

Summer 2010

Quilt Artists: Left Out in the Cold by the Visual Artists Rights Act of 1990

Michelle Moran

Follow this and additional works at: <https://scholarship.law.marquette.edu/iplr>



Part of the [Intellectual Property Law Commons](#)

Repository Citation

Michelle Moran, *Quilt Artists: Left Out in the Cold by the Visual Artists Rights Act of 1990*, 14 Marq. Intellectual Property L. Rev. 393 (2010).

Available at: <https://scholarship.law.marquette.edu/iplr/vol14/iss2/11>

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Intellectual Property Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

Quilt Artists: Left Out in the Cold by the Visual Artists Rights Act of 1990

ABSTRACT	393
INTRODUCTION	393
I. COPYRIGHT PROTECTION FOR QUILTS AS “USEFUL ARTICLES”	395
A. <i>Copyrightable Subject Matter and Useful Articles</i>	395
B. <i>Copyright Protection for Quilts</i>	396
II. VISUAL ARTISTS RIGHTS ACT OF 1990	399
A. <i>Policy and Goals of VARA</i>	401
B. <i>Visual Works of Art Included and Excluded from VARA</i>	402
III. QUILT ARTISTS’ RIGHTS.....	403
A. <i>Elevating Quilt Artists’ Rights to Include Rights of Attribution and Integrity</i>	403
1. Determining Congressional Intent for VARA.....	403
2. Protection Under State Artists’ Moral Rights Statutes ...	407
B. <i>Maintaining the Status Quo for Copyright Protection of Quilt Designs</i>	407
CONCLUSION.....	409

ABSTRACT

The United States Copyright Act with the inclusion of the Visual Artists Rights Act of 1990 (“VARA”) gives sculptors, painters, and photographers a bundle of rights that include the moral rights of attribution and integrity. However, the artistic efforts of artists who create quilts, whether the original purpose was to hang the quilt on the wall or to provide warmth and comfort on a bed, are not included in VARA due to the exclusion of applied art from VARA. This Comment contends that the Congressional intent to protect the highly personal connection artists have to their creations supports extending the rights of attribution and integrity to quilt artists.

INTRODUCTION

Imagine walking into a museum and observing a display of five original pieces of artwork created in the United States. The display includes a sculpture, a painting, a quilt, a photograph, and a print—all

original, all protected by copyright.¹ The Copyright Act gives all the artists an equal “bundle of rights,” with one exception: four out of the five artists have their “moral rights” of attribution and integrity protected, but the quilt artist is not entitled to these rights because applied art is excluded from the Visual Artists Rights Act of 1990 (“VARA”).²

A quilt is art because it is beautiful, and a quilt is a useful article because it provides warmth and comfort. The quilt’s dual purpose creates an inequity for the quilt artist. The useful articles or applied art³ status of the quilt eliminates for the quilt’s creator the right to claim protections that are readily available to artists who work in other media, such as paint, canvas, paper, stone or metal. These artists are able to protect their rights of attribution and integrity because their works function only as art. Alice Walker’s *Everyday Use* expresses the duality of the quilt with poignancy when the mother asks her greedy daughter, who covets the family’s antique quilts: “Well,” *I said, stumped. “What would you do with them?” “Hang them,” she said.* The mother is left thinking: *As if that was the only thing you could do with quilts.*⁴ Ironically, if that were the only thing that could be done with a quilt, then the artist would be afforded the same rights of attribution and integrity as other visual artists. The reality of a quilt, however, is that it is more than art. It seems a harsh penalty that because a quilt can be useful, the quilt artist is offered fewer rights, especially when the underlying policy expressed by Congress under VARA seems to speak directly to the artist who created and labored to produce an original quilt.⁵

To understand how copyright law fails to protect useful articles and quilts, Part I provides a basic backdrop of copyright law as it applies to useful articles and specifically how quilt designs have been protected by copyright. Part II discusses the Visual Artists Rights Act of 1990 (VARA), which protects the moral rights of attribution and integrity for

1. 17 U.S.C. § 102(a) (2006).

2. 17 U.S.C. § 106A.

3. The terms “useful article” and “applied art” are used at various places in 17 U.S.C. § 101 (2006), but they are interchangeable and will be used that way in this Comment. The choice of either term will primarily be driven by what section of the copyright code is being discussed. See BLACK’S LAW DICTIONARY 108 (8th ed. 2004) (defining “applied-art doctrine” and “useful-article doctrine” as synonymous terms).

