An Artist is Someone who Makes Art: The Legal Definition of Visual "Artist"

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The legal definition of artist appears in myriad fields of law: tax; employment; zoning and land use. But more notable is where the definition is not found: federal statues on the arts and humanities;[1] federal statutory protection of artists' pecuniary and moral rights;[2] federal funding agencies for the arts.[3] Surprisingly,these laws and organizations assumethe definition. Courts also rarely address the definition directly; the inquiry into the legal definition of artist is often ancillary to onedefining "art" or "artistic activity." Indeed, a "legal" artist in one state could not be so defined in another, and the designation of artist may even vary depending on his tax filings, his employment status, and the art disciplines he practices. This paper seeks to provide a broad overview of the many and fragmented views of who an artist is and for what purpose. It suggests that, ultimately, a fixed legal definition of artist may neither exist nor matter.

The scope of the author's research included federal and state statutory and common law, proposed federal legislation, select city municipal codes, treatises on art and copyright, legal and non-legal journals, and general searches of public and private entities like art-related institutes and associations. For state and city-level research, the author focused primarily on four states with large art markets—New York, California, Florida, and Illinois. For tax-related research, the author concentrated on charitable deductions in income and estate tax statutes. For customs-related research, she focused on cases that came closest to addressing "artist" in their discussions of art.

I. Historical Context for Legal Definition

[1] *See, e.g.*, 20 U.S.C. § 952 (1985).
[2] *See, e.g.*,17 U.S.C. § 101 (2010); 17 U.S.C. § 106A (1990).
[3] See, e.g., the National Endowment for the Arts.

During the Middle Ages, an artist was defined by his membership in a trade union.[4] But although artists could define themselves through union membership as recently as the early twentieth century,[5] such trade membership or certification is uncommon for artists today.[6] Historically, the law has tried to define an artist by what an artist is not—a visual artist is not, for example, an artisan.[7] The definition of artist focuses on an artist's activities, as "art" is frequently defined as covering fine art practices like painting, drawing, and sculpture.[8]

II. Definition of Artist on the Federal Level

As mentioned above, neither the Copyright Act[9] nor the Visual Artists Rights Act[10]("VARA") defines artist. Nor does National Endowment for the Arts ("NEA)" or its enabling legislation, the National Foundation on the Arts and Humanities Act[11] of 1965 ("NFAHA").In the case of VARA, one can only infer that an artist is one who makes the types of visual art that are expressly listed as protected. For the NEA, one is left to guess than an artist is one who proposes projects of "artistic excellence" and "artistic merit."[12]Besides their tautological nature (an artist is someone who makes art), these definitions seem rootless and depend on what the meaning of art is—something also in flux.

A. Statutes that Protect Artists' Rights

It is possible that these arts-related statutes may not need to define artist—it may be sufficient to define the protectedor grant-worthy work. Take, for instance, the Copyright Act and VARA. In great detail they define the many types of works potentially covered and categorize

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[4] Alexandra J. Darraby, Art, Artifact, Architecture & Museum Law § 9:54 (2010).
[5] *See*Helen A. Harrison, *American Art and the New Deal*, 6:3 J. AM. STUD. 289, 294 (1972).
[6] *See*Darraby, *supra* note 4, § 9:54.
[7] *See id*.§ 9:55.
[8] *Id*.
[9] *See*17 U.S.C. § 101
[10] *See*17 U.S.C. § 106A.
[11] *See* 20 U.S.C. § 951 *et*. *seq*. (1990).
[12] *SeeGrants, Grant Review Process*,NATIONAL ENDOWMENT FOR THE ARTS, http://arts.gov/grants-organizations/grant-review-process (last visited April 6, 2014), *infra* note 28.

what a work of "visual art" does and does not include.[13] But they define neither "author," which appears throughout the above definitions, nor artist.[14] Because both Acts focus on the work itself—either by setting forth requirements of originality and fixation, or by creating categories of what is and is not visual art—they may already protect the pecuniary and moral rights of the creators of the defined works. Perhaps for VARA to define "visual artist" in addition to "work of visual art" (beyond a definition like a visual artist creates a work of visual art) would be superfluous or lead to inconsistencies. An artist's rights of attribution and integrity are so linked to his or her works that it might be adequate for the law to define only the works themselves. Of course, those rights may hinge upon a court's determination of the work as art.

B. Grant Funding Agencies and Statutes

The history of the NEA also suggests that, at least for grant funding purposes, the legal definition of artist may no longer matter. Indeed, the NEA does not define it.[15]Between evolving assumptions about artists and political controversies concerning funding individual artists, the NEA no longer funds an artist directly, but rather focuses on the proposed project or work. A reference to artist is used within the statute primarily to reference what types of art the NEA will fund.[16] The NEA may even look beyond the project—to funding non-profit organizations or state-level arts programs.[17]

In 1965, the passage of the National Foundation on the Arts and the Humanities Act brought the NEA into existence. The NFAHA represented the federal government's first

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[13] *See* 17 U.S.C. § 101 (not defining "author," but rather approximately 10 types of works).
[14] *Id*.
[15] *See* 20 U.S.C. § 954 (1965, as amended 2014).
[16] *Id*.§ 954(c) ("The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry outa program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts. . . ."); *see also* §§ 954 (g), (p).
[17] Interestingly, many state-level art programs themselves do not define artist (e.g., the California Arts Council's grant funding criteria).*See, e.g*., CAL. CODE REGS. tit.2, § 3604(a) (2014) (only hinting at the definition of artist by stating that individuals who are "working artist[s]/and show professional competence in an artistic discipline" are eligible for funding).

comprehensive support for the arts (aside from the relief-oriented support under the Works Progress Administration during the New Deal).[18] Remarks made during a two-day conference among leading arts professionals—including Roger L. Stevens, the NEA's first chairperson—reveal the assumptions concerning and attitudes towards artists.[19] These assumptions hint at the newly formed NEA's idea of who an artist was and presumably underlie the grant criteria. To the NEA, an artist was one "committed to a search for meanings deeper and more enduring than any provided by the standardization and commodification of culture that were alarming many Americans [in 1965]."[20] An artist had "heightened sensibilities," was "inner-directed," and was not "seduced and corrupted by money."[21] An artist "offered 'an aesthetic alternative to the utilitarian pursuits in which most of us are busily engaged.'"[22] These attitudes concerning who artists were would make the support of artists—by making them feel at once part of American society but also protecting their distance from it—one of the NEA's goals.[23] Although there was no explicit definition, being an artist (as the NEA understood one) was important.

