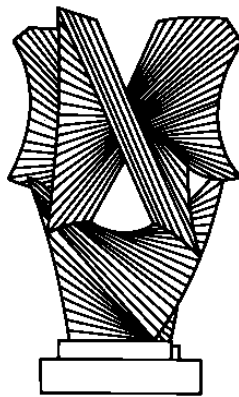


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WHAT HAS THE VISUAL ARTS RIGHTS ACT OF 1990 ACCOMPLISHED?

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WHAT HAS THE VISUAL ARTS RIGHTS ACT OF 1990 ACCOMPLISHED?

WILLIAM M. LANDES*

Abstract

This paper presents an economic analysis of the Visual Arts Rights Act of 1990 (VARA) which provides attribution and integrity rights, commonly called moral rights, for defined types of artistic works. The paper shows that these laws may actually harm artists by adding contracting and transaction costs in the art market. For most works, these costs will be trivial because collectors have a strong self-interest in preserving the works in good condition. These costs are likely to be significant, however, for works subject to destruction or alteration in the future, such as site-specific works and works installed in buildings, because purchasers will require waivers rather than risk violating the Act. The paper also examines the few cases that have been litigated under VARA. Consistent with the economic model, these cases involve large-scale works by relatively unknown artist that have been destroyed by building projects. Finally, the paper presents an empirical analysis of state moral rights laws. Nine states enacted these laws prior to VARA. These laws had no significant effect on artist earnings but a positive and significant effect on the number of artists living and working in the state.

I. Introduction

In 1990 Congress enacted the Visual Arts Rights Act (VARA), which amended the U.S. Copyright statute to provide attribution and integrity rights, commonly called moral rights, for authors of works of visual art. Attribution rights give the artist the right to claim authorship of a work he created and to disclaim authorship if his work is altered in a manner “prejudicial to his honor or reputation.”¹ Integrity rights prohibit the intentional distortion, mutilation or other alteration of the artist’s work that injures his honor or reputation, and makes actionable the intentional or grossly negligent destruction of a work of recognized stature.

In contrast to the United States, most countries in Western Europe have a long tradition of recognizing moral rights. France recognized moral rights as early as the 19th century. And since 1928, moral rights have been codified in provisions of the major international copyright treaty (known as the Berne Convention), which today has more than 100 signatory countries.² Within the United States, nine states starting with California in 1979 enacted moral rights laws prior to the passage of VARA.³

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¹ The attribution right also includes the right to disclaim authorship of a work incorrectly attributed to the artist.

² The United States became a member of the Berne Convention in 1989 prior to the passage of VARA the following year. It was believed that artists in the U.S. could enforce rights akin to moral rights through the copyright act and laws prohibiting unfair competition. I discuss later in the paper the how these laws indirectly provide for rights similar to moral rights.

³ The states are California (1979), Connecticut (1988), Louisiana (1986), Maine (1985), Massachusetts (1984), Pennsylvania (1986), New Jersey (1986), New York (1984) and Rhode Island (1987). All nine states protect both attribution and integrity rights. The major difference among the states is that

In this paper, I examine the law and economics of VARA and present some empirical findings on moral rights laws. The paper is organized as follows. Part II sets out the various provisions and limitations of VARA. Part III reviews the economic analysis of the effects of VARA on the art market. Part IV looks at the few cases that have been decided under VARA and shows that, consistent with the predictions of economics, these cases involve large scale sculptural works that are likely to be destroyed or substantially altered as a result of building renovation or real estate development. Part V contains an empirical analysis of state moral rights laws. Here I try to explain why some states passed these laws and others did not, and the effects of state laws on the art market. The empirical analysis of state laws bears on the question why a federal statute was enacted. Finally, Part VI presents some concluding remarks.

II. The Act Itself

VARA only protects a work of “visual art” which the Copyright Act defines narrowly as a unique work or a print, sculpture or photograph that is produced in a limited edition of no more than 200 copies that are signed and consecutively numbered.⁴ Thus, VARA (as opposed to the usual set of rights under copyright) provides no protection for posters, illustrations or photographs in magazines, applied art, books, movies and so on. VARA gives the artist the right to enjoin a prospective violation or collect damages (as specified in Section 504 of the Copyright Act) for a violation that has already occurred. Though VARA is part of the Copyright Act, rights under VARA endure for the life of the artist compared to life plus 70 years for copyright. Therefore, an artist’s heirs cannot collect damages from a party who mutilates the late artist’s work even though that act would have violated VARA had the artist been alive.

VARA contains a number of other limiting provisions. These include the following.

1. An artist cannot transfer or assign his rights under VARA but may waive them in a signed document identifying the specific work and uses to which the waiver applies.⁵ Rights under VARA are separate from the rights ordinarily conferred

Louisiana, Maine, New Jersey, New York and Rhode Island exclude from the integrity right the destructions of a work of art. I add that the Sec. 301 of the Copyright Act preempts state or common law equivalent rights for works covered by the Copyright Act. For example, VARA would preempt a provision in a state statute preventing the intentional mutilation of work during the artist’s lifetime but not a provision that protected the artist against injuries from the display or reproduction of altered works. Also VARA would not preempt a violation of an “equivalent” right if it occurred in the state prior to the effective date of VARA or if it occurred after the artist’s death. In the later empirical analysis, I exclude New Mexico from the group of states with artist rights laws since New Mexico’s statute (enacted in 1995) provides integrity rights only for art incorporated into public buildings. See Kwall (1997) for a full analysis of preemption issues as well as a very helpful and comprehensive discussion of the various VARA provisions

⁴ See Sec. 101 of the Copyright Act.

⁵ See Sec. 106A(e).

by copyright. Thus, even an artist who transfers his copyright to a third party still retains his attribution and integrity rights absent a written waiver of those rights.

2. The alteration, mutilation or destruction of a work that results from negligence, the passage of time, the nature of the materials or failed conservation efforts does not violate VARA. An owner of an artwork, therefore, has no affirmative duty to expend resources preserving a work in good condition. Moreover, VARA does not hold a party liable for inadvertently or negligently damaging an artist's work. In *Lubner*, a case brought under California's artist right act, two artists lost much of their life work after a City garbage truck parked at the top of hill rolled down and crushed their studio. The artists recovered for tort damages but not for a violation of the California act which, like VARA, excludes liability for negligently caused damages.⁶ The court added in *Lubner* that even if the California act had allowed recovery for negligence, VARA would have preempted such recovery.

3. VARA excludes injuries to the artist's reputation and honor that might arise from the presentation, display or reproduction of his work. An artist cannot complain, for example, that a dimly lit exhibition of his work or an inferior quality reproduction of his work in a pamphlet or website violates his integrity or attribution right.⁷

4. VARA does not protect a "work-for-hire" which the Copyright Act defines, in part, as "a work prepared by an employee within the scope of his or her employment."⁸ Under the "work-for-hire" doctrine, the employer not the party who may have actually executed the work is deemed the author and owner of the copyright. However, what constitutes a work-for-hire under the "scope of employment" definition is not always clear but may depend on balancing a number of considerations.⁹ A work created pursuant to a formal employment relationship (such as when Disney hires an animation artist who is paid a regularly wage, receives fringe benefits, and can be assigned to work on different projects) is unambiguously a work-for-hire. But a commissioned work executed by an independent artist may also be a work-for-hire if the commissioning party pays a monthly stipend, health and other fringe benefits during the time the artist works on the project, covers the cost of materials, and exercises overall but not day-to-day supervision.