4. Alice Walker, *Everyday Use*, in DOWNHOME: AN ANTHOLOGY OF SOUTHERN WOMEN WRITERS 335 (Susie Mee ed., 1995).

5. See H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916.

visual artists. This Part reviews congressional attempts to narrowly limit who is protected under VARA—a departure from the broad coverage under other regimes that protect moral rights. Part III addresses how the courts interpreted VARA and applied art within VARA’s context. This Part also examines how the courts determine what artworks Congress intended to protect with VARA, with a particular focus on how this issue is treated in the legislative history. Part III then discusses how the legislative history supports protecting quilt artists’ rights of attribution and integrity because a quilt artist fits the profile of the artist Congress intended to protect with this act.

I. COPYRIGHT PROTECTION FOR QUILTS AS “USEFUL ARTICLES”

A requirement of VARA is that the visual art must be subject to copyright protection and accordingly must be copyrightable subject matter.⁶ Copyrightable subject matter is limited to the design elements of the quilt. Therefore, its status as a useful article eliminates the quilt from qualifying for protection under VARA.⁷

A. Copyrightable Subject Matter and Useful Articles

To qualify for copyright protection, a work must be “independently created by the author . . . and . . . it [must] possess[] at least some minimal degree of creativity.”⁸ The original work must be “fixed in any tangible medium of expression” and fall within the Copyright Act’s enumerated categories.⁹ Quilts are protected under the Copyright Act as “pictorial, graphic, and sculptural works.”¹⁰

The Copyright Act defines pictorial, graphic, and sculptural (PGS) works to include a wide range of traditional arts and those works that exist in the grey area between copyrights and design patents.¹¹ The term “useful article” often implicates those works included in the PGS category since a useful article is defined as “an article having an intrinsic

6. 17 U.S.C. § 106A (2006).

7. 17 U.S.C. § 101.

8. *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *See also* MELVIN B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §§ 2.01[A]–[B] (2009) (discussing the requirements of originality and creativity).

9. 17 U.S.C. § 102(a). The list of categories includes: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. *Id.*

10. 17 U.S.C. § 101.

11. *Id.*

utilitarian function that is not merely to portray the appearance of the article or convey information.”¹² As a result, the useful article is not protected by copyright unless the article incorporates features that can be identified separately from the utilitarian function, whether physically or conceptually, and only those separable features are copyrightable subject matter.¹³

The underlying policy for the useful article doctrine is to avoid providing greater rights through copyright law than would be afforded through a design patent.¹⁴ Incorporating artistic elements, as well as industrial design into utilitarian objects creates an intellectual property rights ambiguity. The Supreme Court confronted this ambiguity in the seminal case, *Mazer v. Stein*.¹⁵ The Supreme Court held that the copyright registered for a sculpture of dancing figures was valid even though the sculpture was intended for use as a lamp base.¹⁶ In response to *Mazer*, the Copyright Act of 1976 codified the holding “that works of art which are incorporated into the design of useful articles, but which are capable of standing by themselves as art works separate from the useful article, are copyrightable.”¹⁷

B. Copyright Protection for Quilts

A quilt is a coverlet for a bed; it consists of two layers of fabric with some filling between the layers and stitching to prevent the filling from shifting.¹⁸ Thus, as defined, the quilt has a utilitarian function. The design elements of the quilt, however, are eligible for copyright

12. *Id.*

13. *Id.*

14. *See Smith & Hawken, Ltd. v. Gardendance Inc.*, 75 U.S.P.Q.2d 1853, 1855 (N.D. Cal. 2005) (stating that “[t]he useful article doctrine serves the important policy of keeping patent and copyright separate”). Patents are more costly to obtain than copyrights, and the length of protection for patents is much shorter than for copyrights.

15. *See Mazer v. Stein*, 347 U.S. 201 (1954). This case involved a sculpture of dancing figures that was created by Stein for use as a lamp base. Stein registered a copyright for it. Mazer made unauthorized copies of the dancing figures to use for his own lamps. Mazer’s defense was that the copyright was for a work of art and Stein was not allowed a monopoly on a utilitarian item like a lamp. The Supreme Court agreed the lamp could not be copyrighted but the artistic design of the base was copyrightable subject matter and could be protected from unauthorized copying. *Id.*

16. *Id.* at 217.

17. Robert C. Denicola, *Applied Art and Industrial Design*, 67 MINN. L. REV. 707, 720 (1983) (quoting H.R. REP. NO. 94-1476, at 50 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5663).

18. DICTIONARY.COM UNABRIDGED (v 1.1) “quilt,” <http://dictionary.reference.com/browse/quilt> (last visited Mar. 1, 2010).

protection; therefore, many quilt designs are copyrighted.¹⁹ When a quilter purchases a pattern, she is allowed to make the quilt for personal use but infringes on the copyright if she creates the quilt for anything other than personal use.²⁰ Quilters desiring to create a quilt for a fundraising raffle are prudent to seek permission from the design's copyright holder.²¹ It is only the design on the quilt that is copyrightable subject matter. Because it is a useful item, the quilt as an object is not copyrighted.