In its early years, the NEA funded individual artists directly and with few restrictions.[24] But as early as 1968, three years into the NEA's existence, the Senate amended the statute to read that "individuals of exceptional talent," were eligible for NEA funding.[25] This amendment was a concession in response to the House of Representatives' proposed amendment to eliminate grants to individual artists entirely—a sentiment that continued through 1995, when such

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[18] MICHAEL BRENSON, VISIONARIES AND OUTCASTS: THE NEA, CONGRESS, AND THE PLACE OF THE VISUAL ARTIST IN AMERICA, 2 (2001).
[19] *Id*. at 3.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 4, *Cf*. idea of contemporary artist starting in 1990s at 100.
[24] *Id*. at 79.
[25] *Id*. p. 20.

fellowships were eliminated.[26] And today, the NEA seems to focus on funding projects, state grants, and non-profit organizations. Indeed, the NEA now awards most of its grants through its Art Works grant category, focusing on a proposed project and organization.[27] Per the NEA's statute, the review panel for grants looks at "artistic excellence" and "artistic merit."[28]Just this year, the 2014 Consolidated Appropriations Act appropriated funds to the NEA (under the NFAHA) for the support of "projects and productions in the arts"[29]—not of artists directly.

B. Taxes

The legal definition of artist is more concrete and relevant here because it is tailored to particular goal: tax deductions and credits. The Internal Revenue Code does not expressly define artist for itemized deductions for individuals' or corporations' income taxes. Rather, it broadly allows deductions for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[30]Most businesspersons are eligible. As applied to the arts, courts look to the trade or business nature of the artistic activity to determine whether a taxpayer is an artist.[31] To be characterized as an artist, a taxpayer must show that he engaged in the trade (making art) with a good faith effort to realize profit.[32]A fact-intensive inquiry, courts have determinedthe good faith expectation of profit of a taxpayer claiming to be

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[26]*Id*. at 20, 89-90.
[27] Thomas Pye, *National Endowment for the Arts Announces Guidelines Available for Fiscal Year 2015 Funding Programs*, NEA, NEWS, (Jan. 7, 2014), http://arts.gov/news/2014/national-endowment-arts-announces-guidelines-available-fiscal-year-2015-funding-programs (last visited April 6, 2014).
[28]*Grants, Grant Review Process*, NATIONAL ENDOWMENT FOR THE ARTS, http://arts.gov/grants-organizations/grant-review-process (last visited April 6, 2014).
[29] Consolidated Appropriations Act, 2014, PL 113-76, Jan. 17, 2014, 128 Stat. 5, Title III (NFAH, NEA, Grants and Administration)
[30] 26 U.S.C. §126(a) (2011).
[31]*Cf*. the City of Los Angeles' broad definition for tax exemptions. Los Angeles, Cal., Code Ch. II, art. 1, § 21.29(b) (2005) (providing tax exemptions for gross receipts attributable to "creative activities" earned when that person is engaged in business as a "creator of visual fine arts").
[32]*SeePorter v*. *Comm'*r, 28 T.C.M (CCH) 1489 (1969), *aff'd* 437 F.2d 39, (2d Cir. 1970).

an artist by looking at how successfully he sold his work, how much revenue he received from the sales, any independent sources of income, and his declared motives.[33]

The U.S. Tax Court's inquiry in *Hollander v. Commissioner*[34] illustrates a typical analysis for defining artist for tax deduction purposes. Bette Hollander, the plaintiff, claimed numerous deductions relating to her painting practice on her income tax filings for 1969 and 1970.[35]Because the expenses Hollander claimed (ranging from art supplies to entertaining costs) would be deductible under 26 U.S.C. § 162(a) only if they were incurred in carrying on a trade or business, the court analyzed whether Hollander had a bona fide profit motive in painting. Among the factors the court weighed as against finding Hollander as an artist included her part-time employment at the Metropolitan Museum of Art, her monthly alimony, sparse record keeping for her work, disparity between expenses and income associated with her practice, and the court's casting of informal exhibitions of her work as mere social gatherings.[36]Ultimately, the court held that Hollander's art activities were a hobby, not a trade or business, because she could not prove a sufficient motive for profit.[37] In other words, the court held that at least for tax deduction purposes, Hollander was not an artist.

The Internal Revenue Code does, however,define artist explicitly for exemptions regarding inventory costs in taxable income.It defines an artist as "any individual if the personal efforts of such individual create (or may reasonably be expected to create) a picture, painting,

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[33]*See id*. (denying status as artist where taxpayer sold only a dozen paintings over 30 years, made little money from his artwork, was independently wealthy, and stated his motive was in making artwork was to give people a better sense of beauty). *Cf.Churchman v. Comm'r*, 68 T.C. 696 (1977) (holding that petitioner's artistic activities were engaged in for profit based on her sincere belief her paintings would sell, her requisite academic training in the arts, and the significant amount of time she spent painting).
[34]*Hollander v. Comm'r*, 34 T.C.M. (CCH) 718 (1975).
[35]*Id*.
[36]*See id*.
[37]*Id*.

sculpture, statue, etching, drawing, cartoon, graphic design, or original print edition."[38] As defined, an artist is then exempt from paying "qualified creative expense[s]," which means any expense "paid or incurred by an individual in the trade or business of such individual [. . .] of being a writer, photographer, or artist."[39] Notably, the separation of artist from photographer appears to narrow the definition,for this subsection, to exclude photographers. Although the case law is sparse, the U.S. Tax Court has ruled that a producer of greeting cards featuring cartoon characters did not qualify for the artist exception to 26 U.S.C. §263'suniform capitalization rules.[40]