⁶ See *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525 (1996). The court also stated that it appeared that VARA preempted the California statute dealing with the destruction of a work of recognized statute.

⁷ See *Pavia v. 1129 Ave. of Americas Assocs.*, 901 F. supp. 620 (S.D.N.Y. 1994). Note that several states make actionable the display or reproduction of altered work that is likely to damage the artist's reputation (see Kwall at 29-36). For example, in *Wojnarowicz v. Amer. Family Assoc.*, 745 F. Supp. 130 (S.D.N.Y. 1990), the court held that AFA had violated the plaintiff's rights under the New York Statute for reproducing and distributing altered reproductions of the plaintiff's sexually explicit art in brochures attacking federal funding of the arts.

⁸ See part (1) of the definition of work-for-hire in Section 101 of the Copyright Act. Part (2) of the definition includes specific types of commissioned works for use in collective works such as motion pictures and other audiovisual works provided the parties expressly agree in a signed writing that the work shall be considered a work for hire. It is highly unlikely that a work of visual art would fall into the secondary part of the work-for-hire definition.

⁹ See *Community for Creative Non-Violence v. Reid*, 490 U.S.730 (1989).

It is worth considering for a moment the rationale for the work-for-hire rule in copyright. From an economic standpoint, the rule lowers transaction and contracting costs by assigning the copyright to the party in the best position to exploit it. In the Disney example, transaction costs would be very high if each artist employed by Disney owned the copyright to his work. Then, each artist/employee would be in a position to hold up and delay projects (e.g., publication of a comic book) that require Disney to coordinate the efforts of many employees. Knowing this in advance, Disney would acquire the separate copyrights before embarking on a project. By assigning the copyrights to Disney at the outset, the work-for-hire doctrine saves contracting and potential hold-up costs.¹⁰ Even though Disney holds the copyright under a work-for-hire arrangement, it is conceivable that (contrary to the law) the artist could retain rights under VARA. But since Disney's use of the work might alter, mutilate or even destroy it, Disney would insist that the artist waive these rights in order to avoid liability under VARA. Procuring a waiver involves costs that can be saved by excluding a work-for-hire from VARA.

To take another example, consider a developer who commissions a large sculptural work as part of a commercial project. After the work is completed, suppose the developer decorates it with Christmas or Easter decorations that the artist disapproves of. If VARA covered a work-for-hire, the artist would have a strong claim that his integrity right had been violated. Anticipating this problem, the developer would demand a waiver at the time the work was commissioned. If the artist refused, the developer would probably choose another artist or forego including the sculpture in the building itself. Transaction costs would be lower at the outset if VARA did not cover a work-for-hire for then the building owner would avoid the transaction costs of obtaining a written waiver or potential litigation costs if he did not.¹¹

5. Another important limitation of VARA has to do with works installed in buildings that are likely to be mutilated or destroyed if they are later removed. Sec. 113(d) of the Copyright Act specifies that there is no integrity right (1) for a work installed after the effective date of the Act (July 1, 1991) provided the artist consented in writing to both its installation and the possibility that removal might mutilate or destroy the work; or (2) for a work installed prior to the Act provided the artist consented to its installation. On the other hand, if an installed work can be removed without mutilating or destroying it, the artist retains his integrity right unless the building owner notifies the artist that he intends to remove the work and gives the artist a reasonable opportunity to remove the work at his own expense.

¹⁰ In the case of commissioned works involving many contributors (e.g., a movie) each of whom conceivably could be called authors, the "work for hire" doctrine also reduces transaction cost by vesting the rights in the party who commissioned and is probably best able to exploit the work.

¹¹ This doesn't fully respond to the question why VARA excludes a work-for-hire because VARA rights could be given to the "employer" rather than the party executing the work. Since moral rights are often justified in terms of the personal connection the artist has for his work, this factor would be missing or certainly weaker in the case of the employer/author under the work-for-hire doctrine.

To see how Sec. 113(d) works, consider a building owner who hires an artist to create a site-specific sculptural work for the building's entrance way. For whatever reason, assume that the contract between the parties was silent on the question of what would happen in the event the sculpture was later removed. Assume, however, that removal would effectively mutilate or destroy the sculpture since it was designed specifically for the site. Now suppose a new owner acquires the old building and intends to replace it with a modern office building. Having never consented to the possible destruction of his work, the sculptor would be in a position to demand a substantial payment from the new owner for allowing the new project to go forward. To be sure, the building owner might argue that the sculpture was a work-for-hire and that VARA did not apply. But as I have already explained, commissioning a work does not necessarily turn it into a work-for-hire.¹² That might require the original building owner to have supervised the construction of the sculpture and paid the artist a regular salary plus health and fringe benefits. Since work-for-hire status is somewhat uncertain, one would predict that well-informed building owners would demand written waivers at the time works were commissioned. If this proved difficult to obtain, building owners may choose to forego installing new artwork in buildings for fear of facing future legal problems.

6. Finally, it is worth noting that VARA only protects the artist's integrity right against alterations that injure his "honor or reputation"¹³ and the destruction of his work if it is of "recognized stature." The terms "honor" and "reputation" have been borrowed without discussion from moral rights laws in European countries. "Recognized stature" aims at protecting society's interest in preserving important works of art. Although the Copyright Act does not define these terms, they have relatively well-settled meanings. An artist's reputation relates primarily to what other persons think of the artist's work. A reputational injury is analogous to a defamation injury. Ultimately, it should affect the artist's prices and his earnings. On the other hand, honor is tied up with the notion of self-esteem and "feeling good" about oneself. An injury to an artist's honor may have no impact on his reputation or earnings. One could imagine a case, for example, where a party intentionally mutilates the work of an unknown artist which damages the artist's self esteem. But since the artist has no reputation to begin with, there can be no reputational injury. Yet the injury to his honor would be actionable under VARA. What qualifies as a "work of recognized stature" has been litigated in two separate lawsuits.¹⁴ Both courts interpreted "recognized stature" as only requiring a minimum recognition of the work, such as some mention of it in a local newspaper or expert testimony on its significance.

¹² See the discussion of the *Carter v. Helmsley-Spear* case in Part IV of the paper.

¹³ I add that the attribution right is also protected against distortions, mutilations or other modifications that would be prejudicial to the artist's honor or reputation.

¹⁴ See the lower court ruling in *Carter v. Helmsley-Spear, Inc* 861 F. Supp. 303 (S.D.N.Y. 1994) and *Martin v. City of Indianapolis* 192 F. 3d 608 (7th Cir. 1999)

III. The Law and Economics of Moral Rights

Proponents of moral rights laws argue that these laws result in a climate of artistic worth that encourages artistic creation—i.e., implying that without such laws, the supply of new and innovative art would be lower. I know of no empirical study that supports this proposition. Moreover, artistic innovation in the past 50 years appears to have been more rapid in the United States than in Europe, despite Europe having moral rights laws during this period.¹⁵ In contrast, economists have been skeptical about the benefits of moral rights laws, particularly laws protecting integrity rights.¹⁶ Indeed, economics suggests that integrity rights may do more harm than good, and on balance will discourage artistic creation.

A. Attribution Rights

Attribution rights are closely related to laws designed to prevent fraud and deception in the market. Therefore, much of what attribution rights cover is already protected by existing laws. For example, laws against deceptive advertising and fraud would make it unlawful for someone to paint a picture in the style of Jasper Johns, sign it “Jasper Johns” and attempt to pass it off in the market as Johns’ work. Similarly, removing Johns’ signature from an original Johns painting and selling it under one’s own name would also violate trademark and unfair competition laws.¹⁷ Of course, the latter act is highly improbable because the value of the “new” painting would plunge relative to its value when Johns was considered the artist who painted the picture. Such behavior is self-detering and unlikely to occur in practice. In short, the attribution right under VARA adds nothing to the rights an artist already has under tort and unfair competition law. Unlike VARA, however, tort and unfair competition laws offer one advantage—they are not limited in duration to the life of the artist.