Two recent cases illustrate how copyright protects quilt designs. In *Brown v. McCormick*, the District Court of Maryland examined a case where the plaintiff, Barbara Brown, sued the defendant, Patricia McCormick, for copyright infringement for unauthorized use of fifteen quilt block patterns created by Brown for McCormick's use in the movie, *How to Make an American Quilt*.²² The complaint contained sixteen counts of infringement, which fell into three categories: (1) the unauthorized use of the quilt or its image by McCormick;²³ (2) the unauthorized derivative work McCormick made from one of the Brown copyrighted pattern blocks;²⁴ and (3) the quilt's appearance in a painting.²⁵ The court found that Brown's designs were copyrightable.²⁶ The court also found that McCormick infringed Brown's copyrights: (1) when she used the quilt for any purpose beyond the authorized purpose for the filming of the movie and (2) when she copied the design of one of the blocks for another quilt.²⁷ The court found Brown's copyright was not infringed, however, when (3) the quilt appeared in the painting

19. QUILTER'S NEWSLETTER MAGAZINE, QUILTMAKER MAGAZINE, & C&T PUBLISHING, ALL ABOUT QUILTING FROM A TO Z 137 (2002).

20. Janet Jo Smith, *Copyright: Answers to Quilter's Questions, Part I*, QUILTERS NEWSLETTER, June 1998, at 46.

21. *Id.*

22. *Brown v. McCormick*, 87 F. Supp. 2d 467 (D. Md. 2000). McCormick contracted with Brown to create quilt patterns in a specific style. The patterns were used by McCormick and other hired quilters to create a quilt for the movie. The agreement between Brown and McCormick was limited to McCormick using the designs for a quilt to be used in the movie; the contract allowed for two versions of the quilt to be made because the movie was going to take place in two different time periods and the producers wanted to show the quilt as it would look if it were new in one time period and old in the later time period. *Id.*

23. *Id.* at 469. These claims all related to McCormick using the quilt she had made from Brown's designs in ways beyond what Brown had authorized in the contract. *Id.*

24. *Id.* McCormick also created a block for another quilt used in the movie that was based on one of Brown's quilt blocks. The design was substantially similar and thus infringed on Brown's copyright. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 469–70.

because the print was “rendered suggestively” and was not easily recognizable as portrayed in the painting due to “insufficient detail.”²⁸ The court also held the infringement was not willful and awarded Brown only actual and statutory damages.²⁹ This case is a good example of the scope of copyright protection available for quilt patterns. The court found the design was original enough to be copyrightable subject matter.³⁰ The unlawful derivative block also was infringement of Brown’s exclusive rights to create derivative patterns.³¹ Also, McCormick infringed on Brown’s right to limit the use of the display of the quilts created from her copyrightable material.³² Essentially, all the typical rights of copyright were available to Brown for the quilt block patterns she created for the movie.

In *Boisson v. Banian, Ltd.*, the United States Court of Appeals for the Second Circuit examined the complaint made by plaintiff, Judi Boisson, against defendant, Banian, Ltd., for copyright infringement.³³ Boisson claimed Banian sold quilts that resembled two of her quilt designs for which she had registered copyrights.³⁴ The United States District Court for the Eastern District of New York held that Boisson’s copyrights were not infringed because no substantial similarity existed between the defendants’ quilts and the protected elements of Boisson’s quilts.³⁵ The Second Circuit held that the district court’s finding that the layout of the quilt was not protected by copyright was in error.³⁶ The Second Circuit held instead that the quilts produced by Boisson fulfilled copyright requirements because she had valid copyright registrations for the quilt design and because the design layout required some minimum degree of creativity.³⁷ The Second Circuit found that Banian infringed because of the substantial similarity of two of their quilts to one of Boisson’s designs.³⁸ The Second Circuit remanded the case to the

28. *Id.* at 470.

29. *Id.* at 483–84.

30. *Id.* at 467.

31. See 17 U.S.C. § 106(2) (2006) (describing the right to prepare derivative works based on the copyrighted work).

32. See § 106(5) (providing for the right to display the copyrighted work publicly).

33. *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001).

34. *Id.* at 265.

35. *Id.* at 266.

36. *Id.*

37. *Id.* at 269.