The Internal Revenue Service's, or U.S. Tax Court's, determination that one is an artist hugely benefits that artist, even if it does not affect the artist's personal identification as one.Once so deemed by the IRS, an artist may deduct expenses incurred either in engaging in his work or in producing his own creation.[41] And although these expenses do not include the costs of learning an art or the creative labor involved in making artwork, they do cover rent for a studio, supplies, and any travel associated with selling work.[42] Because the courts conduct a fact-intensive inquiry into the activities of the artist, art attorneys can play an active role in helping ensure that a client artist is also considered an artist legally. For instance, Bette Hollander's academic training (BFA from the University of Pennsylvania, post-graduate study at other institutions); professional experience (the Metropolitan Museum and assorted galleries); and significant time spent painting in her studio and trying to sell her paintings, were insufficient to legally define her as an artist.[43]

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[38] 26 U.S.C. §263(A)(h)(3)(C)(i).
[39] *Id*. §263(A)(h)(2).
[40] *Suzy's Zoo v. Comm'r*, 114 T.C. 1, *10-12 (2000).
[41] 1B Nichols Cyc. Legal Forms § 24:3 (2013).
[42] *Id*.; *see alsoManiscalco v. Comm'r*, 632 F.2d 6, 7-8 (6th Cir. 1980) ("Creativity, unfortunately, does not support a tax deduction as an ordinary and necessary business expense.").
[43] *SeeHollander*, 34 T.C.M. (CCH) 718, *supra* note 34.

Based on *Hollander*, competent counsel should advise her client artist to maintain scrupulous records, show work frequently, consider hiring an agent to represent her, and ensure she inform her accountant of both expenses and income derived from making art.Counsel may also suggest that the artist downplay any personal or recreational motives for creating art, instead focusing on expected profit.[44] This advice will assist the client establish herself as an artist when filing taxes and help preserve a record of her artist activities should the issue be litigated.

Proposed legislation concerning artists' charitable contributions also does not define artist, and instead focuses on the donated work. For example, the proposed Artist-Museum Partnership Act of 2013 refers to an artist generically as a taxpayer.[45]It seeks to amend the IRC's section on charitable contributions and gifts[46] by adding a special rule that would allow a taxpayer to deduct the fair market value of the "qualified artistic charitable contribution" donated to a specified institution such as a museum.[47] The bill, however, defines only the "qualified artistic contribution": a charitable contribution of an artistic composition made by the taxpayer no earlier than 18 months prior to such contribution.[48] Despite several other references in the bill to "artistic adjusted gross income," neither "artist" nor "artistic" is defined explicitly. That said, the increased income tax deductions in this bill benefit artists directly, so perhaps the artist does not need to be defined. For charitable contribution income tax deductions, then, an artist could be

[44]*See generally Stasewich v. Comm'r*, 81 T.C.M. (CCH) 1122, *4-5 (2001); *see alsoBowles v. Comm'r*, 65 T.C.M. (CCH) 2733 (1993) ("[A] business will be discontinued when it becomes apparent that it will never show a profit. A hobby is an activity that will be carried on, for reasons of personal satisfaction, regardless of whether it shows a profit.").
[45]*See* Artist-Museum Partnership Act of 2013, H.R. 2482, 113th Cong. (1st Sess. 2013). Although this bill has been introduced in Congress annually since 2000, it has never made it through Committee.
[46]*See* 26 U.S.C. § 170 (2013) (limiting a taxpayer's charitable contribution deduction to his own labor costs as an artist in making the work, as opposed to the likely much higher fair market value); *see also Maniscalco*, 632 F.2d 6, at*8 (holding that 26 U.S.C. § 170(e) precisely limits the charitable deduction to the donor's cost basis in the property and noting that this limitation is not restricted to artists; it extends to property held by the donor primarily for sale to customers in ordinary course of business).
[47]*See* H.R. 2482.
[48]*See id*.

one of many taxpayers eligible for a tax deduction contribution as long as he made the donated artistic charitable contribution.

C. U.S. Census and Labor Statistics

According to the U.S. Census Bureau, an artist is one who is "primarily engaged in . . . creating artistic and cultural works."[49]This definition is important because it is used by myriad federal agencies, including the Bureau of Labor Statistics ("BLS") and the NEA, to report employment conditions for artists.[50]However, each agency uniquely construes theCensus Bureau's above definition, which leads to another level of complexity. For instance, the BLS also defines a fine artist as one who "create[s] original works of art for their aesthetic value, rather than for a functional one."[51]The Current Population Survey (co-sponsored by the Census Bureau and the BLS) yet defines "artist occupations" to include fine artists, entertainers, art directors, comedians, photographers, writers, and authors.[52]

It is important to note that because the Census Bureau focuses on paid employment in its surveys, many people whom merely self identify as artists may not be counted as such. Legislators therefore may not appropriate adequate funding for the arts or legal protection for artists if the census does not account for many self-identifying—but not legal—artists.[53] The author could not locate any case law on the census and the legal definition of artist.

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[49]*See* NAICS 7115, *Independent Artists, Writers, and Performers*,U.S. CENSUS BUREAU, http://www.census.gov/epcd/ec97/def/7115.HTM (last visited April 3, 2014).
[50]*See id*.; *see also* Bonnie Nichols, *Taking Note: A WPA Legacy for Measuring Employment Among Artists*,ART WORKS BLOG, NATIONAL ENDOWMENT FOR THE ARTS, Apr. 3, 2014, http://arts.gov/art-works/2014/taking-note-wpa-legacy-measuring-employment-among-artists (last visited April 6, 2014).
[51]*Occupational Outlook Handbook*, U.S. DEP'T OF LAB., BUREAU OF LAB. STATS.,*available at* http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm (last visited April 6, 2014).
[52]*See* Nichols, *Taking Note: A WPA Legacy for Measuring Employment Among Artists*,ART WORKS BLOG, *supra* note 50.
[53]*See* Daniel Grant, *How Do You Define Artist?*,THE BLOG, THE HUFFINGTON POST (May 19, 2010, 4:14 p.m.), http://www.huffingtonpost.com/daniel-grant/how-do-you-define-artist_b_582329.html (last visited April 3, 2014)

