

Oyez!

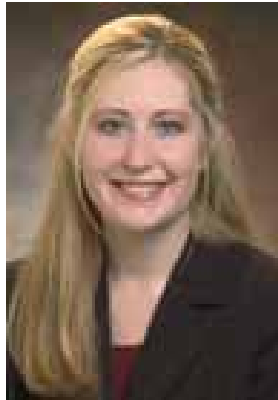
Fall Newsletter for the Young Lawyers Division 2007

Moral Rights in American Copyright Law

By Heather Hubbard

Moral rights are puzzling and unfamiliar to many Americans. Originating from the French term "*le droit moral*," moral rights are those that are of a spiritual, non-economic and personal nature; they are inalienable, natural rights that are considered an extension of an artist's personality and reputation. These rights are not based on economic protection of copyrightable works. The system in the United States is fundamentally different. The basis of copyright law in the United States is based entirely on an economic analysis: if we do not protect the rights of artists, creativity will be stifled and new work will not be created.¹

However, moral rights legislation has been attempted in the United States. The first moral rights bill was introduced in Congress in 1979, but it had very little support. For over one hundred years, scholars, artists and politicians have debated as to whether the United States should join the Berne Convention because of the moral rights requirement. Many states took the issue into their own hands. The first state moral rights act was passed in 1979 in California.² New York fol-



lowed suit in 1983.³ Twelve other states passed a moral rights act within the next decade. Tennessee never passed a similar law. Although the United States joined the Berne Convention in 1998, it was not until 1990 that Congress passed the Visual Artists Rights Act ("VARA") in order to comply with the minimum moral rights requirements of the Convention.⁴

Despite this step towards recognizing moral rights, many refer to VARA as mere "window dressing" because of its limited rights and narrow scope.

Under VARA, moral rights belong to the author only and not necessarily the copyright owner.⁵ Therefore, even if an author transfers her copyright, she cannot transfer her rights under VARA.⁶ Although moral rights cannot be transferred, they may be waived.⁷ Additionally, the rights exist only during the life of the author.⁸ The rights under VARA include attribution (the right to claim of authorship) and integrity (the right to prevent distortion, mutilation or modification that is prejudicial to honor and reputation and/or intentional or grossly negligent destruction of a work of recognized stature).⁹ There are two

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NBA YLD
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From the President . . .



Emily Shouse

GET INVOLVED - THE YLD NEEDS YOU!
(OR WHY YOU SHOULD GET INVOLVED IN THE YLD)

At the beginning of my legal career, my mentor did not suggest that I get involved in the YLD – he insisted, and I am forever in his debt for it. I volunteered for a couple of committees and within two years, I was chairing the Carbolic Smoke Ball committee and sitting on the YLD Board of Directors.

There are many benefits to be gained from getting involved with the YLD: 1) Make new friends, 2) Develop your career, 3) Contribute to the Nashville community, 4) Have fun, 5) Impress the partners at your firm, and 6) Develop leadership skills.

There are also many levels of involvement with a time commitment to meet every schedule.

1) Come to the social events – The Social Committee plans a social event almost every month. Happy hours, wine tastings, Sounds games, etc. Come out, have a refreshing beverage and meet some of your peers.

2) Join a committee – The YLD has numerous committees to fit a wide variety of interests – you could help plan the Davidson County High School Mock Trial Competition, work on the YLD newsletter, *OYEZ!*, help with the Carbolic Smoke Ball or the Race Judicata, both of which benefit local non-profits, produce CLE programs, or plan seminars addressing Quality of Life issues.

3) Volunteer for an event – If you just want to get your feet wet or are not able to make a big time commitment, volunteer a couple of hours for one event - judge a round of the Mock Trial competition, hand out water to runners at Race Judicata or agree to collect toiletry supplies from your firm for the Toiletry Drive for the Homeless.

4) Write an article for *OYEZ!* – Every issue of the *OYEZ!* features a front page an article on a substantive legal issue. This is a great way to get your name (and face – the author’s picture is printed) in front of every member of the YLD. It also gives you a chance to showcase your knowledge on a legal issue and makes you the go-to person for referrals on that issue.