38. *Id.* Another series of quilts produced by Banian did not infringe because of a lack of substantial similarity. *Id.* at 274–75.

district court to determine appropriate remedies.³⁹ As in *Brown*, the court found that quilt patterns were copyrightable subject matter and that unauthorized copies infringed upon the rights granted to Boisson under copyright law.⁴⁰

Courts have found that the designs of quilts are copyrightable material, as they are physically or conceptually separate from the utilitarian aspect of the quilt. This is appropriate and helpful for the designer, but it falls short of treating the quilt as an artwork. Perhaps the bias against a utilitarian object traditionally created by women is a remnant or symptom of gender bias. “Domestic practices, especially those involving needle and thread, have suffered in cultural contexts that have valued and conferred legitimacy on the work of ‘professionals’ (historically, well-educated and well-traveled white males).”⁴¹ The opportunity and ability for the artist to protect her quilt designs is encouraging. However, the inability of the quilt artist to qualify for the elevated rights provided in § 106A of the Copyright Act, the “rights of certain authors to attribution and integrity,” is contrary to the policy goals of VARA.⁴²

II. VISUAL ARTISTS RIGHTS ACT OF 1990

After one hundred years of discussion, the United States joined the Berne Convention in 1988.⁴³ To comply with Article 6*bis* of the Convention, Congress amended U.S. copyright law, adding § 106A to address “moral rights” for a specific group of artists.⁴⁴ As Roger J. Sherman states, “moral rights” are not the economic rights normally associated with copyright but the artist’s connection to their work.⁴⁵

The moral rights concept is derived from the French concept of *droit moral*, where the personal intangible relationship is protected apart from financial interests and even ownership of a work.⁴⁶ Some consider

39. *Id.* at 276.

40. *Id.*

41. Michael James, *Foreword* to WILD BY DESIGN: TWO HUNDRED YEARS OF INNOVATION AND ARTISTRY IN AMERICAN QUILTS ix (Janet Catherine Berlo & Patricia Cox Crews eds., 2003).

42. 17 U.S.C. § 106A (2006).

43. H.R. REP. NO. 101-514, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917.

44. *Id.*

45. Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 379 (1995) (citing ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 66 (Commission of the European Communities trans., Sijthoff & Noordhoff, 1978)).

46. *Id.*

that translating *droit moral* to the English “moral rights” is confusing and believe it might be better translated as “rights of personality” or “author’s rights.”⁴⁷ France has a broader defined scope for works and its creators than does the United States. In France, all copyrightable material is protected, and more rights than attribution and integrity are provided.⁴⁸ All countries participating in the Berne Convention have some form of authors’ rights, from the broad scope under French law, to the narrow scope of the United States. Thus, in other countries, artists who create works likely have greater non-economic rights than if they create artwork in the United States. This disparity seems to undermine the constitutional goal of supporting the progress of science and the arts as set out in Article I, Section 8, Clause 8,⁴⁹ but that is arguable if it is believed that only economic factors motivate artists to create.

Under VARA, three rights are granted:⁵⁰ (1) the right of attribution, which allows artists to claim their work and to prevent their name being used for works they did not create; (2) the right of integrity for which, in the case where the work has been distorted or mutilated, the artist can prevent her name from being used; and (3) for works of “recognized stature” the right to prevent intentional modifications of the work or any intentional or grossly negligent destruction.⁵¹ Congress limited the rights provided in § 106A to those of certain visual artists.⁵² Congress created a limited list of artworks that would be considered works of visual art under VARA: single copies or limited editions of paintings, drawings, prints, sculptures, and photographs, prepared for exhibition purposes only.⁵³ The list of works that do not qualify, including applied art, is much longer than the list of allowable artworks.⁵⁴ Many of the

47. *Id.*

48. Patrick Flynn, Annotation, *Validity, Construction, and Application of the Visual Artists Rights Act*, 138 A.L.R. Fed. 239, I § 2[a] (1997).

49. U.S. CONST. art. I, § 8, cl. 8.

50. While there are three rights, for the purposes of this Comment, the third right to prevent destruction of a work of “recognized stature” is implied when references are made to the rights of attribution and integrity. The “recognized stature” limit adds an additional level of complexity to the analysis of protected visual works and is beyond the scope of this Comment.

51. 17 U.S.C. § 106A (2006). The limitations regarding destruction and mutilation include the changes naturally occurring from time or the nature of the materials. *Id.*

52. 17 U.S.C. § 101 (2006).