D. Employment Law

The legal definition of artist also determines wage and hour disputes and extents of overtime pay for artists. In this field, many self-proclaimed artists likely would not want to be considered legally as such because the designation exempts them from certain overtime protections. The Fair Labor Standards Act ("FLSA")[54] hints at the definition of artist, but does not define it explicitly. The FLSA's overtime provisions do not apply to employees employed in a "bona fide professional capacity."[55]The Department of Labor's regulations establish a two-pronged analysis for determining whether an employee is such an exempt professional: a duties test and a salary test.[56] Leaving the salary test aside, whether the employee makes less or more than $250 per week determines whether the courts will use a "long" or "short" duties test.[57] Assuming an employee makes more than $250 per week (applying the short test), he is an "artistic professional employee" if his "primary duty consists of the performance . . . of work requiring invention, imagination, or talent in a recognized field of artistic endeavor."[58] Such a professional must also exhibit the exercise of discretion and independent judgment.[59]

At issue in *Asp v. Milardo Photography, Inc.*[60] was whether a portrait photographer qualified as an artistic professional—and was therefore ineligible for overtime compensation. Before denying the plaintiff's motion, the court uncomfortably analyzed the meaning of "artistic professional." Despite Asp's argument that she was not an artistic professional because she spent most of her time retouching and printing digital photographs taken by a colleague, the court

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[54] 29 U.S.C. § 201*et seq*.(2014).
[55]*Id*. §213(a).
[56]*SeeAsp v. Milardo Photography, Inc*., 573 F. Supp. 2d 677, 685 (D. Conn. 2008).
[57]*Id*.
[58]*Id*. at 691.
[59]*Id*.
[60]*Id*.

emphasized the creativity and talent required for that task.[61] The court also highlighted the fact that Asp "visualize[d] the final portrait" prior to photographing a client and that she made lighting and composition adjustments herself.[62]Yet, at the same time, the court balked at the defendant/photography studio's argument that Asp was an artistic professional because she was hired as an "artist capable of working with new technology" as the studio moved from working in film to digital and because of her background in visual art.[63]Interestingly, in ultimately denying the plaintiff/photographer's motion for summary judgment, the court left to the jury the question of whether Asp's work duties were artistic in nature.[64] In other words, the court framed the definition of artistic as a factual question. As with tax deductions, the legal definition of artist in employment law appears quite fact-intensive. Sparse case law and courts' turningto juries to decide whether one's duties are artistic creates little certainty or consistency.

The consideration of "artistic professionals" dates back to the New Deal. Amid wage and hour reform in 1940, the Wage and Hour Division of the Department of Labor decided to promulgate uniform amended regulations for industry groups.[65] Harold Stein, who presided over the numerous hearings, coined the term "artistic profession."[66] He expanded upon the then-presiding view that visual artists were different from craftsmen, and, as such, should be exempt from overtime protections.[67] Stein's rationale was that, unlike professionals such as craftsmen, the work of those engaged in the visual arts was the product of "invention, imagination, or

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[61] *Id*.
[62]*Id*.at 692.
[63]*Id*.
[64]*Id*. The case settled before this determination could be made.
[65] Deborah C.Malamud, *Engineering the Middle Class: Class Line-Drawing In New Deal Hours Legislation*,96 MICH. L. REV., 2212, 2302-04 (1998).
[66]*Id*. at 2311.
[67]*See id*.

talent."[68] An artist's work was like that of a professional. Thus, artistic professionals, like other white-collar professionals, should be exempt from overtime protections.

E. Customs and Tariffs

Over the twentieth century, the U.S. Court of Customs Appeals repeatedly analyzed whether particular objects passing through U.S. Customs were works of art. They did this to determine the duty rate to be assessed under the Tariff Act. Although courts typically focused on the alleged work of art, they sometimes indicated at the definition of the artist if that element was required. In *U.S. v. Downing &Co.*, the court hinted at the definition of "sculptor" because it required that sculpture be made by a professional sculptor. The court described a sculptor as follows: he "must have had instruction and experience in the art [. . .]he should possess artistic conception, taste, sense, and skill, together with the requisite ability to reproduce or present the same to the beholder [. . .] not a skilled artisan, but a person who is capable of making or who does make sculpture his profession."[69]And in *Brancusi v. United States*, the court, in judging whether Brancusi's "Bird in flight" was a sculpture, based its quick determination that Brancusi was a professional sculptor on expert witness testimony and Brancusi's reputation as an artist.[70]But in *Consmiller v. United States*, the court doubted that a marble mason was a sculptor because, despite his academic training and apprenticeship, he had never publicly shown work and there was no record of him ever creating an original sculpture.[71]Other courts have declared that because ornamental or decorative pieces were not fine art, their creator was likely an artisan, not an artist.[72] In sum, a few observations about an artist arise out of the Customs court cases: an

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[68]*See id.*
[69]*United States v. Downing & Co.*, 6 Ct. Cust. App. 545, 551-52 (Ct. Cust. 1916).
[70]*See Brancusi v. United States*, 54 Ct. Cust. 428 (Ct. Cust. 1928).
[71]*Consmiller v. United States*, 3 Ct. Cust. App. 298, 299-300 (Ct. Cust. 1912).
[72]*See, e.g., Petry Co. v. United States*, 11 Ct. Cust. App. 525, 527 (Ct. Cust. 1923) (mosaic is not fine art).

artist is different from an artisan; the court must deem the work art for its creator to be an artist; and the artist must have a certain (yet unspecified) amount of training.

III. Legal Definition of Artist on the State Level

The legal definition of artist is relevant on the state (and sometimes municipal level) for several different purposes. These purposes range from visual artists' moral rights to zoning to public art project funding. The legal definition of artist for its varied purposes are outlined below, with a focus on four states with major art markets,. Note the differences in the definition's scope across places and purposes.

