

**THE EMPTY PROMISE OF VARA: THE  
RESTRICTIVE APPLICATION OF A  
NARROW STATUTE**

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## INTRODUCTION

The United States became a party to the Berne Convention in 1989. Article 6<sup>bis</sup> of the Convention requires member nations to protect an author’s rights of attribution and integrity; two of the generally recognized moral rights.<sup>1</sup> Article 6<sup>bis</sup> states:

Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>2</sup>

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<sup>1</sup> CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA, COPYRIGHT LAW 573, 577 (8th ed. 2011). These are “the two most prominently recognized moral rights.” Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U.L. Rev. 1519, 1524 (2011). See generally Susan Liemer, *On the Origins of Le Droit Moral: How Non-Economic Rights Came to be Protected by French IP Law*, 19 J. INTELL. PROP. L. 65 (2012).

<sup>2</sup> Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Mar. 1, 1989, 102 Stat. 2853 [hereinafter Berne Convention]. The Berne Convention is an international copyright treaty, adopted in Berne Switzerland in 1886, providing that works created by the citizens of one signatory country will be fully protected in other signatory countries without the need to comply with local formalities such as registration and deposit. Victor Hugo was a moving force behind this treaty. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 133 n.3 (1st Cir. 2006).

The protection of these and other moral rights is said to help encourage the creation of art. These rights are “of a spiritual, non-economic and personal nature,” they exist “independently of an artist’s copyright in his or her work,” and they “spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.”<sup>3</sup> They “protect the author’s personality rights in his work.”<sup>4</sup>

The Visual Artists Rights Act (VARA)<sup>5</sup> was enacted by Congress in 1990 in order to bring our laws into compliance with Article 6<sup>bis</sup>,<sup>6</sup> and to acknowledge that protecting these rights will foster “a climate of artistic worth and honor that encourages the author in the arduous act of creation.”<sup>7</sup> The passage of this legislation is said to show Congress’s “belief that the art covered by the Act ‘meet[s] a special societal need, and [its] protection and preservation serves an important public interest.’”<sup>8</sup>

Notwithstanding these lofty statements about artistic worth, honor and encouraging creation,<sup>9</sup> VARA is a narrowly drafted addition to the Copyright Act. This legislation recognized several

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<sup>3</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

<sup>4</sup> Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors’ Moral Rights*, 69 TUL. L. REV. 935, 938 (1995). See also Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (“When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones.”). See generally Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1753-57 (2012); Zemer, *supra* note 1, at 1523-25.

<sup>5</sup> 17 U.S.C. § 106A (2012).

<sup>6</sup> JOYCE ET AL., *supra* note 1, at 577. The Berne Convention Implementation Act of 1988, that altered aspects of U.S. copyright law for Berne compliance, had taken a “minimalist” approach on moral rights and did not touch this field. *Id.* at 573.

<sup>7</sup> HOUSE REPORT ON THE VISUAL ARTISTS RIGHTS ACT OF 1990, H.R. REP. NO. 101-514, at 6 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6915 [hereinafter H. REP. with cites to U.S.C.C.A.N. pagination].

<sup>8</sup> *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 49 (1st Cir. 2010) (quoting H. REP., *supra* note 7, at 6915-16). Moral rights laws “give artists the right to prevent purchasers of their works from altering those works, even after the purchase is complete, if the artist disapproves of the alterations.” Brian Angelo Lee, *Making Sense of ‘Moral Rights’ in Intellectual Property*, 84 TEMP. L. REV. 71, 71 (2011).

<sup>9</sup> See Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 270 (2009) (quoting members of Congress about the justifications for enacting VARA).

moral rights in the United States for the first time,<sup>10</sup> but it does not extend to all works of authorship. It protects only a very select group of artists and only very narrowly defined works.<sup>11</sup> Enacted over twenty years ago, VARA may have initially fulfilled our nation's obligations under Article 6<sup>bis</sup> of the Berne Convention, even though it provides less protection than most European moral rights legislation.<sup>12</sup> It has been called weak, anemic and insufficient.<sup>13</sup> As interpreted and applied by the courts since 1991, it is now reasonable to conclude that VARA has not come close to fulfilling our obligations under Article 6<sup>bis</sup>. The federal judiciary, at both the trial and appellate levels, has taken seriously the statute's restrictive language, its explicit exclusions from coverage, and the legislative history's emphasis on VARA's limited scope.<sup>14</sup> In addition, severe tensions between artists' moral rights

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<sup>10</sup> Several states had enacted moral rights statutes prior to the enactment of VARA. Lee, *supra* note 8, at 79-80; Jean-Luc Piotraut, *An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 598 (2006).

<sup>11</sup> Dana Burton, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 642 (1995).

<sup>12</sup> Ciolino, *supra* note 4, at 956. It has been asserted that VARA was enacted merely for the limited purpose of bringing U.S. law closer to compliance with the Berne Convention. Lee, *supra* note 8, at 74 n.7 (quoting ROGER SCHECHTER & JOHN THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* 139 (2003) ("Doubts nevertheless persisted over whether the United States had fully met its Berne Convention obligations. Congress responded by enacting [VARA]."); Edward Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946 (1990) (noting the sentiment at the time of adoption that the legislation did not comply with the Berne Convention); Jacquelin Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agenda*, 21 FORDHAM INTELL. PROP MEDIA & ENT. L.J., 537, 539, 577 (2011) (stating that VARA fell short of bringing the U.S. into compliance with 6bis and that the U.S. may not be in a position to comply with Berne obligations consistent with our Constitution).

<sup>13</sup> Bernard J. Pazanowski, *Controversy Over Football-Field-Sized Exhibit Supports Artist's VARA Suit Against Museum*, 78 U.S.L.W. 1469 (Feb. 9, 2010) (quoting Ray Dowd, author of *COPYRIGHT LITIGATION HANDBOOK*); Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 452 (2009).

<sup>14</sup> Adler, *supra* note 9, at 268; Lindsey Mills, *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*, 90 TEX. L. REV. 443 (2011) (noting that moral rights defenders say the statute provides little protection for too few artists, that waivers cut back on that protection, and that the courts have under enforced VARA); Monica Pa & Christopher Robinson, *Recent Developments in the Visual Artists Rights Act*, LANDSLIDE, Jan.-Feb. 2009, at 22-23 [hereinafter Pa & Robinson]; Zemer, *supra* note 1, at 1527.

and defendants' rights, particularly property rights, have been palpable in many of the cases brought under VARA. As a consequence, courts have shown great reluctance to permit an artist's moral rights to prevail over a defendant's rights.<sup>15</sup> Successful reported VARA claims seem to be few and far between.