53. *Id.* The limited edition of a visual art must be 200 copies or fewer and must be numbered and signed by the artist to qualify. *Id.*

54. *Id.* The complete list of excluded works includes:

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical,

works on the disqualified list are typically created by groups of artists, such as motion pictures for mass production, or for more crassly commercial purposes, such as advertising or promotional pieces. Congress excluded such works because it did not expect the creators of those works would have the type of close personal connection to the work that painters or sculptors would have to their artwork.⁵⁵

A. Policy and Goals of VARA

The United States adopted VARA to comply with the moral rights standard required under the Berne Convention, as well as to express Congress' belief that providing artists with the rights of attribution and integrity would create an environment that encouraged, supported, and enhanced artistic endeavors.⁵⁶ At that time, several states provided artists' moral rights protection, and members of the legal community thought that combining rights to privacy, publicity, and protection against defamation protected moral rights adequately.⁵⁷ Congress, however, desired to develop federal rights because of the role artists play in national culture.⁵⁸ Congress associated the integrity of the country's culture with the integrity of the individual artist's integrity and, for that reason, determined that artists' integrity was important to preserve.⁵⁹ Testimony from members of the arts community at the subcommittee meetings supported VARA as a means to provide artists the incentive to do their best, to not be motivated only by profit, and to protect the country's historical legacy.⁶⁰ As Arnold Lehman stated, "[t]he arts are an integral element of our civilization; the arts are fundamental to our national character and are among the greatest of

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.

55. See H.R. REP. NO. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919.

56. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995).

57. TAD CRAWFORD, *LEGAL GUIDE FOR THE VISUAL ARTIST* 55 (4th ed. 2001).

58. H.R. REP. NO. 101-514, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915-16.

59. *Id.* at 6916.

60. *Id.*

our national treasures.”⁶¹ Congress did not justify expanding copyright protection merely to comply with the Berne Convention. Protecting the rights of attribution and integrity with VARA also recognizes the role artists and their work have in American culture, which extends beyond the economic value traditionally protected under copyright.⁶²

B. Visual Works of Art Included and Excluded from VARA

Congress did not intend for the enhanced rights of attribution and integrity to extend to all authors who created copyrightable subject matter.⁶³ The legislative history shows clear intent to limit the scope of the act.⁶⁴ Representative Edward Markey’s comment best illustrates this intention when he said, “I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered. This legislation covers only a very select group of artists.”⁶⁵ For VARA, Congress did not use the existing definition for pictorial, graphic, and sculptural works in the Copyright Act. Instead, Congress specified a new definition of visual arts that limited the type of works and the number of allowable copies eligible for protection.⁶⁶

The legislative history exhorts courts to use “common sense” and to use expertise from the artistic community to determine whether a work is defined as a visual art under VARA.⁶⁷ The legislative history also indicates that there are not limits on the materials used, such as allowing for paintings on plaster (as a mural often is) as well as traditional canvas.⁶⁸ Sculpture is likewise referred to using an assortment of materials.⁶⁹ The legislative history indicates that a work such as a collage created with excluded material such as applied art would still qualify as a visual artwork as a “new and independent work.”⁷⁰ This suggests Congress focused on protecting artworks that most embody the artist’s personality and creativity. As noted, “[a]n artist’s professional

61. *Id.* at 6917.

62. *Id.* at 6916.

63. *Id.* at 6921.

64. *Id.*

65. *Id.*

66. *Id.* Visual artworks qualifying under VARA are single copies or limited editions of paintings, drawings, prints, sculptures, and photographs, prepared for exhibition purposes only. 17 U.S.C. § 101 (2006).

67. H.R. REP. NO. 101-514, at 11 (1990), *reprinted in* 1990 U.S.C.A.N. 6915, 6921.

68. *Id.*

69. *Id.*

70. *Id.* at 6923–24.

and personal identity is embodied in each work created by the artist. Each work is a form of personal expression”⁷¹ and thus needs the rights of attribution and integrity protected.

III. QUILT ARTISTS’ RIGHTS

Quilt artists enjoy copyright protection on their quilt designs. Courts have found quilt designs to be copyrightable material and have held that unauthorized copying, derivative works, and display infringe on quilt designers’ rights and have awarded damages accordingly.⁷² VARA rights, however, do not seem to pertain to quilts because quilts are applied art and VARA excludes applied art.⁷³ Analyzing how courts used legislative history to interpret VARA suggests an opportunity for VARA rights to extend to quilt artists. Also, the quilt artist may be eligible for artist’s rights under state statutes that have a broader definition of protected artworks.

A. Elevating Quilt Artists’ Rights to Include Rights of Attribution and Integrity

1. Determining Congressional Intent for VARA

Limited precedent exists on claims by visual artists that their rights to attribution and integrity exist under VARA. Thus, determining congressional intent concerning the scope of VARA remains difficult.