A. Moral Rights

1. New York

The State of New York protects its visual artists' moral rights through the Arts and Cultural Affairs Law.[73] Under this statute, an artist is defined as "the creator of a work of fine art, or in the case of multiples, the person who conceived or created the image which is contained in or which constitutes the master from which the individual print was made."[74]The definition is circular, and New York courts have done little to clarify its scope—though they have interpreted this definition to mean an artist can be a corporation.[75]Still, one can understand New York's definition of artist only to the extent it understands fine art, which leaves many practices an open question.

New York courts have expanded upon the definition of artist in the context of disputes over the meaning of other terms, such as "art merchant." For instance, in *Wesselmann v*.

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[73]N.Y. ART & CULT AFF § 101 (McKinney 1983). The statute covers artist-art merchant relationships, express warranties, right to reproduction, and sales work. It has not covered, however, artists' authorship rights since 2003 when a New York federal court found that VARA pre-empted that section. *SeeBd. of Managers of SoHo Int'l Arts Condo v. City of New York*, No. 01 Civ. 1226 DAB, 2003 WL 21403333 (S.D.N.Y. June 17, 2003).
[74]*Id*. N.Y. ART & CULT AFF § 11.01(1); *see also* § 11.01(9) ("'[F]ine art' means a painting, sculpture, drawing, or work of graphic art, and print, but not multiples").
[75]*Wesselmann v. Int'l Images, Inc*., 169 Misc. 2d 476, 481(N.Y. Sup. Ct. 1996).

International Images, Inc., Pop-artist Tom Wesselmann sued International Images ("International"), seeking a ruling as to whether the corporation possessed and sold Wesselmann's work subsequent to an injunction prohibiting them from doing so.[76] Specifically, the issues were (1) whether a limited edition of prints of Wesselmann's work published by International were also consigned to International, and (2) whether the prints and proceeds of their sale constituted trust funds in International's hands for Wesselmann's benefit.[77]The court rejected International's argument that Wesselmann's prints were not of his own creation because they were created by a publishing process. Instead, the court held that the prints were of Wesselmann's own creation because Wesselmann had conceived the images for the masters.[78] In so holding, the court classified Wesselmann as an artist. This legal classification seems irrelevant, as Wesselmann was already a renowned Pop Art artist.

2. California

TheCalifornia Art Preservation Act defines an artist as "the individual or individuals who create a work of fine art."[79] "Fine art" means "an original painting, sculpture, or drawing, or an original work of art in glass. . . ."[80]Surprisingly, most of the statues and common law concerning artists in California address performers, talent agencies, and actors in the film industry—not visual artists. Despite a paucity of common law regarding the legal definition under the California Art Preservation Act, the definition appears most frequently in labor and employment statutes,[81] and it focuses on the music and film industry.

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[76]*Wesselmann v. Int'l Images, Inc*., 172 Misc. 2d 247, 248 (N.Y. Sup. Ct. 1996).
[77]*Id*.
[78]*See id*.at 251.
[79]CAL. CIV. CODE § 987(b)(1),(2) (1994).
[80] *Id*.§ 987(b)(2).
[81] *See, e.g*., CAL. LAB. CODE § 1700-05 *et. seq*. (West 2011).

B. Zoning and Land Use

1. New York

The legal definition of artist is extremely important for housing in New York because only certified artists may inhabit particular mixed-use zoning areas. The State of New York's Multiple Dwelling Law applies to all cities or towns of at least 325,000 residents.[82] Article 7(B) of that law governs joint-living quarters for artists. It defines an artist as "a person who is regularly engaged in the fine arts, such as painting and sculpture [. . .] *and* is so certified by the city department of cultural affairs and/or state council on the arts."[83] Other sections within Article 7(B) regulate light, air, and fireproofing standards for joint-living quarters for artists.[84] The State Legislature sought to promulgate statewide minimum standards for alterations of non-residential buildings into being fit for residential use.[85] Although this housing statute for artists is not unique to New York City, it is most often invoked there.

The Multiple Dwelling Law defines artist in a particularly broad manner—anyone who regularly makes visual art.[86] The artist certification requirement reins in whom the State of New York and cities in New York consider an artist, however. Take New York City for example. The State and City's zoning legislation permit professional fine artists (who demonstrate the need for a live/work loft) to reside in lofts otherwise zoned for manufacturing.[87] But, the law first requires certification as a working artist for an individual to reside in joint-living work space in SoHo and NoHo, for instance.[88] A resident must acquire certification before he is permitted to move into

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[82] N.Y. MULT DWELL § 3 (McKinney 1995).
[83] *Id*. § 276 (emphasis added).
[84] *Id*. § 277.
[85] *Id*. § 275.
[86] Query meaning of "regularly."
[87] *Artist Certification, About Cultural Affairs*, NEW YORK CITY DEP'T OF CULTURAL AFFAIRS, http://www.nyc.gov/html/dcla/html/about/artist.shtml (last visited April 4, 2014).
[88] *See Notice to Applicants Re. Artist Certification*,NEW YORK CITY DEP'T OF CULTURAL AFFAIRS, http://www.nyc.gov/html/dcla/html/about/artist.shtml (last visited April 4, 2014).

Article 7(B) joint-living quarters, and courts have strictly construed the requirements for artists living in these quarters.[89] New York City's Zoning Resolution mandates that the New York City Department of Cultural Affairs be the certifying agency for the State's Multiple Dwelling Law. This state law in turn requires the city-level law to refine the state's definition of artist as needed.