5) Attend a CLE produced by the YLD – There are many options for completing your CLE requirements, but the YLD produces three high-quality CLE programs every year. They are a great way to meet your requirements and support the YLD at the same time.

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Over the course of the next year, you will receive announcements about all of these events, volunteer opportunities and more. Your participation will make the YLD a stronger and more interesting group and, speaking on behalf of the Board of Directors, we look forward to getting to know you. If you would like more information about joining a committee or writing an article for *OYEZ!*, please contact me at eas@iplawgroup.com.

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different types of recognized stature: artists of recognized stature and works of recognized stature. An example of the former would be Ansel Adams – because of his stature as an artist, any photograph he takes (that is for exhibition only or in a numbered, signed, limited print) would qualify for protection under VARA. To enjoy the additional protection against intentional or grossly negligent destruction of a work, artists that are not so well known (and most are not) must prove that the particular artwork at issue has gained recognized stature within the artistic community. Expert testimony is often critical to this analysis.

Unlike their European counterparts, only a very limited group of artists in the United States is entitled to protection of moral rights because VARA only protects paintings, drawings, prints, sculptures and still photos for exhibition only and existing in limited edition of two hundred or fewer signed by the author.¹⁰ Even if an artist qualifies for moral rights protection under VARA, there are numerous exceptions, including passage of time, inherent nature of materials, conservation measures, public preservation and reproductions.¹¹ There are also special rules concerning artwork that is incorporated as part of a building.¹²

If an artist qualifies, she is free to pursue an injunction to prevent destruction or muti-



lation, statutory damages, enhanced damages (for willfulness), and attorney's fees.¹³ Unlike traditional copyright claims, registration is not required for an author to be eligible for statutory damages or attorney's fees.¹⁴

Some of the more interesting legal opinions related to VARA are briefly described below:

NASCAR Trophy - The designer of the new Nextel Cup trophy had no right to attribution because he merely created a technical drawing. Thus, the president of the Franklin Mint was permitted to publicize that he was the designer of the trophy even if he really was not.¹⁵

Stargazer Series – The artist of a popular “Stargazer” series in New York could not protect against the destruction of a 40’ x 10’ steel swan “Stargazer” sculpture because it was in a private backyard with tall hedges. As such, the artwork itself was not readily viewable by the public or artistic community and could not be of “recognized stature” in its own right.¹⁶

Forest Myer's “The Wall” in Soho - Commissioned in 1972, the new owner of a building in Soho wanted to remove artwork (painted wall with channel iron and projections of aluminum) from the side of that building in order to sell advertising space. The court held that the artwork would not be

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destroyed by removing it because it could be taken apart and then “revived.” Additionally, the court rejected the argument that placement on that specific site was part of the artwork itself.¹⁷

Jan Randolph Martin’s “Symphony #1” in Indianapolis – A 20’ x 40’ stainless steel sculpture was bulldozed by the city while the artist and city were negotiating to move the artwork prior to tearing down the park and converting it to housing. Although Martin was successful on his VARA statutory damages claim, he was not entitled to willful damages because the court determined that the bulldozing, in spite of ongoing negotiations to move the artwork, was merely a “bureaucratic failure.”¹⁸



New York City Community Garden – A once rundown park that was revived by local artists, including sculptural pieces and several murals, was not entitled to protection because the artists did not request permission. Because the artwork was technically considered to be the result of trespass, it did not matter that the artwork received recognition and helped revitalize that area.¹⁹

After reading this article, you might be asking yourself, how is this useful to me? If you are at all interested in or have respect for the arts, then the rationale behind protection for artists merits your attention. The United States’ most recent attempt to recognize limited moral rights is one such protection. If you have any interest in representing artists and exploring the intricacies of VARA, you might get the opportunity to pursue such a claim by volunteering for pro bono organizations such as the Tennessee Volunteer Lawyers for the Arts.²⁰

Heather Hubbard is an attorney with Waller Lansden Dortch & Davis and practices in the areas of trial and appellate litigation and intellectual property.