This article, after summarizing VARA's provisions, presents a pre-VARA moral rights case that might come out much differently if it were litigated today. This hypothetical case highlights many of the issues raised by VARA. Subsequent sections of the article analyze the act's narrow definition of works of visual art as well as its several limitations on the attribution and integrity rights. These are the key provisions which have been interpreted by the courts since VARA's passage in 1990. Time after time the courts have applied this narrowly drawn statute to deny plausible moral rights claims asserted by visual artists.

An important theme of this article is the concept, "get it in writing." Notwithstanding the challenges of winning a VARA claim, the possibility of expensive and time consuming litigation should cause individuals and organizations who are considering purchasing or commissioning a work of visual art that comes within the scope of VARA to look at the statute's provisions on waiver in sections 106A(e)(1) and 113(d) and then bargain with the artist for an explicit waiver of his or her moral rights. Waivers are especially important in regard to works of visual art that are incorporated in a building, and for works of visual art which are site specific or integrated in their surroundings. After all, today's highly acclaimed sculptural work on display in the grand hall of a municipality's convention center might become tomorrow's white elephant, and the decision to remove that work could result in a VARA claim by the sculptor absent waiver.

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<sup>15</sup> Pa & Robinson, *supra* note 14, at 23. Cf. Robert Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 422 (1990). The number of reported VARA cases is exceeded by the number of scholarly works about moral rights. Robert Bird, *Of Geese, Ribbons and Creative Destruction: Moral Right and Its Consequences*, 90 TEXAS L. REV. 63, 64 (2011).

## I. AN OVERVIEW OF VARA

VARA does not afford protection to all works of authorship. To the contrary, it is limited to “works of visual art.” These works are defined in section 101 of the Copyright Act as:

[A] painting, drawing, print, or sculpture existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature of other identifying mark of the author.

Photographs are included too. They are defined as: “[A] still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”<sup>16</sup>

The definition excludes motions pictures, audiovisual works, books, magazines, electronic publications, and advertising or promotional materials. Works made for hire are also excluded, as are works not subject to copyright protection.<sup>17</sup> “Thus, VARA establishe[s] a new and distinct genus of art: ‘work[s] of visual art,’ which differs in many respects from the pre-existing categories in Section 102(a) of the Copyright Act.”<sup>18</sup>

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<sup>16</sup> 17 U.S.C. § 101 (2012). “The statute’s limitation to ‘still’ photographic images is intended to ensure that ‘moving’ images . . . are not protected under the bill. The limited approach of the bill precludes coverage of all photographs. Thus the bill both narrowly defines the kinds of photographs covered and . . . specifically denies protection to others.” H. REP., *supra* note 7, at 6921. Still, it encompasses a wide range of works including positives and negatives, prints, contact sheets, and slides. *Id.* A significant impact of the “200 copies or fewer” limitation on the several works of visual art is that works intended for reproduction beyond those limits are outside of VARA’s protections. *Silberman v. Innovation Luggage, Inc.*, 67 U.S.P.Q.2d (BNA) 1489, 1494 (S.D.N.Y. 2003).

<sup>17</sup> 17 U.S.C. § 101. *See, e.g.*, *Kamanou v. Exec. Sec’y of the Comm’n. on Econ. Cmty. in W. Africa*, No. 10 Civ. 7286(GBD)(JLC), 2012 WL 162708, at \*7 (S.D.N.Y. Jan. 19, 2012) (holding the west African poverty profile written by the plaintiff, as an employee of the UN Statistics Division, is a work for hire and not under VARA).

<sup>18</sup> *Lilly v. Stout*, 384 F. Supp. 2d 83, 86 (D.D.C. 2005) (quoting 3-8D MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06(A)(1) (2004) [hereinafter NIMMER ON COPYRIGHT]). *See also Dastar Corp. v. Twentieth Century Fox Films*, 539

According to VARA's legislative history, "courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition."<sup>19</sup> VARA's drafters recognized that artists work in a variety of media and use many different materials, so whether a particular work falls within the definition should not depend on the medium or materials used.<sup>20</sup> For example, the legislative history states that "[t]he term 'sculpture' includes, but is not limited to, castings, carvings, modelings, and constructions."<sup>21</sup> Given the definition and its exclusions, as well as the legislative history, it is not surprising that courts have had to grapple with whether VARA reaches unfinished installations, relatively permanent floral displays, a sculptural work with four separate but interrelated elements, art incorporated into a building, graffiti, and site-specific art.<sup>22</sup>

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U.S. 23, 24 (2003) (noting that VARA is carefully limited to and focused on works of visual art).

<sup>19</sup> H. REP., *supra* note 7, at 6921.

<sup>20</sup> *Id.* "[T]he term 'painting' includes murals, works created on canvas, and the like." *Id.* One commentator has argued that the definition covers tattoos. Christine Lesicko, *Tattoos as Visual Art: How Body Art Fits into the Visual Artists Rights Act*, 53 IDEA 39, 50-51 (2013). Another author has considered whether VARA can extend to the electronic world of Second Life. Nathan Brown, *VARA Rights Get a Second Life*, 11 J. HIGH TECH. L. 280 (2011). Some scholars doubt that graffiti can be protected. Jamison Davies, *Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 ME. L. REV. 27, 43-44 (2013).

<sup>21</sup> H. REP., *supra* note 7, at 6921. For example, courts have held that "sculpture" encompasses a large walk through installation which filled up most of a building's lobby and a massive installation that covered most of an exhibition space the size of a football field. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 48 n.7 (1st Cir. 2010).