However, VARA could be used to prevent a type of “fraud” that would escape the reach of unfair competition laws. These laws deal with the behavior of firms in market settings. They would not prohibit (as VARA might) a person from painting a picture in the style of Jasper Johns for the purpose of displaying it in his home and signing it “Jasper Johns.” To be sure, the person is probably perpetrating a fraud in the inter-personal relationship market. He is trying to gain prestige and status by fooling relatives, friends and others into believing he is wealthier and more cultured than he actually is. But it is not clear that Johns or society has much interest in devoting resources to deterring this activity.¹⁸

¹⁵ See Galenson (2000) for data indicating the rapid increase in innovation in American art starting in the late 1940s.

¹⁶ See: Hannsmann (1997).

¹⁷ See Sec. 43(a) of the Lanham Act (the federal trademark and unfair competition statute).

¹⁸ The person painting a picture in the style of Johns might violate copyright law if sufficient expression were also borrowed. It is not clear how VARA or existing laws against fraud and deception would treat the case of a dealer or auction house selling an original painting under the artist’s name even though the work had been significantly damaged and later restored. Consider the well known English case involving a painting by Igon Schiele that was sold at Christie’s for over \$1 million (See *Debakjany v. Christie’s, Queen’s Bench Division* (1995).) Many years before the sale, paint from

A final point is that I am not aware of any cases brought under VARA that turn on the question whether the attribution right has been violated. To be sure, there have been cases involving attempts to sell forgeries as original works. But the defendants in these cases have faced criminal and civil charges for fraud not for violations of VARA. As we shall see, all the decided cases under VARA involve the integrity right.

B. Integrity Rights

Does the artist's right to prevent the alteration or destruction of his work fill an important gap not covered by other laws? Not only is the answer "no" but economic analysis suggests that mandating integrity rights is inefficient and may even harm artists.

1. Contract law

In the absence of a moral rights law, contract law enables the artist to protect a wide range of integrity rights. For example, an artist concerned with the possible future alteration of his work can add a term to the original sales contract giving him the right to approve or veto future modifications of the work. Two difficulties arise with this solution. One is that contracts in the art world are often informal and not written.¹⁹ To protect the integrity right in such cases would require that the parties incur the costs of a substituting a written for an oral contract. The other is the difficulty in enforcing this provision against subsequent purchasers of the work.²⁰

Schiele's work had flaked off requiring repainting of about 94 percent of the painting. We may assume that the restorer followed the underlying sketch and attempted to duplicate the original colors, including Schiele's initials. Christie's sells works "as is" but potential buyers can inspect the work prior to the purchase. At the same time, Christie's warrants the work against a negligent misattribution—i.e., if Christie's negligently represents the work as a Schiele painting and it turns out not to be by Schiele, Christie's will refund the purchase price. When the buyer learned about the extensive restoration she asked for a refund on the ground that Christie's represented the work as a Schiele when it was not. Christie's argued that its attribution was correct and that the over painting was merely a question of the condition of the work, which Christie's did not warrant. The court found that the work was not an Igon Schiele (as evidenced by the fact that it was now estimated to be worth about \$60,000 compared to the \$1million sale price) and that Christie's had been negligent because it should have known about the extensive over painting and informed potential buyers about this fact.

The difficulty the court faced was deciding whether significant restoration meant it was negligent to represent that the work as a Schiele painting or whether extensive restoration was merely a question of the condition of a work, which Christie's was not responsible for. Under VARA, Schiele (assuming he were alive) might have an easier time showing an injury to his reputation and honor from attributing the work to him without significant qualifications

¹⁹ About 60 percent of the 754 respondents to a survey conducted by the Copyright Office said that oral contracts are most common in the art world. (See Table 3-2 of the Final Report of the Register of Copyrights (1996).)

²⁰ A seller of a chattel generally can not reserve either affirmative or a negative rights in the chattel that are enforceable against subsequent purchasers even if those purchasers have notice of the initial seller's intention to reserve such rights. The efficiency rationale for this rule is that it economizes on the transaction and monitoring costs that would be necessary to enable parties to keep track of these restrictions and to negotiate to get rid of them when the burden is greater than the benefit to the initial seller. Conceivably, an artist could preserve his integrity rights against subsequent purchasers by

That is, artist A could enforce the provision against the initial purchaser B but would face problems enforcing it against C who buys the work from B. Still, the contract term would protect the artist against alterations in the near term that are most likely to be harmful in a present value sense.

I have found no mention that contracts in the art world contained integrity right clauses prior to VARA. Their absence implies that the expected gain to an artist from including such a provision is less than the sum of the cost of drafting the term, the cost of monitoring compliance and the reduction in the price of the work that would result from the buyer giving up the option of modifying or even destroying the work in the future without the artist's consent. A numerical example helps illustrate the last point. Imagine that an artist believes his reputation will be compromised by the possibility his work will be altered in the future. Prior to the passage of a moral rights law, the artist could add a contract term giving him the right to approve any future alteration by the purchaser of the work. Assume the purchaser assigns a cost of \$100 to giving up the option of altering the work in the future without checking with the artist. The purchaser also incurs an uncertainty cost because it is difficult to know how or when the artist might invoke the integrity clause –e.g., the artist might believe that the way the painting was framed violated his integrity right. Assume uncertainty adds an additional \$50 to the contract. For the integrity right to be value maximizing (assuming no third party effects) the artist would have to value it by at least (1) the \$150 he must “pay” the buyer (in terms of a price reduction) plus (2) the added transaction costs involved in drafting the contract term and monitoring the purchaser's compliance. Suppose these transaction costs equal \$10. Then one would observe an integrity clause in a contract if the artist valued it by at least \$160. Since contracts did not contain integrity clauses prior to VARA, we can conclude that their cost exceeded their value.²¹

Some support for the proposition that integrity rights are inefficient and not value maximizing comes from a survey of the waiver provision conducted by the Copyright Office in 1995. If integrity rights impose costs that exceed their benefits,

leasing or selling his work with a buy back clause or right of first refusal. But these alternative arrangements add other costs that probably exceed the benefits of preserving the cluster of integrity rights. Another possibility I discuss shortly is having the artist retain the copyright in the work.