Endnotes

1. “[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of science.” The Federalist No. 43, p. 272 (D. Rossiter ed.1961).

2. California Civil Code § 987.

3. N.Y. Arts & Cultural Affairs Law §§ 14.51 – 14.59.

4. Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis; 17 U.S.C. § 106A.

5. 17 U.S.C. § 106A(b). It is also important to remember that “works made for hire” in the United States actually vest in the person or entity commissioning the work. These “works made for hire” are excluded from VARA because the creator is deemed to have no rights in the work after its creation.

6. 17 U.S.C. § 106A(e).

7. To effectively waive moral rights under VARA, the waiver must be written and signed by the author. *Id.*

8. If the work was created before VARA and the work has not been parted with, then the protection is life plus seventy years. If the work was created before 1990 and the author has sold copies or otherwise parted with the work, then she has no rights under VARA. 17 U.S.C. § 106A(d).

9. 17 U.S.C. § 10A(a).

10. 17 U.S.C. § 101.

11. 17 U.S.C. § 106A(c).

12. 17 U.S.C. § 113(d). If the artwork was incorporated in the building prior to June 1, 1991, without the artist’s consent to the installation, or after June 1, 1991 without a written waiver, then the artwork cannot be removed if it will cause the destruction, muti-

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The YLD Really does make a difference...

In 2007, the Young Lawyers Division hosted two successful fundraising efforts, the Carbolic Smoke Ball and the Land Rover Race Judicata.

The Carbolic Smoke Ball, in its tenth year, raised over \$17,000 for CASA (Court Appointed Special Advocates). CASA provides legal assistance for abused, neglected, and/or abandoned children.

The 2007 Land Rover Race Judicata, consisting of both a 5K and 10K race, was held for the benefit of Magdalene House—a charity directed at woman with a criminal history of addiction and prosecution. The success of the fund raising effort was evinced when the Young Lawyer’s Division presented Magdalene House with a check for almost \$14,000.

As such, the Young Lawyer’s Division helped to raise over \$31,000 in 2007 for two very worthwhile causes.



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lation or other modification to the work. 17 U.S.C. § 113(d)(1). Similarly, if the artwork can be removed without destruction or mutilation of the work, the owner must notify the artist and the artist has 90 days to remove or pay for the removal. 17 U.S.C. § 113(d)(2).

13. 17 U.S.C. §§ 502, 504-505.

14. 17 U.S.C. § 412. Criminal penalties are not available under VARA either. 17 U.S.C. § 506(f).

15. *NASCAR v. Scharle*, 184 Fed. Appx. 270, 2006 U.S. App. LEXIS 15254 (3rd Cir. 2006).

16. *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004).

17. *Board of Managers of Soho Int’l Arts Condominium v. City of New York*, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005).

18. *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

19. *English v. BFC&R East 11th Street, LLC*, 1997 U.S. Dist. LEXIS 19137 (S.D.N.Y. 1997).

20. You can get more information on this worthy organization by visiting www.tnvla.org.

THE DAVIDSON COUNTY MOCK TRIAL COMPETITION WANTS YOU!



WE NEED VOLUNTEERS!

**PLEASE MARK YOUR
CALENDARS
FEBRUARY 15 & 16, 2008**

The Mock Trial Competition is one of the YLD's signature events and it provides a great service to the community and establishes goodwill for attorneys and the bar in general.

The YLD **needs your** help with the event as **SCORERS, JUDGES & BAILIFFS** for all rounds!

For more details please contact either
Patrick Witherington at
pwitherington@howell-fisher.com
or Kimberly Silvus at
Kimberly@gideonwiseman.com



There is an immediate need for assistant coaches for two of the competing teams. Please contact us if you can help!

The OYEZ! Attorney Cross Examination

In an effort to prove to the world, and ourselves, we are not blood sucking leeches (except maybe that Gossip editor guy), the Oyez! is implementing, or maybe reviving - we forget - a series called "Cross Examination" where YLD members, just like yourself, are surveyed and asked a few simple questions. This gives each of a chance to learn a little something about a colleague in the bar and helps us remember that there is a human on the other side of the courtroom.