The United States Court of Appeal for the Second Circuit in *Carter v. Helmsley-Spear* evaluated the claim the plaintiffs, John Carter and two other artists, filed to prevent the defendants, Helmsley-Spear, from altering the artwork installed by the plaintiffs in a building owned by the defendants.⁷⁴ The plaintiff claimed the walk-through sculpture was protected under VARA.⁷⁵ The defendants argued that because the

71. *Id.* at 6925.

72. *See Brown v. McCormick*, 87 F. Supp. 2d 467 (D. Md. 2000).

73. 17 U.S.C. § 101 (2006).

74. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80–81 (2d Cir. 1995). Subsequent cases cite *Carter* for its thorough history of moral rights in the United States and the legislative history of VARA. *Phillips v. Pembroke Real Estate*, 459 F.3d 128, 133 (1st Cir. 2006), cites *Carter* for VARA’s history, the legislative history’s comment instructing courts to use common sense and the concept that an artwork can be composed of different media, but still be considered an artwork under VARA. In *Phillips*, the First Circuit found that VARA did not apply to site-specific art. *Id.* at 143. It appears that *Carter* has been relied on steadily for VARA discussions in since 1995, and it is still a primary source of judicial precedent for VARA.

75. *Carter*, 71 F.3d at 84.

sculpture was attached to parts of the building lobby's floors, ceilings, and walls, which are utilitarian objects, the sculpture was applied art and not a visual work as defined by VARA.⁷⁶ The Second Circuit rejected the defendants' argument on three grounds. First, the Second Circuit held that applied art is multi-dimensional ornamentation or decoration attached to utilitarian objects.⁷⁷ Parts of the sculpture, however, did not become applied art when installed to the walls and ceilings of the lobby.⁷⁸ Second, the Second Circuit rejected how the defendants defined applied art because according to the defendants' definition VARA would not apply to any work of visual art installed in buildings, and that result would be contradictory to the purpose of the act.⁷⁹ Third, the court used the legislative history to decide that even if parts of an artwork were applied art, there was nothing in VARA to proscribe protecting works that incorporate elements of applied art.⁸⁰ The artwork ultimately did not fall under VARA protection because the court held the sculpture was a work for hire, which is excluded from VARA.⁸¹

The concept that artwork, such as a collage that had applied art incorporated into it, is eligible for protection under VARA,⁸² creates opportunity for quilt artists. The Second Circuit said in *Carter* that a multi-part sculpture could incorporate applied art and yet as a whole, the sculpture qualified as VARA-protected visual art.⁸³ A quilt on its own is not visual art as recognized under VARA, but what about a "sculpture" that consisted of several quilts hanging in a certain manner? If a quilt artist displays work that way, could the artist claim VARA rights? That approach would not serve the goals Congress articulated when it enacted VARA. Thus, the inconsistency supports an argument that a quilt is a qualifying work of visual art, and the quilt artist should be protected under VARA.

In *Pollara v. Seymour*, the United States Court of Appeals for the Second Circuit examined the claim plaintiff, Joanne Pollara, made against the defendants, including Joseph Seymour, for violating her

76. *Id.* at 85.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 88.

82. H.R. REP. NO. 101-514, at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921.

83. *Carter*, 71 F.3d at 85.

rights under VARA.⁸⁴ Pollara created a banner for a non-profit group to be used in a display in New York City, and the banner was destroyed by a state employee because it was displayed without a permit.⁸⁵ Pollara sued the defendants under the VARA provision that protects an artist's right not to have her work destroyed.⁸⁶ The United States District Court for the Northern District of New York dismissed the suit, and the Second Circuit affirmed the district court's decision that Pollara's banner was not a work of visual art protected by VARA because Pollara made the banner for the purpose to promote the mission of the non-profit group and promotional works are expressly excluded from VARA protection.⁸⁷

In *Pollara*, the Second Circuit relied on the limits defined within the legislative history to decide whether the banner qualified as a work of visual art.⁸⁸ The Second Circuit said, "Congress instructed courts to 'use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition' . . . and explicitly stated that 'whether a particular work falls within the definition should not depend on the medium or materials used.'"⁸⁹ The Second Circuit's use of legislative history to discern Congress's intent bodes well for quilt artists to be protected by VARA. The decision also implies a court would be open to the argument that a work of art that embodied the qualities described in the legislative history deserves VARA rights.

Certainly, a case could be made that the artistic community views the work of quilt artists as art to be compared to noted masters of other visual arts that are protected by VARA. As Ruth Marler writes in *The*

84. See *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003). While *Pollara* has not been utilized as frequently as *Carter* for judicial precedent for VARA, cases subsequent to *Pollara* often use both cases for interpreting legislative history of VARA. Two cases that cite both *Carter* and *Pollara* for their VARA discussions and legislative history are *Hunter v. Squirrel Hill Associates*, 413 F. Supp. 2d 517, 520 (E.D. Pa. 2005), and *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004). In *Hunter*, the District Court found the artist's VARA rights were violated when the defendant's negligence damaged a mural she had painted, however, the statute of limitations had passed the claim was dismissed. In *Scott*, the District Court found for the defendants because the plaintiff, the artist, failed to establish her sculpture was of recognized stature to qualify for VARA.