In New York City, this means that many artists are legally defined as such based on findings of the Department of Cultural Affairs' advisory committee, who then makes recommendations to the Commissioner of Cultural Affairs. This advisory committee comprises professional artists, art educators, and various administrators involved in the arts.[90] The Department's criteria in "considering the applicant's eligibility" are based on the State-level definition of artist.[91] Accordingly, the advisory committee considers the following:

> (1) The individual is engaged in the fine arts, not the commercial arts, including but not limited to painting, sculpture, choreography, filmmaking, and the composition of music, regularly and on an ongoing basis; (2) The individual demonstrates a serious, consistent commitment to his or her art form; (3) The individual is currently engaged in his or her art form; (4)The individual demonstrates a need for a large loft space in which to create his or her art.[92]

Interestingly, the Department notes that it reviews the above criteria not to "make an aesthetic judgment" about the applicant's work, but rather to evaluate the applicant's commitment to his or her work and the need for large space in which to create it.[93] Beyond inquiring about the applicant's present workspace and the space actually needed, the Department asks the applicant

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[89]*See, e.g.*, *Saul v. 476 Broadway Realty Corp.*, 735 N.Y.S.2d 538, 539 (N.Y. App. Div. 2002) (holding that arrangement of New York-certified artist and non-certified artist, a friend, to share shared-living quarters for artists was a sham and violated Multiple Dwelling Law); *Caton v. Grand Mach. Exch. Inc.*, 910 N.Y.S.2d 761, *3-5 (N.Y. Sup. Ct. April 23, 2010) (granting landlord's action to evict plaintiff, owner of a garment and design business, because the plaintiff did not acquire artist-certification until after moving into building).
[90]*See Notice to Applicants Re. Artist Certification*,NEW YORK CITY DEP'T OF CULTURAL AFFAIRS, *supra* note 88.
[91]*Id.*
[92]*Id.* Query meanings of "regularly" and "serious, consistent commitment."
[93]*Id.*

to describe his art form, to provide documentation of going back five years, and to supply recommendations that can attest to the applicant's commitment to his work.[94]

To bolster its assertion that it seeks only to evaluate the applicant's commitment to work, the Department notes that students and professionals without a body of work spanning five years prior to their application are typically ineligible for the certification.[95] Commercial and "hobby" artists are likewise excluded. The exclusion of commercial and "hobby" artists is in keeping with the State of New York's policy goals behind the enactment of legislation on joint living-work quarters for artists.[96] Still, one wonders how effective or consistent the Department's differentiation of "committed professional" from "hobby" artists can be.[97] The exclusion of applicants with fewer than five years' worth of documented work suggests that the legal definition of artist in New York may not cover art some students—or even very recent graduates of art institutes. This distinction is further complicated by the fact that self-identifying artists may not be "artists" under the State (and City) of New York's zoning laws, yet may be defined as artists under the state's Arts and Cultural Affairs Law.[98]

New York's Multiple Dwelling Law has invited litigation over an artist's proper use of his residence, but the court often addresses the definition of artist in an ancillary manner. Or, by what an artist is not. For example, in *Mason v. Dept. of Buildings in the City of New York*, the court held that, based on the Multiple Dwelling Law's definition of artist as one regularly engaged in the fine arts and also so certified by the City, the plaintiff was not an artist. The court reasoned that "by no logical definition . . . may 'artist' be defined to also include one who rents

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[94] *Id*.
[95] *See id*.
[96] *See* N.Y. MULT DWELL § 275 (McKinney 1995) (justifying the choice to make housing more available for artists by looking to artists' great need of space, little financial remuneration, high rents, difficulty in affording both an apartment and studio, as well as that the cultural life of cities in New York is enhanced by artists).
[97] Query whether this determination of hobby different from the IRS's.
[98] *See* N.Y. ART & CULT AFF § 11.01(1), *supra*, note 74.

out space and technical equipment and services to those who actually do the musical composition and performance."[99] Thus, because the plaintiff was acting as a "commercial enterprise," he was not an artist and not the intended beneficiary of New York's law for artists.[100]

2. Florida

The City of Miami Beachtakes a very broad view of a visual artist in its definition for its zoning regulations of the cultural arts neighborhood district overlay ("CANDO")[101]. Seeking to provide incentives to developers to, among other things, encourage arts-related businesses, CANDO defines an artist as:

> a person who creates art as an occupation, or who works in an art-related non-profit field, which sponsors, creates[,] or exhibits art or artists as an occupation. This includes any museum, theater[,] or similar institution sponsoring art. Activities shall include but not be limited to drawing, painting, sculpture, acting, dancing, writing, filmmaking, photography, and music—people who use imagination, talent[,] or skill to create works that may be judged to have aesthetic value and, [sic] those who produce art within a recognized or recognizable discipline.[102]

This is lofty language. Artists in this area of Miami Beach include not only individuals who either make works with aesthetic value in a recognized discipline, but also those who work in arts-sponsoring institutions. The author could not locate any common law resulting from this ordinance; its interpretation remains an open question for the courts. Still, this scope suits the City of Miami Beach's purpose: a more vibrant arts district. The City also uses the definition of artist to shape future growth of a neighborhood, rather than adapt to the housing constraints found in New York, for example.

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[99] *Mason v. Dep't of Bldgs. in the City of New York*, 759 N.Y.S. 2d 470, 478 (Sup. Ct. App. Div. 2003).
[100] *Id*.
[101] CANDO comprises properties within the following boundaries: 24th Street and North Lincoln Road. on the north; Meridian and Lenox Avenues on the west; South Lincoln Lane on the south, and the Atlantic Ocean on the east.
[102] Miami Beach, Fla., Code ch. 142, art. 3, §§ 142-854, 142-855 (2013). Query meanings of aesthetic value and recognized/recognizable discipline.

3. "Home Occupation"Zoning Laws

Several state courts have rejected the argument that hairstylists and cosmetologists are artists for zoning purposes. For instance, one Texas court ruled that a plaintiff's beauty shop in her home was not the kind of " home occupation" acceptable for artists under the city's zoning ordinance.[103] Specifically, the court rejected the plaintiff's argument that she was an artist according to the 1906 edition of Webster's International Dictionary.[104] The court did not even interpret the city's ordinance, however. Indeed, Texas's legal definition of artist seems to have been purely crafted by one judge in 1960. For support, the judge merely cited one other factually similar case from a decade earlier. The Supreme Court of Tennessee has likewise held (in the 1960s) that a cosmetologist cannot operate a one-chair beauty shop in her home because she is not an artist as understood by the statute.[105] The court reasoned that, as interpreted under*ejusdem generis*, "cosmetologist" had no connection to the other listed and permitted home occupations like doctor, dentist, or lawyer.