²¹ One should mention another possibility that makes the question of efficiency more ambiguous. Under VARA the contract default rule is that the artist retains his integrity right absent a written waiver. Again suppose the cost of a waiver is \$10 and the cost to the buyer of the integrity right is \$150 (\$100 plus \$50 uncertainty cost). The buyer will be willing to pay up to \$140 more for the work if the artist executes a waiver (\$150 minus the \$10 cost the buyer pays for the waiver). If the artist values the integrity right by more than \$140, he will not sign a waiver. But note that if the default rule is no integrity right, an artist would not be able to add an integrity right to the contract unless he valued it by more than \$160 (a \$150 price reduction demanded by the buyer and the \$10 cost of adding the term to the contract). In short, if the artist valued the term between \$140 and \$160, we would not observe either the addition of an integrity right term in contracts prior to VARA or waivers in post VARA contracts. This implies that the efficiency implication of not observing contracts that included an integrity rule before VARA is uncertain within some range. To be sure, if the cost of adding the term or executing a waiver were slight and we observed that pre-VARA contracts did not contain integrity right clauses but post-VARA contracts contained waivers, we would conclude that VARA is inefficient.

we would expect parties to waive these rights following the passage of VARA. Roughly 73 percent of the 1054 survey respondents were aware of VARA. Moreover this percentage remained at around 75 percent independent of whether an agent or gallery represented the artist, whether his income from art was less than or greater than \$25,000, whether he had been commissioned to create a work of art and whether he resided in a state with a moral rights statute.²² About 40 percent of respondents were aware that moral rights can be waived, but more than 55 percent of those who were aware of moral rights ($=.41/.73$) were aware of waivers. Of the 66 respondents whose income from art exceeded \$25,000 annually and who were aware of moral rights, more than 75 percent were also aware that these rights could be waived. Of course, awareness does not mean that waivers were actually obtained. The survey indicates, however, that 17 percent of all respondents had seen waiver clauses. Of those respondents who were aware of moral rights laws, 23 percent had seen waiver clauses and over 40 percent knew that these rights could be waived. Twenty-three percent of all respondents knew artists who had been asked to waive moral rights. But that number increases to 32 percent for those aware of moral rights and 56 percent for those aware that these rights can be waived. Finally, 20 percent of respondents indicated that waivers are included in sale contracts (but only 373 persons responded to this question).²³ Finally, 43 percent of (144) respondents who had seen contracts containing waiver clauses believed that rejecting the clause would mean that the artist would not sell his work. In sum, the survey suggests that VARA induced waivers impose contracting costs that would be avoided in the absence of the law. In short, legislating moral rights for parties who are free to contract for them but choose not to would raise transaction costs and paradoxically harm the parties that such legislation is intended to benefit.

2. *Copyright Law*

An artist who retains the copyright in his work can preserve most of the same rights that the integrity right provides. At least since the 1976 Copyright Act, the sale of a unique work does not transfer the copyright to the buyer.²⁴ Since the copyright owner retains the right to make and authorize others to make derivative works, any significant distortions, mutilations or modifications without the author's permission would violate the derivative works provision of the act. And unlike VARA rights, which expire with the death of the artist, the copyright term includes an extra 70 years.

It is worth mentioning that the derivative or adaptation rights provision would not prevent the intentional destruction of a work of visual art. To use a favorite

²² The Copyright Office mailed about 6800 surveys nationally to visual artists, art lawyers, agents and others working in the visual arts. 1061 individuals responded to the survey, 955 of whom categorized themselves as visual artists within the meaning of the Copyright Act.

²³ The small number of respondents may reflect, in part, that 60 percent of respondents said that oral contracts were most common in the arts. These respondents would be less likely to be aware of written contracts and hence waivers.

²⁴ Under the so-called Pushman presumption, which several federal courts endorsed, it was presumed that the artist transferred his copyright to the buyer when he sold him his work. See Gorman & Ginsburg (1999) at 72

classroom example, painting a moustache on the Mona Lisa would violate the derivative work provision (provided the work was still under copyright) but torching the painting would not. It is unclear, however, why anyone would intentionally destroy a work of “recognized stature” which is likely to be highly valuable. Moreover, an artist who wants to prevent the possible destruction of his work in the future could add a contract term giving him the right to repurchase the work in the event the buyer loses interest in it. In short, the artist who retains his copyright can use his adaptation right to prevent the alteration or mutilation of his work while the self-interest of owners will generally prevent the destruction of works of “recognized stature.” And in rare instance when the self-interest of the owner and artist collide, the artist can buy back the work from the owner.

3. *The Hansmann/Santilli Argument*

Before I move on to the cases under VARA, I want to mention an ingenious economic argument that Hansmann and Santilli develop in defense of moral rights.²⁵ They point to a possible collective action problem that a moral rights law can overcome.

Let the value of an artist’s work depend, in part, on his reputation which is embodied in the stock of all his existing works. In a sense, each work acts as an advertisement for other works. Suppose an owner of one of these works, say a Picasso painting, finds it profitable to cut the work into 1000 small pieces and sell each piece as a “Picasso.” Since hanging a piece of a Picasso painting on your wall might be a source of enjoyment, prestige and status, the aggregate value of these thousand pieces could substantially exceed the value of the original painting. But mutilating one painting could harm Picasso’s reputation and, thereby, lead to a reduction in the value of all Picasso’s paintings. The price of a Picasso might also decline because Picasso is less exclusive and prestigious than he was because 999 more people now own a Picasso painting after the original is cut up. Though it may be privately beneficial for one owner to create 1000 works from the original painting, it will be socially harmful if the remaining works fall in value by more than the original owner gained. In principle, a collective agreement among all the holders of Picasso works not to sell bits and pieces of their Picassos could overcome the self-interest of a single owner. However, the costs of arranging and enforcing this agreement would be too great relative to the benefits. A moral rights law, however, can overcome the collective action problem by assigning to the artist the right to prevent any owner of his work from mutilating it and harming the remaining owners.

Hansmann and Santilli point out several difficulties with their argument. One is that the destruction or mutilation of one work may reduce the effective supply of the artist’s works and increase not decrease the price of the remaining works. Second, it seems unlikely that the thousand fragments would be worth more than the original painting. Third, it is not clear why Picasso’s reputation would suffer if it were known that Picasso was not the source of the mutilated works. Finally, note that Hansmann and Santilli don’t claim that moral rights laws are socially efficient. Rather they

²⁵ Hansmann & Santilli (1997).

develop fully the economic arguments against these laws, and offer the collective action argument as a possible positive explanation for these laws.

IV. *The Cases*

Although VARA has been in effect for nearly a decade, I am aware of only four decided cases that turn on whether the defendant had violated VARA.²⁶ Indeed, there have been more law review and related articles on VARA than there have been decided cases. To be sure, decided cases in any legal area tend to represent only a fraction of the number of disputes for most cases are settled before they are litigated. Still there appear to be only a few other newsworthy disputes involving moral rights and most of these arose in a period before the passage of moral rights laws in the United States.²⁷ All the decided cases involve disputes between property owners and sculptors. In only one case did the artist prevail. Moreover, these cases all involve relatively unknown artists who had created large-scale sculptural or site-specific

²⁶ There have been other reported cases in which the plaintiff claimed, among other allegations, that his rights under VARA have been violated. But either the VARA claims were dismissed because the alleged violations were not covered by VARA or the court did not rule on whether the defendant had violated VARA. In *Gegenhuber and Orthal v. Hystopolis Products et. al.*, 1992 U.S. Dist. LEXIS 10156 the plaintiffs alleged that the defendants had failed to give them proper credit for costumes, puppets and sets in the playbill for a theatrical show performed in Chicago. The defendants removed the case from state to federal court on the grounds that the plaintiff's state law claims involving proper attribution were preempted by Visual Arts Rights Act. The court ruled that the defendants had incorrectly removed the case because the plaintiff's work falls outside the copyright definition of a work of visual art. In *Pfaff v. Denver Art Museum and Columbus Museum of Art*, 1995 U.S. Dist. LEXIS 8573, the sculptor Judy Pfaff claimed that an employee of the Denver Art Museum had irreparably destroyed her sculpture in violation of VARA. The reported case deals only with questions of personal jurisdiction and venue (Pfaff had filed her lawsuit against the two museums in the Southern District Court of New York) and does not rule on whether the defendant behavior violated VARA. In *Shaw et. al. v. Rizzoli International Publications*, 1999 U.S. Dist. LEXIS 3233, the plaintiff photographers contributed to an exhibition of Marilyn Monroe photographs and memorabilia in Italy. The plaintiffs alleged that the distribution of a catalog of the exhibition violated their rights under VARA as well as copyright, unfair competition, trademark and misappropriation laws. The VARA claim was dismissed on summary judgment because the plaintiffs failed to allege any intentional alteration of their works which would be prejudicial to their honor or reputation.