85. *Pollara*, 344 F.3d at 267.

86. *Id.* at 266.

87. *Id.* at 271.

88. *Id.* at 269.

89. *Id.* (citing *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995) (quoting H.R. REP. NO. 101-514, at 11 (1990), reprinted in 1990 U.S.C.A.N. 6915, 6921)).

Art of the Quilt, “the quilt has achieved acceptance as a high art form.”⁹⁰ In 2002, the work of the quilters from Gee’s Bend, Alabama, toured eleven art museums throughout the country.⁹¹ When the exhibit was opened in New York at the Whitney Museum of American Art, New York Times Art Critic, Michael Kimmelman wrote in his review,

[the quilts] turn out to be some of the most miraculous works of modern art America has produced. Imagine Matisse and Klee . . . arising not from rarefied Europe, but from the caramel soil of the rural South in the form of women, descendants of slaves when Gee’s Bend was a plantation.⁹²

He also compares various quilts with “painterly equivalents” that would be familiar to those New Yorkers appreciative of modern art.⁹³ The non-profit organization Tinwood Alliance, which handles the Gee’s Bend Cooperative’s transactions with museums and manufacturers, has contracts with the individual quilt artists that incorporate moral rights because of the intensely personal nature of the quilt art.⁹⁴

The Gee’s Bend quilters are a prime example of the relationship of artist to artwork that inspired VARA. “The quilts of Gee’s Bend communicate . . . an improvisational flair. Beyond survival . . . and beyond the mathematical purity of geometric form, this culturally constructed aesthetic of improvisation . . . introduces the maker’s personality and the role of individual performance into the quilt aesthetic.”⁹⁵ VARA’s legislative history emphasized that the personal

90. RUTH MARLER, *THE ART OF THE QUILT* 20 (2001). The author summarizes four functions of the modern quilting community: (1) the traditional school where women use and adapt old patterns while using modern materials and tools, including quilt classes, shops, and associated businesses; (2) the use of quilts in the political sphere advancing causes such as feminism and AIDS awareness; (3) the study of the history of quilts as a social history tool to uncover the lives of ordinary people, the hidden history of daily life; and (4) the acceptance of quilt as a high art form, with quilts classified as “fiber art.” *Id.*

91. Victoria F. Phillips, *Commodification, Intellectual Property and the Quilters of Gee’s Bend*, 15 AM. U. J. GENDER SOC. POL’Y & L. 359, 366 (2007).

92. Michael Kimmelman, Art Review, *Jazzy Geometry, Cool Quilters*, N.Y. TIMES, Nov. 29, 2002, at E33.

93. *Id.*

94. Phillips, *supra* note 91, at 368–69. Variable rights agreements exist, depending upon when the quilts were acquired by Tinwood. For all acquisitions after 1984, the artists retain all rights, and Tinwood pays a royalty for all quilts acquired before 1984 based on the French doctrine *droit de suite*, which provides for a resale royalty to the artist. *Id.* at 369.

95. William Arnett, *Gee’s Bend: The Architecture of the Quilt*, in GEE’S BEND: THE ARCHITECTURE OF THE QUILT 8, 31–34 (Paul Arnett, Joanne Cubbs, & Eugene W. Metcalf Jr., eds., 2006).

connection is the reason to protect the rights of attribution and integrity to support the policy of encouraging artistic efforts. Because the quilter's personal identity and expression are embodied in each quilt, the artist should have her VARA rights of attribution and integrity protected.

2. Protection Under State Artists' Moral Rights Statutes

Several states, with California and New York leading the way, have enacted various forms of artists' rights statutes.⁹⁶ VARA's legislative history outlines the question of whether it preempts these statutes.⁹⁷ VARA preempts state law for the artworks protected under VARA.⁹⁸ State statutes are not preempted, however, for works protected under state law that are excluded from VARA's protection.⁹⁹ Ten out of twelve states with artists' rights statutes expand the range of protected artwork, and many of the statutes use the inclusive phrase "including but not limited to."¹⁰⁰ Quilt artists, therefore, can enjoy elevated rights if they reside in a state with a statute that does not exclude their art. In VARA's legislative history, however, the Register of Copyrights is quoted as saying that "[a] single Federal system is preferable to state statutes . . . on moral rights because creativity is stimulated more effectively on a uniform, national basis."¹⁰¹ Thus, because quilt artists are included under state statutes, they should be included under VARA to achieve a uniform national system.

