dec. 1, 2004. The search excluded news accounts of cases that eventually were published in a reporter.

86 Laurie Becklund, *GSA, Artist Hope Talks Will Settle Dispute Over Sculptures’ Removal*, *L.A. Times*, Dec. 7, 1991, at 1.

87 *Sculptor Says College’s Move ‘Killed the Piece,’* *The Seattle Times*, Oct. 11, 1992, at D4.

88 *Troll Toll: Creators Claim a Copyright on Sculpture*, *The News Tribune* (Tacoma, WA), Aug. 18, 1996, at B5; *Public Sculpture’s Creators at Odds with Arts Community in Asserting Ownership Claims*, *West’s Legal News*, Aug. 20, 1996, 8640 (1996 WL 468249).

89 *Patt Morrison, California Dateline: Brushwork: First It Was Art, Then It Was--Gone*, *L.A. Times*, Feb. 13, 1998, at A3.

90 *Ericka Mellon, Sistine Chapel Replica Escapes Paintbrush at Northwestern U.*, *Daily Northwestern*, Jan. 6, 1999. See also *Susan Dodge, Student Wins Fight to Keep Art: NU: Painting Can Stay Until School Year’s End*, *Chicago Sun-Times*, Dec. 15, 1998, at 17.

91 *Mellon*, *supra* note 90.

92 *Mellon*, *supra* note 90.

93 *Bob Howard, Fountain’s Destruction Costs Former Owner; Sculptor Settles Suit Over the Dismantling of Artwork at What is Now MGM Plaza in Santa Monica*, *L.A. Times*, Aug. 15, 2000, at C8.

94 *Tanya Weinberg, Artists, Center Settle Rift Over Trashed Sculptures Left Unresolved Was a 1990 Statute that Awards Artists ‘Moral Rights’ to Their Work*, *South Florida Sun-Sentinel*, Nov. 15, 2000, at 3B.

95 *Brenda Sandburg, Artist Wants His Creations Preserved at Juvenile Hall*, *The Recorder* (San Francisco) Dec. 3, 2001, at 5. The author speculates that the amount of the settlement might exceed the value of the VARA claims because California state law protection of visual artwork was also asserted.

96 Geoff Fox, Artist Will Discuss Rights on Radio, Tampa Trib., May 21, 2004, at 1.

97 Cecil Angel, Artist's Whales Saved, Thanks to Angry Public, Detroit Free Press, Nov. 16, 2004, available at [http://www.freep.com/news/locway/whale16e\\_20041116.htm](http://www.freep.com/news/locway/whale16e_20041116.htm) (last visited Mar. 4, 2005).

98 Hal Dardick, Park District Sued Over Wildflower Art; '84 Grant Park Garden Cut in Size, Chi. Trib., Dec. 1, 2004, at 3.

99 C. Ron Allen, Settlement Reached on Public Statue's Authorship, Sun-Sentinel (Ft. Lauderdale), Sept. 7, 1997, at 3B.

100 Id.

101 Id.

102 See *infra* Appendix, Part A for more details regarding the format of the 2003 Survey.

103 See *infra* Appendix, Part A.

104 See *infra* Appendix, Part A.

105 See *infra* Appendix, Part B.

106 See *infra* Appendix, Part B.

107 This analysis considers p-values of more than 0.1 to have no significance. This analysis also gives little weight to p-values that are derived from small sample sizes (e.g. comparing the 2003 sample of VARA artists represented by an agent or artists' representative who have turned down an offer because of a waiver clause, consisting of five people, with the 1995 sample of 144 people). For details see *infra* Appendix, Part B.

108 See *infra* Appendix, Part B.

109 See *infra* Appendix, Part C.1.

110 See *infra* Appendix, Part C.1.

111 See data tabulated *infra* Appendix, Part C.2.

112 The 2003 Survey did not ask the direct question of whether respondents knew of VARA and the specific provisions of VARA because the 2003 Survey was designed to mirror the format of the 1995 survey as closely as possible. Future surveys regarding VARA may wish to include a more direct question about VARA awareness.

113 See Copyright Report, *supra* note 11, at 186.

114 See data tabulated *infra* Appendix, Part C.3.

115 The 2003 survey did not receive any complete samples of waiver provisions from survey respondents. A comment included an incomplete waiver provision: “6.5. VARA WAIVER. Recognizing the need for City to retain long term control of its public spaces, Artist expressly waives rights provided under the Visual Arts Rights Act. Notwithstanding this provision, City will not inte [sic].” Due to the incomplete nature of the submitted text, it is not analyzed by this article. The data analyzed in this paragraph and the following paragraph is tabulated in the Appendix, Part C.5, *infra*.

116 See data tabulated *infra* Appendix, Part C.4.

117 See, e.g., Tim Vincent, *On the Arts: Everybody Profits as Corporations Spend Millions to Collect Art*, Pittsburgh Post-Gazette, Dec. 29, 2002, at F5.

118 *Martin I*, 982 F. Supp. 625 (S.D. Ind. 1997). See *supra* notes 71-101 and accompanying text.

119 *Supra* notes 25-32 and accompanying text.

120 17 U.S.C. § 101 (2003).