²⁷These include the following examples involving alterations or destructions of well known works prior to the passage of moral rights laws in the United States. (1) A massive black and white Calder mobile installed in the rotunda of the Pittsburgh International Airport from 1958 to 1978 was repainted green and gold, the colors of Allegheny County, and motorized to turn at regular intervals. (2) Clement Greenberg, a distinguished art critic and trustee of the David Smith estate, stripped the paint from six Smith's sculptures after Smith's death because he believed it would improve their aesthetic and market values. (3) A sculpture by Isamo Noguchi that had been displayed in the lobby of the Bank of Tokyo Trust Company in New York was removed, cut into pieces and destroyed in 1980. (4) Diego Rivera painted a large wall mural in Rockefeller Center in 1933 that included a portrait of Lenin near the center and people marching with red flags past Lenin's tomb—elements that were not part of Rivera's original proposal. Rivera refused a request to replace Lenin's head with a portrait of Abraham Lincoln. In response, the owners temporarily covered the mural and then destroyed it. (5) Richard Serra's site-specific sculpture "Tilted Arc" was removed from a Federal Plaza in lower Manhattan after complaints that the sculpture was a safety hazard and prevented the public from using the space for recreation. Examples (1) – (3) are taken from Ch. 2 of Waiver of Moral Rights In Visual Artworks, Final Report of the Register of Copyrights (March 1, 1996). Example (4) comes from Robinson (1993).and (5) from *Serra v. U.S. General Services Administration*, 847 F.2d. 1045 (2nd Cir. 1988).

works that would have been or were substantially damaged or even destroyed as a result of new construction or renovation. This is not surprising because self-interest provides a powerful incentive for most owners of art not to mutilate or destroy it. First, paintings and other smaller works are likely to be more valuable than the cost of moving them and so they will not be intentionally damaged or destroyed. Second, although one can point to a few examples over the last fifty years of well-known works that have been altered without the artist's consent, for the most part, the value of a work is enhanced by preserving it in good condition and not altering or mutilating it. And finally, real estate developers who commission well-known artists to create site-specific works are likely to be sufficiently sophisticated to insist that the artist sign a contract consenting to the installation of the work and its possible destruction should it be removed.

*Carter v. Helmsley-Spear*²⁸ is the best known of the VARA cases. In *Carter*, the artist plaintiffs known as the "Three-Js" created a vast lobby sculpture using more than 50 tons of recycled materials including a school bus in a mixed-use commercial building in Queens. The work was never completed though the artists had worked at it for over three years. After the original real estate partnership defaulted on its loan, the new management evicted the artists from building. Fearing that the new management was planning to junk and destroy the sculpture, the artists filed suit under VARA .

The lower court found in favor of the artists. The building owner had not obtained the artists' consent to the possible future destruction of the work. Indeed, the artists claimed that if consent had been required, they would have designed a work that could be removed without destroying it. The work was held to be a single unified work (which meant that removal would destroy it) of "recognized stature."²⁹ Finally, the lower court rejected the defendant's argument that the work was a "work for hire."³⁰

The appellate court reversed the lower court on the ground that the sculpture was a "work for hire" prepared by an employee within the scope of his employment. Counting against a "work for hire" finding was that the artists had full authority in design, color and style while the building management retained authority to direct the location and installation of work within building. On the other hand, what proved decisive in finding the sculpture a "work for hire" was that the artists had received a weekly salary based on 40 hours a week for three years, received employee benefits including unemployment and health benefits (two of artists filed for unemployment benefits after the new managers terminated their work arrangement), and payroll and social security taxes were deducted from their weekly salary checks.³¹ One final

²⁸ 71 F.3d 77 (2nd Cir. 1996).

²⁹ Hilton Kramer testified for the defense and claimed that the work had no merit and no recognized stature. He based his argument of the fact that there was no literature on either the artists or the sculpture. The judge rejected Kramer's testimony on the grounds that Kramer was opposed to all modern art.

³⁰ Recall that rights under VARA do not apply to a work for hire.

³¹ Not surprisingly, critics of the decision claimed it wasn't fair that artists would have to give up a regularly paycheck and health benefits to avoid the "work for hire" classification. A further troubling

observation is that the case arose because of poor legal advice. The party commissioning the work was unaware of VARA and, therefore, did not obtain the artist's consent under Sec. 113(d) of the Copyright Act to the possible future destruction of the work..

A second New York case, *Ron English et al. v. BFC&R 11th Street LLC*³², involved a group of related artworks installed in a community garden on East 11th Street. Developing the land meant moving the sculptures but leaving the murals intact although the new construction would clearly obstruct the view of the murals. The artists claimed that the work was conceived as a unified environmental work and that removing the sculpture would, therefore, destroy the work. The court did not have to reach the question of whether the work was a single work of recognized stature that would be destroyed by construction.³³ The court held that VARA was inapplicable because the work was illegally placed on property in the first place. The previous owner (New York City) had never licensed or expressly authorized the artists to put their work on the site although the City did nothing about it for many years. The Court reasoned on policy grounds that a finding in favor of artists would mean that artists could freeze development by affixing graffiti to future construction sites—a clearly undesirable result.

In response to the plaintiff's *estoppel* argument that the city knew about the work and acquiesced in the activities for many years, the Court responded with an economic argument. To hold for the artists would require the City to incur the enormous costs of patrolling its many vacant lots. It was, therefore, cheaper to place the burden on the artists to obtain explicit consent from the City than to require the City to monitor continuously its lots.

In *Pavia v. 1120 Ave. of America's*³⁴, the plaintiff's large bronze sculpture comprising four standing forms had been on display in the lobby of the Hilton Hotel from 1963 to 1988. The plaintiff had retained the title and copyright in the work. In 1988, the sculpture was removed, two of the four pieces were placed in storage and the remaining two were put on display in a parking garage. Since the artist had retained title to the work, the court held that it was still protected by VARA even though it had been created before the effective date of the Act. Still the court barred Pavia's VARA claim because the alleged mutilation took place prior to VARA's effective date. The remaining allegation concerned the on-going display of a mutilated work. Although VARA does not cover display rights, New York's artists rights act does. The court ruled that Pavia's had a valid state law claim that was not preempted by the "equivalent rights" provision in the Copyright Act.

factor of the decision was that the contract the Three-Js signed stipulated that artists held the copyright to the work implying that parties did not contemplate that the sculpture was a "work for hire" in which the employer owns the copyright.

³² 1997 U.S. Dist. LEXIS 19137.

³³ The Court noted in dicta that it would have held that the work was not of recognized stature so destruction would have been permitted even if artists had been authorized expressly to do the work. Moreover, the court held that even if the work was a single unified work, the artists had no reputation and thus would not have been harmed by the mutilation.

³⁴ 901 F. Supp. 620 (SDNY 1995).