B. Maintaining the Status Quo for Copyright Protection of Quilt Designs

An argument against protecting quilt artists with VARA is based in the factor of the artist's initial purpose when creating the artwork. In *Pollara*, the Second Circuit identifies the artist's purpose as a factor for whether VARA applies to an artwork.¹⁰² The Second Circuit stated that the "[p]rotection of a work under VARA will often depend, as it does

96. Patrick Flynn, Annotation, *Validity, Construction, and Application of the Visual Artists Rights Act*, 138 A.L.R. Fed. 239, I § 2[a] n.1 (1997). States with artists' moral rights statutes are California, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. *Id.*

97. H.R. REP. NO. 101-514, at 21 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6931.

98. *Id.*

99. *Id.*

100. States that include or have inclusive language: Connecticut, Illinois, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island.

101. H.R. REP. NO. 101-514, at 21 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6931.

102. *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003).

here, upon the work's objective and evident purpose."¹⁰³ In *Pollara*, the court found that the artist created the banner to promote the message of a non-profit group.¹⁰⁴ Therefore, VARA did not apply because the purpose of the banner was not to be an exhibit but a promotion. Another example of examining the artist's purpose is that VARA only applies to photographs that are created for an exhibit.¹⁰⁵ As a result, the photographer's purpose when creating the photograph affects his VARA rights. If a photographer shoots a photo for an advertisement and realizes it has artistic value, he cannot make a claim under VARA because he did not initially take the photo for the purpose of exhibit.¹⁰⁶ Likewise, a quilt made to cover a bed and provide comfort could be precluded from VARA based on the quilter's purpose when making the quilt.

Purpose, however, can be used in the quilt artist's favor. Some quilt artists have the sole purpose to create a work of art. The quilt is created for display and to be appreciated for its artistic qualities. This quilt artist is personally connected to her work and arguably qualifies as an artist VARA intends to protect. Using the Gee's Bend quilt artists as a counterpoint, however, illustrates the inequity of VARA. Their quilts were not intended to be artwork. The quilts' purpose was to cover beds and to keep drafts out of the house.¹⁰⁷ But the quilters have great personal connection and stake in the creation of their quilts. Museums have displayed the Gee's Bend quilts as art, and the quilts have been compared to great paintings.¹⁰⁸ It is contrary to the policy of encouraging creative works that the court prohibits applying VARA because the quilts were not created with the purpose of being art.¹⁰⁹

103. *Id.*

104. *Id.* at 270.

105. H.R. REP. NO. 101-514, at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921.

106. *Id.* at 6921-22.

107. Kimmelman, *supra* note 92.

108. *Id.*

109. If this point were argued in court, one counterargument in favor of the Gee's Bend quilters is the tradition they had in displaying their quilts on clotheslines. The residents of Gee's Bend would stroll around admiring and comparing their neighbors' quilts. Arnett, *supra* note 95, at 31. This might constitute sufficient exhibit purpose to satisfy VARA. The legislative history discussed the scenario that a photograph created for the purpose of being exhibited but then used for non-exhibition purposes would not deprive the photographer's VARA rights for the original photo or the limited edition of it. H.R. REP. NO. 101-514, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6922.

CONCLUSION

The quilt artist can find some intellectual property rights comfort because she can protect the design of the original pattern her quilt in copyright, but protecting only the design is inadequate. VARA misses an opportunity to support the goals of furthering artistic culture in this country when it excludes quilt artists from the rights of attribution and integrity. A quilt created by an individual is a unique work and is not created for mass production. The artist makes a personal statement with her quilt. This applies whether the quilt is created in poverty as part of a culture, as with the Gee's Bend quilters,¹¹⁰ or by a quilt artist who has chosen quilting over painting because of the expression the artist can accomplish in this medium.

Admitting quilt artists to the protected class of visual artists is not a foregone conclusion. A strong case can be made, however, because VARA's legislative history directs the courts to use common sense and does not confine materials used to an enumerated list. It appears in the legislative history that some artworks might not obviously be included. But there is enough latitude for the courts to evaluate artwork to ensure that the goals and the policies represented by VARA are advanced. A quilt artist deserves to be protected by VARA because "professional and personal identity is embodied in each work."¹¹¹

MICHELLE MORAN*

110. Arnett, *supra* note 95.

111. H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925.

* The author is a 2009 graduate of Marquette University Law School, Milwaukee, Wisconsin. She would like to thank Professor Kali Murray for her enthusiastic, extensive, and expert encouragement and guidance for this Comment.