<sup>22</sup> *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011); *Buchel*, 593 F.3d at 38; *Phillips v. Pembroke Real Estate*, 459 F.3d 128 (1st Cir. 2006); *Cohen v. G & M Realty L.P.*, No. 13-CV-5612 (FB)(JMA), 2013 WL 6172732 (E.D.N.Y. Nov. 20, 2013) (VARA did not give court authority to preserve abandoned building decorated with graffiti art); *Bd. of Managers of Soho Int'l Arts Condo. v. City of N.Y.*, No. 01 Civ. 1226 DAB, 2003 WL 21403333 (S.D.N.Y. June 17, 2003); *Pavia v. 1120 Ave. of the Ams. Assocs.*, 901 F. Supp. 620, 628 (S.D.N.Y. 1995). See also *Jackson v. Curators of the Univ. of Mo.*, No. 11-4023-CV-C-MJW, 2011 WL 5838432, at \*4 (W.D. Mo. Nov. 21, 2011) (plaintiff's mosaic of glass tiles with the University's symbol and tiger mascot might be a work of visual art protected by VARA). It is not clear if VARA applies to conceptual art such as the work of Dadaists like Marcel Duchamp, or to works like Andy Warhol's bulk ketchup box. Nathan Davis, *As Good As New: Conserving Artwork and the Destruction of Moral Rights*, 29 CARDOZO ARTS & ENT. L.J. 215, 223-24 (2011).

VARA grants three moral rights to the creators of qualifying works of visual art. These rights are subject to fair use.<sup>23</sup> The right of ‘integrity’ gives the artist “the right . . . to prevent an intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.”<sup>24</sup> Under the right of paternity or attribution, the artist can insist that his work be attributed to him, that works created by someone else not be misattributed to him, and to prevent the use of his or her name as the artist in the event a distortion or modification of the work would be prejudicial to his or her honor or reputation.<sup>25</sup> In respect to works of recognized stature, the artist has the right to prevent destruction.<sup>26</sup> In addition, there is a special provision concerning the rights of artists whose works have been incorporated in a building. This provision—the so called “buildings exception” or real estate waiver—distinguishes between removable and non-removable works of visual art.<sup>27</sup>

The integrity and attribution rights are standard in moral right statutes but the right to prevent destruction is not universal.<sup>28</sup> Many countries also give artists a disclosure right

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<sup>23</sup> 17 U.S.C. § 106A(a) (“Subject to section 107 and independent of the rights provided in section 106.”). See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 814 (2001).

<sup>24</sup> 17 U.S.C. § 106A(a)(3)(A).

<sup>25</sup> *Id.* § 106A(a)(1), (2).

<sup>26</sup> *Id.* § 106A(a)(3)(B). By providing for a right of attribution and by protecting against both mutilation and destruction, the statute followed the preservation model enacted by some states in moral rights statutes. This model recognizes that destruction of art hurts society as well as the artist. In essence, the most effective way to protect works is by giving the artist the right of integrity and the power to enforce it. H. REP., *supra* note 7, at 6926. It is not clear that the destruction of a work falls within Article 6bis(1)—in other words, whether the Berne Convention requires this right. Lipton, *supra* note 12, at 546; *see also* Piotraut, *supra* note 10, at 600 (asserting that the U.S. seems to satisfy the requirements of 6bis with respect to the attribution and integrity rights).

<sup>27</sup> 17 U.S.C. § 113(d)(1), (2); Keith Attlessey, *The Visual Artists Rights Act of 1990: The Art of Preserving Building Owner’s Rights*, 22 GOLDEN GATE U. L. REV. 371, 385 (1992); Francesca Garson, *Before That Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site Specific Artwork*, 11 CORNELL J.L. & PUB. POL’Y 203, 206 (2001); Pa & Robinson, *supra* note 14, at 25.

<sup>28</sup> H. REP., *supra* note 7, at 6925 n.26; *see also* Amy Adler, *supra* note 9, at 267 & n.17 (2009); Lipton, *supra* note 12, at 546; *cf.* Piotraut, *supra* note 10, at 603-04

which is the right to determine when and whether his or her work of visual art is completed and ready to be shown.<sup>29</sup> A few countries also recognize a right of withdrawal, and in some there is a right to be free of excessive criticism.<sup>30</sup>

The artist has the burden of proof to show that his or her work comes within the definition,<sup>31</sup> and then to establish that the defendant's action in regard to that work are "prejudicial to his or her honor or reputation."<sup>32</sup> This standard imposes some limitations, but the "formulation for determining whether harm to honor or reputation exists must of necessity be flexible" and expert testimony is permissible.<sup>33</sup>

The rights under VARA exist independently of the artist's copyright in a work of visual art and endure for the life of the artist.<sup>34</sup> They are distinct from ownership of any particular copy of the work. A transfer of a copyright, or the transfer of a copy of the

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(discussing French cases in which the destruction or removal of works violated the integrity right). Kenneth Snelson, a widely known and well regarded artist, provided VARA's drafters with a compelling example of the need for the right to prevent destruction. As an unknown artist his first major commission was two sculptural towers he created in the early 1960s that he sold to the New York World's Fair. At the conclusion of the fair, the towers were sold for scrap metal without Snelson's knowledge. If VARA had been law at that time, his works might have been protected against destruction even though he was relatively unknown. H. REP., *supra* note 7, at 6926.

<sup>29</sup> VARA does not provide for a disclosure right, also called the right of divulgation. *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 62 (1st Cir. 2010).

<sup>30</sup> *JOYCE ET AL.*, *supra* note 1, at 573. *See also* *Ciolino*, *supra* note 4, at 942. It is reasonable to regard the right to prevent destruction as a subset of the integrity right and conclude that VARA created two exclusive rights—*attribution and integrity*. Pa & Robinson, *supra* note 14, at 22.

<sup>31</sup> H. REP., *supra* note 7, at 6923. *See, e.g.*, *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005) (photographer's claim that defendant incorporated her photo in a painting without attribution dismissed because the plaintiff could not show that her photos were for exhibition purposes only); *Kamanou v. Exec. Sec'y of the Comm'n of the Econ. Cmty. of W. African States*, No. 10 Civ. 7286(GBD)(JLC), 2012 WL 162708, at \*7 (S.D.N.Y. Jan. 19, 2012) (plaintiff unable to bring her publication profiling poverty within VARA because it was a work for hire and it was not a work of visual art).

<sup>32</sup> H. REP., *supra* note 7, at 6925-26.

