

SUBSTANTIALLY MODIFYING THE VISUAL ARTISTS RIGHTS ACT: A COPYRIGHT PROPOSAL FOR INTERPRETING THE ACT'S PREJUDICIAL MODIFICATION CLAUSE

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After years of petitioning by artists and art enthusiasts, the passage of the Visual Artists Rights Act of 1990 finally conferred upon U.S. artists certain moral rights long enjoyed by their European counterparts: the personal, non-economic rights that artists hold in their works. Specifically, the Act forbids the destruction of works that are "of recognized stature" and modifications of works if such modification would be "prejudicial to [the artist's] honor or reputation." The Act, judicial opinions, and academic commentaries, however, have not defined the meaning of the prejudicial modification clause. This Comment suggests that the adoption of a "substantial modification" standard, drawing from the copyright doctrine of "substantial similarity," provides a useful framework for objectively determining prejudicial modification.

Under the proposed substantial modification standard, only quantitative or qualitative modifications that are sufficiently significant would be considered prejudicial to the artist. In conducting a substantial modification analysis, a decisionmaker would evaluate the quantitative component of a modification, including the amount, duration, and observability of the modification, as well as the qualitative component of a modification, including changes to the expression or feeling conveyed by a work. Modifications that are merely quantitative in nature would be considered presumptively non-prejudicial unless the plaintiff could show that the quantitative change alone resulted in prejudice. A plaintiff's showing of any qualitative modification, on the other hand, would result in a rebuttable presumption in favor of prejudice. The proposed standard organizes the Act's patchwork of protections and exceptions into a cohesive whole, provides a framework for efficient adjudication by litigants, judges, and juries, and conforms with the legislative history of the Act, the current U.S. copyright regime, and the traditional moral rights doctrine.

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