Cross Examination - Leigh Ann Roberts

1. What drew you to the practice of law?

I have always been a problem-solver and a person in whom people confide. I also love learning and the lawyers I knew growing up said that their profession required constant learning. I also knew from a very young age that I wanted to carry a briefcase- it was my first toy equipped with stapler, stationary, and other office supplies.

2. What is the focus of your practice?

Civil Mediation and conflict resolution, with an emphasis on employment/workplace conflicts, commercial disputes and construction disputes. Mediation is my true profession and what I went into business to do full-time. I also have a transactional law practice and provide support to small to medium size businesses and non-profit organizations.

3. What do you enjoy doing in your free time?

Free time as a business owner is often filled with quasi-business activities such as developing marketing materials and networking with other professionals but when I am REALLY enjoying "free time", I am usually hiking at Radnor, gardening or enjoying live music. I also conduct Leadership and Communication trainings with my husband for managers and other organization leaders several weekends a year.

4. What is your favorite part of living in Nashville?

I love all the outdoor hiking and recreation areas that are located around Nashville. I also love being able to enjoy an array of live music.

5. If I were not an attorney, I would be . . . either one of those individuals that travels around the globe eating on \$40 a day or an executive director of a local nonprofit organization.

Leigh Ann Roberts
ForwardFocusMediation.com



YLD really does make a difference... (again)

Every year the Homeless Committee of the Young Lawyers Division of the Nashville Bar Association co-sponsors a toiletry drive in conjunction with the NALS-Association of Legal Professionals, Nashville Chapter. This drive provides a much needed service to the homeless community of Nashville and participation from Nashville law firms is invaluable. During the months of August and September, the Homeless Committee collected boxes at numerous participating law firms and public agencies. Donations included over 40 boxes of shampoo, conditioner, soap, mouthwash, toothpaste, and shaving cream. This was approximately a 20% increase from the Toiletry Drive of 2006! Thank you to all of the participants for making this such a successful event.



INTRODUCING THE 2007-2008 YLD BOARD OF DIRECTORS

Being on the YLD Board of Directors is a lot of work – and a lot of fun. The Board is responsible for planning and executing numerous events and activities throughout the year to fulfill the YLD’s mission of “Service to the Community, Service to the Profession.” So while it is fun, it is also a serious commitment of time and energy. Happily, this year’s Board is definitely up to the challenge. Please feel free to contact anyone on the Board if you have questions, suggestions or would like to get involved. Also, please check out the full list of Board Members on Page 2.

Cross Examination - Mark Odle

1. What drew you to the practice of law?

I have always been interested in the law; however, after working in banking for several years, I knew that I wanted to be more involved in the legal aspect of the business.

2. What is the focus of your practice?

My practice is focused in the areas of creditors' rights, consumer and commercial debt collection and judgment recovery.

3. What do you enjoy doing in your free time?

During my free time, I enjoy outdoor activities such as hiking and fishing with family and friends.

4. What is your favorite part of living in Nashville?

My family, as well as friends that I have known for many years, are close to Nashville. Additionally, Nashville is a very welcoming city with many opportunities. It is simply a great city.

5. If I were not an attorney, I would be . . . *I would be pursuing a career in business because I have always had a strong interest in that field.*

Mark Odle

Smythe & Puryear

(picture not available at press time)

TLAP

Do you know a Lawyer who is feeling sad? Call the Tennessee Lawyers Assistance Program and they will help your Lawyer Friend feel glad (or better). Call the Tennessee Lawyers Assistance Program at the number below for help dealing with a range of health and personal issues.

(615) 741-3238

Hey, have ya'll heard about this one...

There is this web site, www.freerice.com, where you can give rice to the World Food Program (WFP) by answering vocabulary questions. Philanthropy and the savant walk hand in hand at this web site...



by
Rob Baker

Word on the Street



Weddings:

YLD Board member **Erin Palmer** of Walker Tipps & Malone married **Ben Polly** on September 24 in St. Simons, Georgia. The happy couple honeymooned in Spain where Erin's luggage joined them three days later. The luggage was not missed.