<sup>33</sup> *Id.*

<sup>34</sup> "Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art – (1) shall have the right." 17 U.S.C. § 106A(a) (2012); *see also* § 106A(e)(2). The duration provision is section 106A(d). The life of the artist term is for works created on or after VARA's effective date – (d)(1) – while works created before that date enjoy the standard copyright term – (d)(2).

work of art, is not a waiver of the artist's moral rights.<sup>35</sup> Since these rights are considered an extension of the artist's personality, they cannot be transferred.<sup>36</sup> However, these rights can be waived if the artist "expressly agrees to such waiver in a written instrument" he or she signs that specifies the exact terms of the waiver.<sup>37</sup> The "buildings exception" also contains a similar waiver provision.<sup>38</sup> Whether Article 6<sup>bis</sup> allows waivers is not certain but the United States is not alone in permitting them even though VARA prohibits transfers.<sup>39</sup> VARA can apply to works created before its effective date of June 1, 1991,<sup>40</sup> but it exempts infringements of the attribution and integrity rights which occurred before that date.<sup>41</sup> The legislation was not retroactive so the continued display of a work that was modified before VARA became effective is not an actionable distortion, mutilation or display.<sup>42</sup>

This brief summary of VARA underscores its limited scope.<sup>43</sup> Lobbyists for the real estate and publishing industries argued against expansive moral rights protections out of fear that an artist could hold a property owner hostage once his or her work of visual art was installed in a building.<sup>44</sup> There is no doubt that

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<sup>35</sup> 17 U.S.C. § 106A(e)(2).

<sup>36</sup> *Id.* § 106A(e)(1); *see also supra* notes 3-4 and accompanying text.

<sup>37</sup> 17 U.S.C. § 106A(e)(1).

<sup>38</sup> *Id.* § 113(d)(1)(B).

<sup>39</sup> Lipton, *supra* note 12, at 548-49.

<sup>40</sup> 17 U.S.C. § 106A(d)(2); *Pavia v. 1120 Ave. of the Ams. Assocs.*, 901 F. Supp. 620, 628 (S.D.N.Y. 1995) (VARA applies to sculptural work created in 1963). *See also Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011) (litigation concerned the modification of a massive floral exhibit planted in 1984); *Bd. 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) (VARA claim regarding the removal of artwork installed on the side of a building in the early 1970s).

<sup>41</sup> *Pavia*, 901 F. Supp. at 628.

<sup>42</sup> *Id.* at 629.

<sup>43</sup> JOYCE ET AL., *supra* note 1, at 589; *cf. Speaking of Moral Rights: A Conversation Between Eva E. Subotnik and Jane C. Ginsburg*, 30 CARDOZO ARTS & ENT. L.J. 91, 94-95 (2012) (discussing the very limited nature of VARA's attribution right since this right is tied to the act's very limited definition of 'work of visual art').

<sup>44</sup> *See Ciolino*, *supra* note 4, at 957 (listing several reasons for disfavoring moral rights); Garson, *supra* note 27, at 206 ("[T]o ensure that real estate remained alienable Congress added the real estate waiver to VARA[—section 113(d)]."); Lee, *supra* note 23, at 814 ("Perhaps most jarring to the American psyche is the idea of an author's moral right taking precedence over another's property right."); Lipton, *supra* note 12, at 560-61; Pa & Robinson, *supra* note 14, at 22; Zemer, *supra* note 1, at 1525 (noting

Congress's intent was to limit VARA's application.<sup>45</sup> This is emphasized in the statute's legislative history. The definition of a work of visual art is a critical underpinning of the *limited scope of the bill*. As Representative Markey testified, "I would like to stress that *we have gone to extreme lengths to very narrowly define the works of art* that will be covered . . . [T]his legislation covers only a very select group of artists."<sup>46</sup>

"[T]he congressional debate 'revealed a consensus *that the bill's scope should be limited to certain carefully defined types of works and artists*, and that if claims arising in other contexts are to be considered, they must be considered separately."<sup>47</sup> "*Because of its limited nature*, H.R. 2690 protects the legitimate interests of visual artists without undue interference with the successful operation of the American copyright system."<sup>48</sup>

## II. BEFORE AND AFTER: A PRE-VARA DISPUTE BECOMES A POST-VARA HYPOTHETICAL

*Crimi v. Rutgers Presbyterian Church*,<sup>49</sup> a New York decision from 1949, presents a stark conflict between moral rights and property rights, and illustrates how the enactment of VARA sharpens this conflict. Alfred Crimi was a well-known muralist

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opposition by the copyright industries). One commentator denounced the new statute as "an exotic legal import" that "represents an unprecedented incursion on property rights as Americans know them." George C. Smith, *Artistic License Takes on a New Meaning*, LEGAL TIMES, Dec. 17, 1990, at 23. Another commentator said this was

classic special-interest legislation, regulating the ability of an owner to do with her property, as she likes, not so much for the benefit of artists or filmmakers as such, but for the benefit of a minority who will feel better knowing that the owner is not allowed to act in an uncultured way.

Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 101 (1990). Cf. Gorman, *supra* note 15, at 422.

<sup>45</sup> *Cheffins v. Stewart*, No. 3:09-cv-00130-RAM, 2011 WL 1233378, at \*3 (D. Nev. Mar. 29, 2011).

<sup>46</sup> H. REP., *supra* note 7, at 6920-21 (emphasis added).

<sup>47</sup> *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003) (emphasis added) (citing H. REP., *supra* note 7, at 6919).

<sup>48</sup> H. REP., *supra* note 7, at 6920 (emphasis added). There was fear that these moral rights "might hamper commerce or unduly impose on other property ownership rights." Davis, *supra* note 22, at 221. See generally Zemer, *supra* note 1, at 1526-27 (summarizing problems with VARA and its limited scope).