In *Martin v. City of Indianapolis*³⁵ (7th Cir. 1999) the City destroyed Martin's 40 foot outdoor sculpture as part of an urban renewal project. The sculpture had been engineered in 1986 so that it could be disassembled and removed. Recall that the integrity right covered a pre-VARA work that could be removed without destroying it unless the artist was given notice and the opportunity to remove the work at his own expense. Through a bureaucratic foul-up, the defendant was notified but not given sufficient time to remove the work. Liability also depended on the court holding that the work was of recognized stature. The case shows how little evidence is required to prove that claim. The plaintiff satisfied its burden by producing local newspaper and magazine articles from Indianapolis describing the work. No experts testified and there were no critical writings on the work or the sculptor.³⁶ The dissent argued that the question of "recognized stature" should not be decided on the basis of such flimsy evidence for this would mean that works that had no "real" stature or had lost their luster over the years would be protected under VARA. In turn, this would raise the cost of acquiring and owning works of art since parties would either incur the costs of obtaining waivers at the outset or face a risk of violating VARA in the future.

In another reported case alleging a violation of VARA, the plaintiff Moncada claimed that Lynn Rubin had assaulted him when he attempted to videotape Rubin's removal of his painted wall mural "I am the best artist, Rene" from a building in Soho located opposite Rubin's gallery.³⁷ The only question before the court was whether the defendant's general liability insurance policy also covered an intentional tort. Still the facts of the case bring to light several questions that may be of interest in future VARA disputes. First there is the threshold question whether the plaintiff's mural qualifies as a work of visual art. One could argue that the work should more properly be regarded as a literary work subject to copyright but not VARA protection. The entire mural consisted of the plaintiff's signature and a single sentence proclaiming his artistic skill. If one treated this as a work of visual art, how would one distinguish the mural from other short writings, such as a student's homework or poem, that are not protected under VARA? Second, a tenant may have authorized Moncada's mural but there is no indication that the building owner also authorized it. If a tenant's authorization was sufficient to establish VARA rights, VARA might well protect an unlimited number of graffiti artists and doodlers who decorate walls in their own apartment and elsewhere. In principle, cleaning and repainting walls throughout New York City would risk violating VARA. Third, VARA only protects works of recognized stature from destruction. So even if the plaintiff could show that the mural was a legally authorized work of visual art, he also would have the burden of showing it was of recognized stature. This, however, may

³⁵ 192 F. 3d 608 (7th Cir. 1999).

³⁶ The dissent had argued that the plaintiff should not be able to satisfy its burden of proving "recognized stature" with little evidence on summary judgment. The dissent was worried that this would lead to extra contracting costs because people accepting art that may never attain any stature would still be required to obtain waivers at the outset. The case also raises an interesting damage question. The Copyright Act permits enhanced damages for a willful or intentional violation. The court held that though destruction was intentional, the defendant had been careless rather than willful.

³⁷ See *Moncada v. Rubin-Spangle Gallery*, 835 F. Supp. 747 (S.D.N.Y. 1993)

not be a difficult burden. As the *Martin* case illustrated, the plaintiff only has to show that a local newspaper has praised the work.

To sum up, although the evidence provided by the four decided VARA cases is modest, we still can learn from them. First, the cases show that VARA disputes are likely to arise for works of visual art that cannot be moved without damaging or destroying them. Second, the works are not likely to be valuable works by well-known artists. Third, the cases arise because the parties were either unaware of the Act or they received bad legal advice. Fourth, judges appear reluctant to preserve art at the cost of hampering development. Fifth, the cost of obtaining waivers from artists may deter museums and galleries from exhibiting installation art that cannot be removed without destroying it. Finally, the cost of obtaining waivers may deter property owners from commissioning works for installation in open spaces, lobbies and building.

V. *Empirical Analysis of State Moral Rights Laws*

This section presents an empirical analysis of moral rights laws that were enacted in nine states prior to the passage of VARA. Although the content of the state laws varies among states (e.g., California, Connecticut, Massachusetts and Pennsylvania prohibit the destruction of artistic works while the other five states do not, some states cover display and reproduction rights and some extend moral rights beyond the artist's life), all state statutes provide attribution and integrity rights.³⁸ The analysis uses cross-sectional data in the United States from 1980 and 1990 to examine the impact of state moral rights laws on artist earnings, location decisions and appropriations for state art agencies, and to explore the factors that may have influenced the passage of these laws. An analysis of state moral rights laws should also provide some insight into the likely effects of VARA.

Table 1
Definition of Variables and Means for the Year 1990

<i>Variable Name</i>	<i>Definition of Variables</i>	<i>States Without Laws</i>	<i>States With Laws</i>
POP	State population(millions)	3.92	9.24
INCOME	State income (\$1000) per capita	\$22.49	\$26.90
METRO	Percent state population in metropolitan areas	.607	.837
COLLEGE	Percent college graduates in state	.128	.139
ARTEXP	Per capita state art agencies appropriation	\$1.33	\$1.87
GOVEXP	Per capita state and local gov't. spending (\$1000s)	\$2,816	\$2,964
APC ₉₀	Artists per 1000 population in 1990	1.34	.160
AEARN	Mean Annual Earnings (\$1000s) of Artists (both full and part time)	\$21.21	\$25.77
MR	1 if a state has a moral rights law and 0 otherwise	42 states	9 states
MRDEST	1 if a state has a moral rights law that prohibits the intentional or willful destruction of a work	47 states	4 states

Notes:

³⁸ See Kwall (1997) at pp. 29-45.

- (1) The means are for the year 1990.
- (2) Income, appropriations and expenditures data are in 1999 dollars.
- (3) Artists include painters, sculptors, print makers, and photographers. Teachers of art and designers are separate census classifications and are not included in the artist category. Income data for artists excludes photographers.
- (5) The nine states with moral rights laws are California (1979), Connecticut (1988), Louisiana (1986), Maine (1985), Massachusetts (1984), Pennsylvania (1986), New Jersey (1986), New York (1984) and Rhode Island (1987).
- (6) Data Sources: (The subscripts refer to the years 1980 and 1990.) POP_{80&90}, METRO_{80&90}, ARTEXP₉₀, and GOVEXP₉₀ are from Tables 27, 33, 402 and 462 of the Statistical Abstract of the United States (hereafter "Statistical Abstract") (1992); ARTEXP₈₀ and GOVEXP₈₀ are from Tables 488 and 40 of the Statistical Abstract (1981); COLLEGE_{80&90} is from Table 242 of the Statistical Abstract (1995); INCOME_{80&90} is from Table 706 of the Statistical Abstract (1997); APC_{80&90} is from Diane C. Ellis and John C. Beresford, Trends in Artist Occupations: 1970-1990 (1994), Tables: A-14, 15; and ARTINC90 is from <http://govinfo.library.orst.edu/cgi-bin/sstf22-list?rjob=B29&radi=&table=5&rloc=X001>.

Table 1 defines the variables in the empirical analysis and presents their mean values for both the nine states that passed moral rights laws and the states (plus the District of Columbia) that did not. The category "artists" include painters, sculptors, craft artists, artist printmakers and photographers. The data on artists are taken from the U.S. Census which labels a person an artist only if it is his primary occupation—i.e., his most recent job at which he worked the most hours.³⁹ The "artist" category excludes designers (which are three times more numerous than artists and unlikely to produce covered works) and teachers of art in higher education (which includes art, drama and music teachers). Finally, note that photographers comprise about 40 percent of the "artist" category.

Table 1 shows that states with moral rights laws have larger populations, a greater percentage of residents living in metropolitan areas, higher per capita income, a higher proportion of college graduates, higher per capita state and local government spending, higher per capita appropriations for state art agencies and relatively more and higher income artists. In short, a comparison of means suggests that larger, richer and better educated states have relatively more artists and are more likely to enact moral rights laws. I use multiple regression analysis to test whether these differences are statistically significant and whether one can infer any causal relationships among these variables. Specifically, I address the following questions.