Births:

Donna L. Roberts of Stites & Harbison and her husband **Steven** had a baby boy, **James Van Roberts**, born August 26, 2007 at 10:17 p.m. James weighed in at 6 ½ lbs and measured 17 ½ inches.

Moves:

Board member and Race Judicata linchpin, **Allison M. "Money" LaRue**, has recently joined Spicer, Flynn & Rudstrom, PLLC.

Sexiest Lawyer Update:

As some of you may be aware, Time Magazine recently named Matt Damon the sexiest man alive. Despite a vigorous write-in campaign, outgoing YLD President **Rocky "I'm Your Lawyer" McElhaney** was passed over. What many of you may not know is that Mr. Damon was adopted (figuratively) by the YLD after his 1997 appearance in the big-screen adaptation of John Grisham's, *The Rainmaker* –



a David-and-Goliath re-do about a young Tennessee lawyer in over his head. What you don't know is that the OYEZ had selected M.D. for its inaugural "Sexiest Lawyer who is Young" award. Recent and somewhat cryptic changes to the YLD bylaws allowed Mr. Damon to keep from aging out. However, due to internal roadblocks and selection committee leaks, Time beat the OYEZ in a race to the newsstand. Apparently Time's editors insist that EVERY scheduled issue be published. Hey Time, OCD much?

Crying 'uncle' to Time's relentless publishing schedule, the OYEZ decided to hand its SILY award to the original runner-up. However, citing limited space on his mantle, Jonathan Richardson turned us down. After many, many, many more attempts, the OYEZ settled on Phil Walker of Waddey & Patterson – that'll teach you to answer your phone.



It turns out Walker and Damon share many similarities. Matt has starred as Jason Bourne in the motion picture franchise (Identity, Su-

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premacry and Ultimatum) that shares the Bourne name. Ironically, Phil was also born – in 1974. Freaky, but it doesn't end there. M.D. brought the mythical duffer Ran-nulph Junah to life in Robert Redford's *The Legend of Bagger Vance* – Walker owns golf clubs. No kidding – but that's not all.

Both men are average height AND build – not to mention the gender similarity (Male and Male-ish). The OYEZ's statisticians were unable to calculate the odds.

Conspiracy theorists will also note that Phil is an accomplished screen actor in his own right – catch his supporting role in Waddey's holiday video short currently showing in limited release at www.iplawgroup.com. Produced in Canada during the latest Hollywood strike – the writing is a triumph. Citizen Kane, meet Pee-Wee Herman. The film is currently without distribution.



When asked to comment on his SILY, Walker responded, "I don't like you 'that way'." After some explanation and more careful enunciation, the I.P. Don Juan let loose with, "At first I was a bit embarrassed. I thought the whole thing was just a little inappropriate, but now that I know that some dude on Music Row picks the winner by himself, I'm just creeped out – and a little paranoid." That seems about right. When pressed even further, Mr. Walker had security escort this reporter out of the building. Touché law boy.

The OYEZ is currently soliciting nominations for next year's SILY. Video submissions will be accepted in the form of an interpretive dance set to the Blake Lewis beat-box track of your choosing.

Race Judicata V

Runners on your marks!



It is almost race time again. On Saturday, March 1st at 8 a.m. in Percy Warner Park, the 2008 Land Rover Race Judicata will commence. Please contact the "Race" committee, Allison LaRue, Erin Palmer Polly, or Cynthia Parson or www.nashvillestriders.com for further details.



Live Long, Run Longer!

HAPPY HOLIDAYS!

Hark! Though the season doth turn and the cold winter is here, the Young Lawyers Division of the Nashville Bar Association wishes you and yours warm wishes, good will and good cheer. Have a very merry holiday season and a happy New Year!



CALENDAR OF UPCOMING EVENTS:



<u>Date</u>	<u>Event</u>
February 15 & 16	Mock Trial
March 1	Race Judicata V