<sup>49</sup> 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949).

who was paid \$6,800 in 1938 to paint a large fresco on the rear wall of a church. He assigned his copyright to the church. Some members of the congregation did not care for the artist's portrayal of a bare-chested Jesus, and eight years after Crimi completed the fresco, the church painted it over without giving him notice. Crimi sued the church seeking, in the alternative, restoration of the fresco, its removal from the building, or damages. The church won because the artist had failed to reserve any rights.<sup>50</sup> He asserted a moral rights claim but the court noted that moral rights had not yet been accepted in the United States and that it was not about to make new law.<sup>51</sup>

What might happen if *Crimi* was litigated today?<sup>52</sup> Let's assume that the fresco is painted on the church's wall in 2009 and that the muralist assigned his copyright to the church. Notwithstanding several limitations in VARA on what can be protected as a work of visual art,<sup>53</sup> this fresco would qualify.<sup>54</sup> If the artist has advance notice of the church's plans he could try to enjoin the removal or other alteration of the fresco because the act gives him the right to "prevent any intentional distortion, mutilation or other modification" of the work that would hurt his honor or reputation, and also the right "to prevent any destruction of a work of recognized stature."<sup>55</sup> VARA does not define "recognized statute" so this requirement could be a hurdle for the muralist,<sup>56</sup> but it is reasonable to assume that Crimi's fresco

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<sup>50</sup> *Id.* at 814-15, 818; see also RALPH BROWN & ROBERT DENICOLA, COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP 734 (7th ed. 1998).

<sup>51</sup> *Crimi*, 89 N.Y.S.2d at 818. If he wanted to retain rights in his fresco, he should have done so in a contract. See generally Matthew Goodin, *The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners*, 22 GOLDEN GATE U. L. REV. 567 (1992).

<sup>52</sup> BROWN & DENICOLA, *supra* note 50, at 734; cf. Piotraut, *supra* note 10, at 603-04 (discussing a French decision condemning the removal of an artistic fountain set up in a shopping mall as being analogous to the removal of a work incorporated in a building).

<sup>53</sup> See *infra* notes 71-79 and accompanying text.

<sup>54</sup> A "work of visual art" is "a painting, drawing, print, or sculpture, existing in a single copy." 17 U.S.C. § 101 (2012). A case interpreting California's moral rights statute held that murals are not protected, but according to VARA's legislative history, it clearly encompasses murals. H. REP., *supra* note 7, at 6921.

<sup>55</sup> 17 U.S.C. § 106A(a)(3)(A)-(B).

<sup>56</sup> See *infra* notes 187-221 and accompanying text.

would have qualified because the court referred to him as a well-known artist, he was paid a very substantial sum for his work by 1938 standards, and the fresco was seen by many people in the sanctuary for several years. Perhaps it received some critical acclaim even though members of the congregation took offense at the artist's portrayal of Jesus.<sup>57</sup>

Finally, it is vital to recognize that an artist's moral rights are distinct from ownership of the fresco itself and ownership of the copyright in the fresco. Moral rights may not be transferred although they may be expressly waived in a written instrument, signed by the artist.<sup>58</sup> In essence, the church owns the fresco and holds the copyright but absent an explicit written waiver the artist still enjoys his moral rights in this work of visual art. On the other hand, if the fresco is regarded as a work for hire, then VARA would not apply and the church would not need to worry about having the written waiver.<sup>59</sup> It is likely, however, that an artist like Crimi would be treated as an independent contractor.<sup>60</sup>

If the church did not receive a written waiver from the artist, it would have violated VARA by painting over the fresco or by tearing out that section of the wall and applying a new layer of plaster. Either would seem to be an intentional mutilation, distortion or modification of the fresco that might prejudice his honor or reputation, and it also might destroy this work of recognized stature. Accordingly, the church's destruction of the mural could entitle the artist to damages.<sup>61</sup> As noted above, if the artist had received advance notice of the church's plans, he might have been able to obtain an injunction to protect the fresco against being painted over or otherwise removed and perhaps destroyed.

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<sup>57</sup> *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 814 (N.Y. Sup. Ct. 1949).

<sup>58</sup> 17 U.S.C. § 106A(e)(1)-(2).

<sup>59</sup> *Id.* § 101(B). "A work of visual art does not include – any work made for hire." *Id.*

<sup>60</sup> *See, e.g., Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-53 (1989).

<sup>61</sup> Violators of VARA are subject to the normal liabilities for infringement. *See H. REP., supra* note 7, at 6932. *See, e.g., Martin v. City of Indianapolis*, 192 F.3d 608, 610, 614 (7th Cir. 1999) (affirming award of statutory damages for destruction of sculpture); *Cohen v. G & M Realty L.P.*, No. 13-CV-5612 (FB)(JMA), 2013 WL 6172732, at \*13 (E.D.N.Y. Nov. 20, 2013) (after refusing to enjoin destruction of an abandoned commercial building decorated with graffiti the court noted that the plaintiffs still had the opportunity to seek damages from the developer who had permitted them to adorn the buildings with their art).

What about the interests of the church and its congregation? Are their rights as well as their collective taste in art depicting Christ trumped by Crimi's moral rights?<sup>62</sup>

VARA addresses this tension to some degree. Section 113(d)(1), the so called "buildings exception,"<sup>63</sup> provides that when "a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation or other modification of the work" and the artist and the owner of the building both signed a written instrument specifying that "installation of the work may subject the work to destruction, distortion, mutilation, or other modification by reason of its removal," then the artist's rights against destruction and distortion shall not apply.<sup>64</sup> However, absent this written acknowledgment that removal may result in the fresco's destruction, it would appear that the church and its congregation would be stuck with the fresco for the life of the artist,<sup>65</sup> or liable for a substantial award of damages in the event they decide to destroy the mural.<sup>66</sup> Perhaps they could cover it with a tapestry in such a way that the fresco itself would not be damaged and try to fit under VARA's public presentation exception.<sup>67</sup>

Section 113(d)(2) addresses the rights of the church and the congregation in the event it might be possible to remove the fresco without its destruction or modification. In essence, the artist's rights against distortion, mutilation and destruction will not apply

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<sup>62</sup> See Attlesey, *supra* note 27, at 374 (noting that in some circumstances under VARA, the artist's rights will be greater than those of the building owner).

<sup>63</sup> Pa & Robinson, *supra* note 14, at 26. This exception was arguably motivated by the litigation over the removal of Richard Serra's massive "Titled Arc" sculpture from Federal Plaza in lower Manhattan. The seventy-three ton work, made of steel, had to be cut into three parts for removal. *Id. See, e.g.,* Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988) (artist commissioned to create and sell site specific sculpture to the government was unsuccessful in challenging the government's subsequent decision to relocate the work—this was a pre-VARA claim and the artist's contract with the government provided that all designs, sketches, models and the work produced would be the property of the government—and there were no restrictions on the government's use of the work).

<sup>64</sup> 17 U.S.C. § 113(d)(1)(A)-(B).