1. *Do state moral rights laws have a negative impact on artist earnings?*
2. *Do these laws create a favorable environment for artists that tends to encourage the creation of art?*
3. *What factors determine the amounts that state and local governments spend on arts agencies?*
4. *Why did some states enact moral rights laws while others did not?*

Question 1. Economic analysis predicts that moral rights laws are unlikely to improve the economic position of artists for several related reasons. First, contract, copyright, unfair competition and tort law already enable artists to protect most of

³⁹See Ellis & Beresford (1994).

the same rights that moral rights laws provide. Second, if the benefits of moral rights exceeded their costs, contracts between artists and collectors should have included clauses that provided for attribution and integrity rights in the absence of a moral rights law. Failure to observe these clauses implies that legislating moral rights unless the artist expressly waives them will increase transaction and contracting costs in the art market, particularly for works that are incorporated into buildings or designed for specific sites. This, in turn, will lower the demand for art and reduce artist earnings. Finally, the adverse effects on demand are likely to be greater in the four states that prohibit not just harmful alterations but the destruction of artistic works as well.

Equations 2.1 and 2.2 in Table 2 test this proposition. The dependent variable in both equations is the average annual earnings of artists (AEARN) in 1990. I include in these regressions a dummy variable that takes the value 1 if the state enacted a moral rights laws between 1979 and 1987 (MR) and 0 otherwise. Other things the same, the passage of a moral rights laws should reduce the demand for and hence the earnings of artists. Equation 2.2 includes a second moral rights dummy variable (MRDEST) which takes the value 1 if a state law also prohibits the intentional or willful destruction of works of art and 0 otherwise. MRDEST should have a negative sign since adding this provision to the law will lead to greater use of waivers and higher transaction costs in the art market. I also include the following independent variables in the regressions: per capita state income (INC), percent population living in metropolitan areas (METRO), percent college graduates (COLLEGE), population size (POP), per capita appropriations for state art agencies (ARTEXP). These variables should be positively related to artist earnings since the demand for art is probably an increasing function of income, education, urbanization and public support for the arts.

Equations 2.1 and 2.2 also include the lagged (1980) value of artist earnings as an independent variable in order to hold constant (permanent) differences among states in earnings that are independent of the passage of moral rights laws between 1980 and 1990. To explain, if states where artists had higher earnings were more likely to enact moral rights laws, it would be misleading to conclude from a positive regression coefficient on the MR variable that these laws increased the relative earnings of artists. More likely, causation would run in the reverse direction—i.e., from higher earnings to the passage of a moral rights law. By holding constant artist earnings prior to the enactment of state moral rights laws, the regressions eliminate causation that may run from higher earnings to the passage of a moral rights law.

Table 2
Regression Analysis of State Moral Rights Laws
Regression coefficients (and t-statistics)

<i>Independent Variables</i>	<i>AEARN90 (2.1)</i>	<i>AEARN90 (2.2)</i>	<i>APC90 (2.3)</i>	<i>ARTEXP90 (2.4)</i>	<i>MR (2.5)</i>
INC90 (\$1000s)	.601 (2.87)	.679 (3.19)	-.014 (1.48)	.060 (0.67)	-.001 (0.03)
METRO90	3.387 (1.17)	3.350 (1.18)	-.122 (0.87)	1.581 (1.20)	.006 (1.55)

COLLEGE90	-23.404 (1.05)	-23.508 (1.07)	4.626 (3.76)	-14.02 (1.16)	1.703 (0.27)
POP90 (millions)	.139 (1.52)	.165 (1.79)	-.003 (0.59)	-.052 (1.22)	.000 (0.96)
GOVEXP90 (\$1000s)	—	—	—	.051 (0.15)	—
ARTEXP90	-.078 (0.28)	-.140 (0.51)	.002 (0.11)	—	—
MR	.510 (0.44)	1.458 (1.11)	.118 (1.94)	-.170 (0.32)	—
MRDEST	—	-2.856 (1.47)	—	—	—
APC90	—	—	—	1.537 (2.35)	—
APC80	—	—	.977 (11.14)	—	-.174 (0.51)
AEARN80	.055 (0.47)	.020 (0.17)	—	—	-.0005 (0.05)
ARTEXP80	—	—	—	.469 (1.94)	.024 (0.46)
Constant	6.615 (2.24)	5.892 (1.99)	.167 (1.10)	-1.530 (1.15)	-
R ²	.57	.59	.90	.40	.24
n	51	51	51	51	51

Note: Equation 2.5 uses 1980 values for all independent variables.

On the whole, state moral rights laws have no significant effects on artist earnings. None of the coefficients on the moral rights variables are statistically significant. Equation 2.2, however, provides some weak support for the proposition that extending the law to prohibit the destruction of art works adversely impacts artist earnings. The coefficient on MRDEST is negative (and double the size of the positive coefficient on MR) and close to statistical significance.⁴⁰ Of the remaining variables in the earnings equations, INC, METRO and POP have positive signs but only INC is statistically significant. Surprisingly, COLLEGE and ARTEXP have negative though statistical insignificant effects on earnings. More puzzling is the lack of a significant relationship between artist earnings in 1980 and 1990.⁴¹

Question 2: In light of their (small) economic costs, it seems puzzling that artists would support moral rights laws. One possible explanation is that artists are ignorant of the law's true economic effects. Instead, they might believe they lack sufficient power to bargain for these rights in a world without moral rights laws. This does not seem plausible because artists are relatively well educated, the likely economic effects are not difficult to understand and the bargain the artist would strike involves accepting a lower price for the sale of a piece of art in exchange for acquiring moral

⁴⁰ Note, however, that MR and MRDEST are jointly insignificant in equation 2.2—i.e., an F-test accepts the null hypothesis that moral rights law that include a provision banning the destruction of recognized art works have no significant effect on artist earnings.

⁴¹ A possible explanation for why AEARN80 is insignificant is that the artist category for 1980 is much broader than the 1990 category and includes entertainers as well as artists.

rights that might have some value in the future. A more likely explanation relates to the expressive value of these laws. Suppose the rhetoric surrounding these laws and the prestige of the people supporting them signal to the community at large that art is a highly valued social enterprise. In turn, this creates greater interest in art and a more favorable social environment for artists. And if the non-monetary benefits of moral rights laws more than offset their economic harm, which equations 2.1 and 2.2 suggest is insignificant, artists will desire to work and live in states with these laws.

I approximate a “favorable social environment” for artists indirectly by looking at the relative number of artists in a state. A more favorable environment should be positively related to the relative number of artists. Other things the same, if moral rights laws enhance the artist’s social environment (even though his monetary income may fall), one should observe larger relative increases from 1980 to 1990 in the number of artists in states that passed moral rights laws in the 1980s compared to states that did not.⁴² Regression 2.3 in Table 2 tests this proposition.

The dependent variable in equation 2.3 is the per capita number of artists in the state in 1990 (APC_{90}). The independent variables in both regressions include the 1990 state values of per capita income (INC), percent population living in metropolitan areas (METRO), percent college graduates (COLLEGE), population size (POP), and per capita appropriations for state art agencies (ARTEXP). The regressions also include a moral rights variable (MR) and the lagged (1980) value of the dependent variable. As noted earlier, the reason for including the lagged dependent variable is to eliminate permanent differences in the dependent variable that are not caused by the passage of moral rights laws.