C. Public Project Funding

As with the NEA and grant funding, the legal definition of artist does not seem to play a prominent role in cities' funding of public art. For instance, the City of Miami Beach and the City of Chicago both fund public art projects, but do not expressly define artist. The City of Miami Beach's procedures for Art in Public Placesdo not expressly define artist.[106] At most, the selection process' language suggests that "artists" are separate from "sculptors" and "craftsmen."[107]The City of Chicago shapes the definition slightly more through its Public Art

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[103]*Long v. City of Fort Worth*, 333 S.W.2d 644, 647 (Tx. Ct. App. 1960) (citing *Bd. of Adjustment of City of San Antonio v. Levinson*, 244 S.W.2d 281 (Tx. Ct. App. 1950)).
[104]*Id*.
[105]*Davidson Cnty v. Hoover*, 211 Tenn. 223, 229-30(Tenn. 1963).
[106] Miami Beach, Fla., General Ordinancesch. 82, art. 7, §§ 82-612 (f).
[107]*Id*.

Program. Its municipal code delegates to its Department of Cultural Affairs and Special Events ("DCASE") the development of policy procedures for the Program.[108] In turn, the DCASE has created an Artist Registry Application for artists interested in submitting work.[109] The registry serves as a catalog of local artists from which the DCASE can select work. Although the DCASE's review committee does not have as detailed criteria for artists as does New York's Department of Cultural Affairs' committee, it does look at the artist's discipline and images of work to determine eligibility for the register.[110] Still, the DCASE does not expressly define artist; it instead focuses on the artist's pre-existing work.

D. Consignment and Resale Royalties

In many states, the legal definition of artist for consignment appears bare and tautological (an artist is one who makes fine art).For example, California defines an artist in this context as the "person who creates a work of fine art or, if that person is deceased, that person's heir, legatee, or personal representative".[111]Florida defines an artist in its Artist's Consignment Act in almost identical terms: the "creator of a work of art or, if she or he is deceased, the artist's heirs or personal representative."[112] The common law has not further defined artist under Florida's Act; instead, when hearing cases, courts appear to have unquestioningly accepted parties' assertions that they are artists.[113] Illinois defines an artist for its Consignment of Art Act[114] much

[108] Chicago, Ill., Code ch. 2-92, art. 2, § 92-110 (2014).
[109]*Artist Registry Application*,CITY OF CHICAGO PUBLIC ART PROGRAM, *available at* http://www.cityofchicago.org/city/en/depts/dca/provdrs/public_art_program/svcs/chicago_artist_registry.html (last visited April 5, 2014).
[110]*See id*.
[111]*See, e.g*., CAL. CIV. CODE§ 1738 (regarding obligations arising from consignment of fine art).
[112] Fla. Stat. § 686.501 (1997).
[113]*See, e.g*., *Shuttie v. Festa Restaurant, Inc*., 566 So. 2d 554, 558 (Fla. 3rd Dist. Ct. App. 1990) (finding that an innocent third party had a superior possessory interest in 16 paintings over the artist who had failed to follow Artists' Consignment Act).
[114] 815 Ill. Comp. Stat. 320 (2014).

like Florida.[115] The small body of Illinois common law likewise does not clarify the scope or meaning of artist.

Under the California Resale Royalties Act ("CCRA"), an artist is one who "creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years."[116] This definition no longer exists, however. In 2012, the Central District of California held another portion of the CCRA unconstitutional because its control of commerce (art), occurring wholly outside California's boundaries,violated the Commerce Clause.[117] As the court noted, the CCRA's definition of artist applied to all artists who are U.S. citizens.[118] Because the court found the CCRA unconstitutional in its entirety, the CCRA's definition of artist was not spared despite a severability clause.[119] The holding of *Estate of Graham*, however, helps shape the general definition of artist by suggesting that states cannot define artist in a way that transcend their boundaries.

VI. Compound Artists

Municipal codes and the First Amendment converge to define and regulate many other types of visual artists: "tattoo" artists, "street" artists, and "graffiti" artists. Through health and zoning codes, municipalities often try to regulate where and when these types of artists may practice or sell their work.But artists have challenged these regulations on First Amendment grounds, ranging from restriction of freedom of expression to assembly. A legal definition of these types of visual artists thus arises from a hodgepodge of municipal codes under the states' police powers and the case law resulting from artists' First Amendment challenges.

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[115] *See* Fla. Stat. § 686.501, *supra*, note 112.
[116] *Id*. § 986 (held invalid by *Estate of Graham v. Sotheby's Inc. and Christie's Inc*., 860 F. Supp. 2d 1117, 1125 (C.D. Cal. 2012)).
[117] *SeeEstate of Graham*, 860 F. Supp. 2d at 1125.
[118] *Id*. at 1121.
[119] *See id*.at 1126.

1. Tattoo Artists

On the state level, tattoo artists are defined and regulated through health and safety codes.[120] Cities and counties may impose additional regulations on tattoo artists and establishments.[121] Across the circuits, there has been much litigation over the scope of municipal ordinances restricting the right to tattoo and the extent to which tattooing is expressive conduct or pure speech protected by the First Amendment.[122]The case law does not directly inquire into the definition of a tattoo artist, but rather looks to the nature and intention of the tattoo artist when practicing tattooing. For instance, the *Hold Fast Tattoo* court held that because a tattoo artist custom tailored a unique message for each customer, there was no particularized message worthy of First Amendment protection.[123] But the *Anderson* court ruled that tattooing was a purely expressive activity, and cited extensively to the plaintiff-tattoo artist's declaration concerning the artistry involved in his practice, even taking judicial notice of the "skill, artistry, and care that modern tattooists have demonstrated."[124] In its analogy of tattooing to drawing a picture,[125] the *Anderson* court likened a tattoo artist to a fine visual artist. This may suggest that although a "tattoo artist" may be defined and treated differently from visual artists under some laws (e.g., health codes versus moral rights or zoning laws), the distinction may ultimately not matter for First Amendment protection of a tattoo artist's practice. Of course, this observation is limited to the Ninth Circuit and other districts that have ruled similarly to the Anderson court.