<sup>65</sup> See Attlesey, *supra* note 27, at 379-80. Rights under VARA exist for the lifetime of the author. 17 U.S.C. § 106A(b), (d)(1).

<sup>66</sup> Cf. Goodin, *supra* note 51, at 574-75.

<sup>67</sup> 17 U.S.C. § 106A(e)(2). See *infra* notes 223-40 and accompanying text.

if the church makes a diligent and good faith attempt to notify him or her about plans to remove the artwork, and then, assuming the artist receives the notice, he or she fails to remove the work or pay for its removal within ninety days after receiving the notice.<sup>68</sup>

Perhaps the most obvious lesson from this twenty-first century variation on the late 1940s litigation over Crimi's fresco is that any person or entity commissioning a work of visual art that will be incorporated in or integrated with a building or other piece of property needs a written instrument from the artist complying with section 113(d)(1) that waives his or her VARA rights.<sup>69</sup> Of course, the artist will have to agree to the waiver.<sup>70</sup> An alternative would be for the commissioning party to insist that the artist fabricate the work of visual art so that it could be dismantled and removed without being modified or destroyed. Thus, the terms of section 113(d)(2) could be satisfied in the event the commissioning entity wants to have the art removed at some time in the future. In addition, it would be wise to spell out those 113(d)(2) conditions in a written instrument signed by the artist and the commissioning entity.<sup>71</sup> In any event, in the absence of a waiver or a removable work, the muralist would seem to be able to *restrict* what the commissioning entity does with its property for the rest

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<sup>68</sup> 17 U.S.C. § 113(d)(2)(A)-(B). See generally Attlesey, *supra* note 27, at 385-87 (discussing what is removable and VARA's requirements); Goodin, *supra* note 51, at 568-72 (discussing section 113(d)).

<sup>69</sup> See generally Goodin, *supra* note 51, at 573-75. Another author points out that this waiver would have been unnecessary under California's Art Preservation Act because it presumes that the integrity right is waived for works of art attached to buildings absent a written agreement to the contrary. Attlesey, *supra* note 27, at 373.

<sup>70</sup> See generally Goodin, *supra* note 51, at 576-78 (the author also discusses whether it might be possible to consider the work of visual art as a "work for hire" and thus unprotected by VARA).

<sup>71</sup> See Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L. J. 19, 25-26 (2001) (discussing the impact of section 113 and how it forces artists to waive their rights to stop destruction or inspires them to go with materials or formats that will permit removal). See generally Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 760-61 (2007) (discussing VARA's approach to the installation of art in buildings in section 113(d) and noting that VARA and its legislative history are silent in respect to site specific art); Mills, *supra* note 14, at 461-63 (discussing problems with VARA's waiver limitations including transaction costs).

of his or her life: the artist's moral rights would trump the commissioning entity's property rights.<sup>72</sup>

The possibility of litigation in a modern version of Alfred Crimi's dispute with the church that commissioned his fresco is not far fetched. His potential VARA claims are meritorious. Still, it is difficult to be unequivocal about how these VARA claims would be resolved today. Given the restrictive way the courts have interpreted the statute, as discussed in the next several sections, Crimi's claims are not necessarily sure fire winners. There is ample precedent for the commissioning party—the church—to utilize in defending the muralist's VARA claims.

### III. AVOIDING *CRIMI*: VARA AS INTERPRETED AND APPLIED

The scope of VARA is strictly limited by its terms. As discussed in the overview section of this article, the definition of 'work of visual art' in section 101 is narrow and it is followed by several exceptions listing creative works that do not fall within the definition.<sup>73</sup> Similarly, the rights of attribution and integrity provided in section 106A are qualified by several explicit exceptions. The following sections of this article discuss these exceptions and explain how the courts have interpreted and applied them to narrow the scope of this tightly restricted statute.

#### A. *Works of Visual Art and VARA's Restrictions*

A wide variety of works have been found by the courts to fall within VARA's definition of protected works of visual art. For example, the courts have treated as coming under VARA a large walk-through sculpture in a building's lobby,<sup>74</sup> a work with four separate elements alleged to form an integrated whole,<sup>75</sup> a modern

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<sup>72</sup> See Attlesey, *supra* note 27, at 379-80. See, e.g., Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226 DAB, 2003 WL 21403333, at \*7-10 (S.D.N.Y. June 17, 2003) (litigation over sculpture attached to the side of a building and whether or not it was removable as contemplated by 113(d)(2) or whether removal would destroy the work, thus implicating section 113(d)(1)).

<sup>73</sup> See *supra* notes 16-22 and accompanying text.

<sup>74</sup> See Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 88 (2d Cir. 1995) (plaintiffs lost because the court found their lobby installation was a work for hire).

<sup>75</sup> See Pavia v. 1120 Ave. of the Ams. Assocs., 901 F. Supp. 620, 628 (S.D.N.Y. 1995).

statue in a public park,<sup>76</sup> and a massive sculpture of a swan made from plywood and steel.<sup>77</sup> In litigation over the alleged improper use of a photograph, a court said the definition covered negatives as well as prints, contact sheets, and slides.<sup>78</sup> Unfinished works of visual art have been protected, in part because copyright protection is routinely extended to unfinished works of authorship that are fixed in a tangible medium of expression.<sup>79</sup> In view of the Supreme Court's leading decisions on the low threshold for satisfying the requirements for copyright protection, VARA's copyrightability prerequisite is not much of a hurdle.<sup>80</sup>

The courts have, in accord with VARA's legislative history, used common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the definition. They recognize that artists work in various media and use many different materials, so protection has not depended on the medium or materials used.<sup>81</sup> Protected sculptural works have been extended to include castings, carvings, models, and constructions.<sup>82</sup>

Notwithstanding what might seem to be a generous and often common sense approach to interpreting VARA's definition of

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<sup>76</sup> See *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

<sup>77</sup> See *Scott v. Dixon*, 309 F. Supp. 2d 395, 400-01 (E.D.N.Y. 2004) (the plaintiff lost because the large sculpture was not of recognized stature).

<sup>78</sup> See *Lilley v. Stout*, 384 F. Supp. 2d 83, 86 (D.D.C. 2005) (the plaintiff lost because she could not show that her photo was produced for exhibition purposes only).

<sup>79</sup> See, e.g., *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 50-52 (1st Cir. 2010).