121 17 U.S.C. § 106A(c)(1)-(3) (2003). See also *supra* notes 39-41 and accompanying text.

122 See *Berrios Nogueras v. Home Depot*, 330 F. Supp. 2d 48 (D.P.R. 2004) (applying the exception for reproduction, depiction, or portrayal in 17 U.S.C. § 106A(c)(3)).

123 *Supra* notes 36-38, 52-54 and accompanying text.

124 17 U.S.C. §101.

125 Visual Arts Registry, 37 C.F.R. § 201.25 (2005).

126 See *Martin I*, 982 F. Supp. 625 (S.D. Ind. 1997) (artist awarded \$20,000 in damages and \$131,000 in attorney fees); Howard, *supra* note 93, at C8 (artists settle for \$220,000).

127 Though there is a dearth of case law regarding VARA, VARA has produced much commentary. Practitioners can turn to guides such as the Am. Jur. Proof of Facts 3d 1, which is meant for VARA plaintiffs and contains detailed guidelines, model discovery, and draft questions and answers.

128 *Supra* notes 26-32 and accompanying text.

129 *Supra* notes 56 and 86-101.

130 17 U.S.C. § 101 (2003).

- 131 See id. § 106A.
- 132 Id. § 101.
- 133 See id. § 106A(a)(3)(B).
- 134 Martin I, 982 F. Supp 625, 631 (S.D. Ind. 1997) (evidence included awards, letters, affidavits and newspaper articles).
- 135 17 U.S.C. § 106A(e) (2003).
- 136 See Visual Arts Registry, 37 C.F.R. § 201.25 (providing procedure of recordation).
- 137 See Martin I, 982 F. Supp. at 637 (ninety-day notice requirement in contract could render waiver inapplicable).
- 138 See William M. Landes, What Has the Visual Arts Rights Act of 1990 Accomplished, U. Chicago Law & Economics 9 (2001), available at <http://ssrn.com/abstract=270985> (last visited May 3, 2005).
- 139 Copyright Report, supra note 11, at 186.
- 140 Copyright Report, supra note 11, at 189.
- 141 Copyright Report, supra note 11, at 191.
- 142 Copyright Report, supra note 11, at 192.
- 143 Copyright Report, supra note 11, at 194.
- 144 See Copyright Report, supra note 11, at 126-30, Appendix 10-14. The Copyright Office's survey was in turn based loosely on a Volunteer Lawyers for the Arts of Massachusetts ("VLA") survey conducted in 1992 and a model survey drafted by a former Copyright Office intern. Id. at 124 n.513. The VLA survey garnered 22 respondents and the results are available in the Interim Report. Interim Report, supra note 10, at App. 2, letter #6. The results from the VLA survey are not analyzed in this note because of the small sample size and the variation in survey language.
- 145 See Copyright Report, supra note 11, at 125-26.
- 146 Volunteer Lawyers for the Arts National Directory at [http://www.vlany.org/res\\_dir.html](http://www.vlany.org/res_dir.html) (last visited March 4, 2004).
- 147 See, e.g., [http://www.barenforum.org/archives/vol25/v25\\_2467.html](http://www.barenforum.org/archives/vol25/v25_2467.html).
- 148 Copyright Report, supra note 11, at 129-30.
- 149 See Thomas H. Wonnacott & Ronald J. Wonnacott, Introductory Statistics 273 (5th ed. 1990); Deborah Rumsey, Statistics for

Dummies 180-81 (2003).

150 See Wonnacott, supra note 149, at 314; Rumsey, supra note 149, at 245-47.

151 See Wonnacott, supra note 149, at 273; Rumsey, supra note 149, at 180-182. American Psychological Association, Publication Manual of the American Psychological Association 111-40 (1994).

152 See Wonnacott, supra note 149, at 254; Rumsey, supra note 149, at 180.

153 See Wonnacott, supra note 149, at 646-47; Rumsey, supra note 149, at 223-26, 245-47.

154 The variable  $p$  was calculated by using a rounded proportion derived from the statistics in the 1995 Survey because the exact proportion was unavailable.

155 See Wonnacott, supra note 149, at 314-17.

156 This interpretation of  $p$ -value is based off an alpha ( $\alpha$ ) level of 0.05 for rejecting the null hypothesis. See Wonnacott, supra note 149, at 291; Rumsey, supra note 149, at 225.

157 A type II error occurs when the null hypothesis is accepted when it is actually false. See Wonnacott, supra note 149, at 302-03; Rumsey, supra note 149, at 227-28.

158 Copyright Report, supra note 11, at 130-31.

159 See *id.* at 130-38.

160 American Psychological Association, supra note 151, at 120-140 (1994).

166 Four submissions were not tallied because they were duplicates (identified by comparing the email addresses of submissions that included email addresses) and the most complete submission was included in the computation of results.

167 It is possible that the survey elicited responses from more than 36 states and the District of Columbia because only VARA artists were asked about residency. Seven VARA respondents declined to divulge their residency and non-VARA-artist respondents were not questioned about residency.

168 Respondents who did not identify themselves as VARA artists included art lawyers, art professors, and property administrators.

169 Copyright Report, supra note 11, at 131.

170 Copyright Report, supra note 11, at 131.