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[120]*See, e.g.*, FLA. STAT. ANN. §§ 381.00771(6),(7) (West 2012)(a tattoo artist is someone who is licensed by the State's Department of Health to practice tattooing, which is a "mark or design made on or under the skin of a human being by a process of piercing and ingraining a pigment, dye, or ink in the skin).
[121]*See, e.g., id.*§§ 381.00779.
[122]*CompareAnderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (act of tattooing is expressive activity protected by First Amendment) and *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (tattoo itself is pure speech and process of tattooing is protected expressive activity) *with Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656 (N.D. Ill. 2008) (act of tattooing is not an expressive conduct or activity).
[123]*See Hold Fast Tattoo, LLC*, 580 F. Supp. 2d at 660.
[124]*See Anderson*, 621 F.3d at 1057, 1061 (citing to the collaborative process between tattoo artist and tattoo recipient; aesthetic and symbolic considerations for the design; study of motifs and symbols of many cultures).
[125]*See id.* at 1062.

2. "Street" Artists and Art Vendor Regulations

Art vending is protected under the First Amendment.[126] Accordingly, government ordinances regulating art vendors must survive a strict scrutiny or time, place, and manner analysis—depending on whether the regulation is content neutral or content based.[127]Typically, a municipal regulation will require a vendor to secure a permit from the city and will restrict either the type of or place where goods that may be sold.[128]Courts have struck down municipal regulations whichexclude artists from a list of approved vendors in public areas[129] or which reserve insufficient areas for public art vending.[130]

Interestingly, some courts label the vendor an artist (either by accepting the plaintiff's self-identification or by looking at his or her training and experience), but ultimately suggest that the vendor's status as an artist is irrelevant to whether he or she can vend art. The court may determine that the merchandise being sold is not art, and therefore deny the artist the opportunity to sell his work. For instance, the Second Circuit recently scaled back its definition of "painting" in the context of two graffiti artists trying to sell clothing that featured their graffiti artwork.[131]The plaintiffs were "trained freelance artists with substantial artistic backgrounds" that sold in public places "clothing that they individually decorate with text and images in what

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[126]*State v. O'Daniels*, 911 So. 2d 247, 251 (Fla. Dist. Ct. App. 2005) (citing *Bery v. City of New York*, 97 F.3d 689, 695-96 (2d. Cir. 1996)).

[127]*See id*.at 251, 255 (citing *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1286 (11th Cir. 1999)).

[128]*See, e.g*., New York, N.Y., CHARTER CODE§ 20-453 (2013) (requiring general vendors to obtain a license to sell any goods besides enumerated written material); Miami Beach, Fla., GENERAL ORDINANCESch. 18, art 15, §§ 18-901, 18-903 (2013) (defining art vending as the display, creation, and/or sale on public property of art made by the permittee, and setting forth the permit application procedure and requirements).

[129]*Celli v. City of St. Augustine*, 214 F. Supp. 2d 1255, 1258-1261, (M.D.F.L. 2000) (classifying plaintiff/street artist's work as political parody and thus protected expression, and holding the City's street vending ordinance was content discriminatory and did not survive strict scrutiny).

[130]*SeeO'Daniels*, 911 So. 2d at 251, 255 (finding the City of Miami Beach's regulations for art vendors content neutral, but ultimately holding that they were overbroad and did not contain ample alternatives for the artists' communication).

[131]*See generally Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006).

they label a graffiti style."[132] They characterized their merchandize as "artwork on nontraditional canvases" rather than clothing.[133] Nonetheless, although the Second Circuit found that the graffiti clothing served a predominantly expressive purpose,[134] it refused to label the clothing as painting, and refused to extend First Amendment protection to "clothing—or indeed, any item—that been embellished by the application of pigment."[135]It accordingly reversed the District Court, upheld New York City's licensing requirements for vendors[136] as a content-neutral restriction that was narrowly tailored to reduce urban congestion, and ruled that clothing painted with graffiti was not a "painting" for purposes of the City's art vendor regulations.[137] This holding severely limited the 1996 "Bery injunction," in which a district court held that New York City's vendor law was no longer enforceable against vendors of paintings, photographs, or sculpture.[138]

As with laws on artist housing and moral rights, the scope of "artist" in ordinances for art vendors match the ordinances' purpose. Here, the purpose is to decrease public congestion while protecting individual freedom of expression. For instance, the City of Miami Beach's vendor regulations define an artist as one who engages in painting, photography, sculpting, sketching, and crafts—the types of fine art typically vended on the street.[139] But it defines an artist far more broadly for Art in Public Places or CANDO. Similarly, one wonders whether a graffiti artist in New York City whose work is not considered painting for art vending purposes would nonetheless qualify as a visual artist under its moral rights or multiple dwelling laws.

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[132]*Id*. at 86.
[133]*Id*.
[134]*Id*. at 97.
[135]*Id*. at 103.
[136] New York, N.Y., CHARTER CODE§ 20-453 (2013), *supra* note 128.
[137]*See Mastrovincenzo*, 435 F.3d at 82.
[138]*See id*. (quoting*City of New York v*. *Bery*, 906 F. Supp. 163, 165 (S.D.N.Y. 1995)).
[139]*See*Miami Beach, Fla., GENERAL ORDINANCESch. 18, art. 15, § 18-901 (2013).

VII. Conclusion

On the federal level, the legal definition of artist does not appear where one might expect (i.e., The Copyright Act; VARA; NFAHA). Instead, federal tax and employment statutory law provides either definitions or tests that can be applied to artists. On the state level, state arts and cultural policy appears to result in clearer definitions of artists, but these definitions often serve discrete purposes like artists' consignment rights or housing. Municipal codes may define artist in yet another way for project funding or art vendor regulation. Often the definition of artist derives directly from the definition of art—a meaning that continues to change and which presumably changes the legal definition of artist. A discord between self-identifying artists and their classification under the law is apparent. And certainly, there is no single, fixed legal definition of artist. Indeed there may not be a need: artists' pecuniary rights are largely protected by the Copyright Act, their moral rights protected by VARA, their projects reviewed by the NEA and other agencies, their employment and tax status determined by federal legislation, their special housing status by state and city-level organizations, and their ability to sell work in public spaces by states and cities. Such varied legal purposes may require varied legal definitions of artist.