<sup>80</sup> See generally *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). See *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011) (litigation concerning the modification of a massive floral exhibit planted in 1984); *Cohen v. G & M Realty L.P.*, No. 13-CV-5612 (FB)(JMA), 2013 WL 6172732 (E.D.N.Y. Nov. 20, 2013) (graffiti decorating walls of an abandoned commercial building that had been sprayed and painted with the owner's permission within VARA).

<sup>81</sup> See H. REP., *supra* note 7, at 6921. "[T]he term 'painting' includes murals, works created on canvas, and the like." *Id.*

<sup>82</sup> *Id.* For example, courts have held that "sculpture" encompasses a large walk through installation which filled up most of a building's lobby, a massive installation that covered most of an exhibition space the size of a football field, and a mosaic tile depiction of a school's mascot and symbol. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Mass. Museum of Contemporary Art Found., Inc.*, 593 F.3d at 48 n.7; *Jackson v. Curators of the Univ. of Mo.*, No. 11-4023-CV-C-MJW, 2011 WL 5838432, at \*4 (W.D. Mo. Nov. 21, 2011) (the mosaic might come within VARA).

works of visual art, there are several exceptions to the definition which have been interpreted and applied by the courts to prevent quite a few works from being subject to VARA's protection.

1. A work of visual art does not include – (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.<sup>83</sup>

This broad exclusion is said to be “self-explanatory” and it “reinforce[s] the premise of the bill: to cover only those works described in the definition . . . and therefore to protect only originals of those works of art. . . . [It] distinguish[es] covered works of visual art from other works that are denied protection, such as newspapers, audiovisual works, applied art, and maps.”<sup>84</sup> One result of this limitation is that the rights of attribution and integrity do not apply to the reproduction, portrayal, depiction or other use of an otherwise protected work in connection with one of the excluded items. For example, the depiction of an artist's work upon a poster need not be accompanied by the artist's name.<sup>85</sup> Books, magazines, and newspapers often include photos of paintings and sculptural works, and movies contain scenes from art galleries. It would be especially harsh for those depictions and portrayals of works to result in potential liability.<sup>86</sup>

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<sup>83</sup> 17 U.S.C. § 101(A)(i) (2012) (definition of work of visual art).

<sup>84</sup> H. REP., *supra* note 7, at 6923 (this language from the legislative history also applies to the limitations in section 101(A)(ii)).

<sup>85</sup> See *Berrios Nogueras v. Home Depot*, 330 F. Supp. 2d 48, 51 (D.P.R. 2004) (quoting *NIMMER ON COPYRIGHT*, *supra* note 18, at § 8D.06); see also *Wilson v. New Palace Casino, L.L.C.*, Civil Action No. 1:11cv447–HSO–JMR, 2013 WL 870350 (S.D. Miss. Mar. 7, 2013) (defendants' purported use of plaintiff's painting of fish on plastic cups, menus, signage, “drink huggers,” and t-shirts outside the scope of VARA).

<sup>86</sup> See H. REP., *supra* note 7, at 6922-23; *NIMMER ON COPYRIGHT*, *supra* note 18, at § 8D.06; Davis, *supra* note 22, at 225; Jane Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 *CARDOZO ARTS & ENT. L. J.* 73, 82 (2012) (there is no VARA right to compel attribution of one's artwork if the artist's name has been left off anything more than the original or a signed and numbered limited edition copy). See, e.g., *Kamanou v. Exec. Sec'y of the Comm'n of the Econ. Cmty. of W. African States*, No. 10 Civ. 7286(GBD)(JLC), 2012 WL 162708, at \*7 (S.D.N.Y. Jan. 19, 2012)

This limitation on the definition of protected works was the basis for the dismissal of a VARA claim against NASCAR brought by an independent contractor who had been hired by the Franklin Mint to design a trophy for NASCAR's NEXTEL Cup Series.<sup>87</sup> The court said that VARA's definition did not extend to the many drafts of the artist's "designs created to lay a foundation for the eventual manufacturing of the trophy."<sup>88</sup> In addition, these drawings and designs fell under the "models" and "technical drawings" exclusion because they were intended to be used in the eventual creation of a three-dimensional object; the actual trophy that would be fabricated by Tiffany's.<sup>89</sup> In contrast, a sculpted clay head for a large statue that was to be cast in bronze was treated as a protected work of visual art and not within the exclusion for "models" in *Flack v. Friends of Queen Catherine*.<sup>90</sup> The court said that "model" was ambiguous so it turned to the legislative history's precatory language encouraging courts to use common sense and accepted standards of the artistic community to decide whether a work fits within the general definition.<sup>91</sup> It concluded that "models such as [this] clay sculpture [of a head] are considered works of art in their own right."<sup>92</sup>

The publication of a photograph or other depiction of a work of visual art in a magazine is not a violation of VARA due to this limitation.<sup>93</sup> The definition is cross referenced in section 106A(c)(3) which provides that the attribution and integrity rights "shall *not* apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in connection with any item described in subparagraphs (A) or (B)."<sup>94</sup> For example, the unauthorized use of

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(plaintiff's attribution claim fails in part because her publication did not qualify as a work of visual art under VARA).

<sup>87</sup> See Nat'l Ass'n for Stock Car Auto Racing, Inc. v. Scharle, 356 F. Supp. 2d 515, 529 (E.D. Pa. 2005).

<sup>88</sup> *Id.* The court said that the works did not exist in a single copy or a limited number of signed and numbered copies but as multiple attempts to arrive at the optimal design. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See 139 F. Supp. 2d 526, 532-34 (S.D.N.Y. 2001).

<sup>91</sup> See *id.* at 533 (quoting H. REP., *supra* note 7, at 6921).

<sup>92</sup> *Id.*

<sup>93</sup> See *Martin v. Walt Disney Internet Grp.*, No. 09CV1601-MMA (POR), 2010 WL 2634695, at \*4-5 (S.D. Cal. June 30, 2010).