In equation 2.3, the most important variable explaining differences in the per capita number of artists in 1990 is the value of the corresponding variable in 1980. The coefficient of the lagged variables is highly significant and not significantly different from 1.0. Hence, one cannot reject the null hypothesis that the number of artists would have remained constant in a state in the 1980 to 1990 period, if the values of the other independent variables had remained constant.⁴³ Among the other independent variables, the per cent of college graduates (COLLEGE) and the moral rights law (MR) have significant coefficients. The proportion of college graduates is positive and highly significant indicating that the greater the percent of college graduates in a state, the more artists there are. Since more educated persons have a greater demand for the arts and cultural goods, this finding is not surprising.

The coefficient on the moral rights variable (MR) is positive and statistically significant (at the .10 but not quite at the .05 level) in 2.3. The evidence, therefore,

⁴² Except for California, the other eight states passed their moral rights laws after 1980. California enacted its law in 1979 and the lagged artist variables are their 1980 values. It is conceivable that the regression coefficient on the ML variable in equation 2.3 might understate the impact of moral rights because the specification implicitly assumes that the 1980 artist values do not reflect the passage of a moral rights law. To check this, I re-estimated equations 2.3 excluding California. The regression coefficients (and t-statistics) were virtually identical to those reported in Table 2.

⁴³ That is, we accept the null hypothesis in equation 2.3 that the coefficient on the lagged variable is not significantly different from 1.

provides some support for the “favorable social environment” hypothesis. It appears that the per capita number of artists increased more rapidly in states that enacted moral rights laws in the 1979 to 1987 period, holding constant the other socio-economic variables in the regression and the lagged value of the dependent variable.⁴⁴ Quantitatively, the increases associated with the passage of a moral rights law are modest, accounting for about an 7.3 percent increase in APC.⁴⁵ In short, notwithstanding the prediction that moral rights laws may cause a small amount of economic harm to artists, artists appear to prefer working and living in states that have these laws.

Question 3. Here I am interested in determining if moral rights laws affect the amounts that states appropriate for arts agencies. Per capita state appropriations (the ARTEXP variable in Table 1) equals \$1.43 on average. There is, however, substantial variation across states, ranging from \$10.07 in Hawaii to \$.25 in Mississippi. In states with moral rights laws, the range is narrower varying from \$4.21 in New York to \$.27 in Louisiana. Appropriations for state art agencies should depend, in part, on the influence of groups that support the arts such as artists (APC90) and other persons who benefit from public spending on the arts. One suspects that more highly educated and more sophisticated voters, as proxied by the percentage of college graduates and (possibly) the percentage of persons living in metropolitan areas, are more likely to be consumers of arts and, therefore, more likely to support public spending on the arts. In addition, the stronger the preference for state and local government spending in general (GOVEXP), the greater should be the state’s appropriations for art agencies. Regression 2.4 also includes the lagged value for art agency appropriations (ARTEXP80) and a dummy moral rights variable (MR). Recall that regression 2.3 showed that state moral rights law increased the relative number of artists in a state by about 7 percent in the 1980 to 1990 period. Assuming that state appropriations for art agencies respond positively to the relative number of artists in the state, we would expect a positive impact of MR on these appropriations.

Consistent with our predictions, regression equation 2.4 shows that the greater the relative number of artists in a state (APC90) and the greater past spending on art agencies (ARTEXP80), the greater the appropriations or spending of art agencies in 1990. The regression coefficients on these variables are positive and statistically significant. Of the remaining variables, none is significant. The moral rights variable though negative is statistically insignificant. Note that I re-estimated 2.4 substituting APC80 for APC90 because causation may run partly from greater art agency appropriations leading to an increase in the number of artists rather than the reverse. The effects of this substitution were negligible. The coefficients and levels of significance of ARTEXP80 and APC80 remained the same as in 2.4 and the moral

⁴⁴ I also tested added MRDEST to equation 2.3. Its coefficient was .00005 and its t value was less than .005. The coefficient on MR was unchanged when I included the MRDEST in the regression though the significant of MR fell slightly (the t-statistic fell from 1.94 to 1.66).

⁴⁵ The percentage increases equal the value of the regression coefficient on ML in 2.3 divided by the mean value of the dependent variable in states with laws (i.e., .118/1.599).

rights variable continued to be insignificant. In short, the passage of a moral rights law appears to have no significant effect of state spending on art agencies.⁴⁶

Question 4. In regression 2.5, I try to identify the social and economic forces that influence a state's decision to enact a moral rights law. From a public choice perspective, one might expect, for example, that states with more artists, that spend more money on the arts, and have a more educated and urbanized population would be more likely to favor moral rights legislation assuming these laws promote a favorable artistic environment. Since the dependent variable in 2.5 is dichotomous (1 if a state passed a moral rights law and 0 if it does not), I estimated a probit regression to predict the passage of moral rights laws in states between 1979 and 1987 using 1980 values for the independent variables. The results are disappointing. None of the variables is statistically significant and only METRO has a coefficient larger than its standard error. Surprisingly, the per capita number of artists (APC80) has no significant effect on whether a state passes a moral rights law.⁴⁷

VI. Concluding Remarks

In this paper I presented an economic analysis of the Visual Artists Rights Act of 1990 (VARA), which amended the Copyright statute to provide attribution and integrity rights—commonly known as moral rights—for a limited groups of works of visual art. I have shown that VARA will add transaction and contracting costs to the art market and, thereby, reduce the demand for art and the earnings of artists. Overall, these adverse effects are probably small. Generally, it will be in the self interest of an owner of an artistic work to preserve it in good condition and not violate the artist's integrity right because altering or mutilating the work will tend to reduce its value. On the other hand, VARA may have a more significant negative effect on the demand for site-specific art and large scale sculptural works installed in buildings. These type of works are likely to be mutilated or destroyed if they stand in the way of future building renovation or real estate development. Hence, prospective purchasers of these works may forego their purchases rather than incur the costs of obtaining waivers or the expected penalties from violating the artist's integrity right in the future.

Part III of the paper looked at the few cases that have been litigated under VARA. The circumstances involved in these cases are consistent with the predictions of the economic model. All cases have involved relatively unknown artists who have executed sculptural works that will or have been destroyed by building projects. Well-known artists are not likely to be involved in such litigation because their works are more valuable and hence less likely to be destroyed. And outside the area of site-

⁴⁶ I also re-estimated 2.4 using both the MR and MRDEST variables. The coefficients on both moral rights variables were highly insignificant and the results for the other variables were virtually unchanged.

⁴⁷ I also estimated several variations of 2.5 including substituting 1990 for 1980 values of the independent variables and substituting MRDEST for MR. In no case did I find any significant variables in the probit regressions.

specific works and installations in buildings, litigation is unlikely because owners of art have strong financial incentives to preserve their works.

In Part IV, I presented an empirical analysis of state moral rights laws. Prior to VARA, nine states passed moral rights laws in the 1979 to 1987 period. Using cross-section data for 1980 and 1990, I found that state moral rights laws have had no significant effects on artist earnings. However, state prohibitions on the destruction of works have a negative though only marginally significant effect of artist earnings. I also found that state moral rights laws increased by around 10 percent the number of artists that reside in that state. These findings present a paradox. On the one hand, economics predicts that artists will be harmed slightly by the laws yet artists prefer to reside in states with moral rights laws. A possible explanation for this apparent inconsistency is that these laws create a favorable social environment for artists. I also tried to explain empirically why nine states passed moral rights laws and the others did not. One might expect, for example, that states with more artists or more educated persons would be more predisposed to passing moral rights laws. The empirical evidence did not support this proposition.

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