<sup>94</sup> 17 U.S.C. § 106A(c)(3) (2012) (emphasis added).

a professional freelance photographer's copyrighted photo in *Competitor Magazine*, without attribution or compensation, was not actionable under VARA due to this exclusion even though the photo was properly alleged to be a work of visual art.<sup>95</sup> The court, citing VARA's legislative history, explained that because the reproduction of the photo in the magazine "do[es] not affect the single or limited edition copy, imposing liability . . . would not further the paramount goal of the legislation: to preserve and protect certain categories of original works of art. It is the original or limited edition still photographic image . . . that garners the rights VARA bestows."<sup>96</sup>

VARA's definition of works of visual art also excludes applied art.<sup>97</sup> This limitation is not defined other than an explanation in the House Report that "work of visual art" is "narrower than the definition of 'pictorial, graphic, and sculptural works' set forth in 17 U.S.C. 101."<sup>98</sup> This exclusion was discussed in *Cheffins v. Stewart*; a case that concerned defendant's destruction of La Contessa—a mobile interactive replica of a sixteenth century Spanish galleon.<sup>99</sup> This piece consisted of the façade of a Spanish galleon wrapped around a school bus that was no longer being used to transport children. It been converted into a mobile stage used for live performances.<sup>100</sup> The court decided as a matter of law that this bus or stage was "applied art" which it defined as "two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects" and "works that are intended to be or have been embodied in useful articles."<sup>101</sup> It rejected the plaintiffs' arguments that this bus or stage fell within the decorative arts, that it was not used for a commercial purpose, that it was no longer utilitarian, and that it should construe broadly the works of visual art covered by VARA. The court responded that "[a] broad construction of 'work of visual art'—and

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<sup>95</sup> See *Martin*, 2010 WL 2634695, at \*5. The plaintiff stated a claim for copyright infringement. *Id.* at \*3.

<sup>96</sup> *Id.* at \*5 (citation omitted) (citing H. REP., *supra* note 7, at 6921-22).

<sup>97</sup> See 17 U.S.C. § 101 (2012).

<sup>98</sup> H. REP., *supra* note 7, at 6921.

<sup>99</sup> See No. 3:09-cv-00130-RAM, 2011 WL 1233378, at \*1 (D. Nev. Mar. 29, 2011).

<sup>100</sup> See *id.* at \*3.

<sup>101</sup> *Id.* at \*2. The court also said a work can be applied art and not be decorative art. *Id.*

consequently a narrow construction of ‘applied art’—would be at odds with Congress’ intent to limit the application of VARA.”<sup>102</sup>

2. A work of visual art does not include – (A)(ii) any merchandising item or advertising, promotional, descriptive, covering or packing material or container.<sup>103</sup>

The rationale for the promotional and advertising exclusions from the definition of “work of visual art” in section (A)(ii) is the same as the rationale for the exclusions in (A)(i) set forth in the prior subsection. This exclusion was central to the decision in *Pollara v. Seymour*.<sup>104</sup>

Joanne Pollara creates large banners and installations for events like bar mitzvahs and corporate gatherings. She was commissioned by the Gideon Coalition, a non-profit that provides legal services, to prepare a banner for the group’s annual Lobbying Day at the state capital in Albany, New York. The banner was to serve as a backdrop for the coalition’s information table that was to be set up on a state government owned public plaza. Pollara received \$1,800 for preparing a banner that was ten feet high and thirty feet long. She spent over 100 hours on the project and the finished work was a detailed tableau with several colors depicting a diverse group of people standing in line to see a lawyer. It also included messages calling for the preservation of the right to counsel and warning that cuts in the executive budget threatened this right.<sup>105</sup>

Pollara erected the banner at the plaza the evening before Lobbying Day. It was attached to two large steel poles weighed down by sandbags. She left the banner unattended. The Gideon Coalition had not, however, obtained a permit for erecting the banner or leaving it up overnight. The manager of the plaza had it removed. The work was torn into three pieces and crumpled when

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<sup>102</sup> *Id.* at \*3; see also *Landrau v. Solis Betancourt*, 554 F. Supp. 2d 102, 111 (D.P.R. 2007) (architectural works are not works of visual art protected under VARA). *Cf.* Piotraut, *supra* note 10, at 610 (discussing a French decision in which the court denied an attribution claim made by a commissioned draftsman against Citroen, seeking to have his name affixed to the coachwork of each vehicle, and seeming to treat industrial design differently from other works).

<sup>103</sup> 17 U.S.C. § 101(2)(A)(ii) (2012) (definition of work of visual art).

<sup>104</sup> See 344 F.3d 265, 267 (2d Cir. 2003).

<sup>105</sup> See *id.* at 266.

it was taken down. Pollara then filed a VARA claim against the plaza manager and his supervisor in response to the destruction of her work.<sup>106</sup> She alleged that the banner was a work of visual art covered by VARA and that her rights to prevent the work's destruction and mutilation were violated through the willful, wanton and intentional conduct of the defendants.<sup>107</sup>

Pollara's VARA claim was unsuccessful. Following a bench trial, the court ruled that VARA did not apply because the banner constituted advertising or promotional material expressly excluded from protection.<sup>108</sup> The banner's purpose "was to attract public attention and publicity to the [Gideon] information table."<sup>109</sup> The Second Circuit affirmed, saying that the artist failed to show that her work fell within VARA's scope.<sup>110</sup> However, one judge on the panel agreed with the result but wrote a concurrence in which he asserted that Pollara's claim failed because her banner was not a work of recognized stature since it had never been exhibited.<sup>111</sup> Unlike the majority, he believed that there was a potential factual dispute on whether or not the banner was promotional material outside of VARA's protection.<sup>112</sup>

Although the trial court and Second Circuit did not explicitly raise concerns about property rights, both interpreted the statute so as to reject the artist's VARA claim and thus avoided having to reconcile the artist's moral rights against the rights of owners of the public plaza. It was reasonable for the court of appeals to conclude that the banner did not fall within VARA's definition of

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<sup>106</sup> *See id.* at 266-67.

<sup>107</sup> *See id.* at 267. She also claimed, but later dropped, a First Amendment violation. *See id.*

<sup>108</sup> *See Pollara v. Seymour*, 206 F. Supp. 2d 333, 337-38 (N.D.N.Y. 2002). It also ruled that the banner was not of recognized stature because it was not intended to be preserved as a work of stature. *Id.* at 337.

<sup>109</sup> *Id.*

<sup>110</sup> *See* 344 F.3d at 268. *See also infra* note 116.

<sup>111</sup> *See* 344 F.3d at 271 (Gleeson, J., concurring).

<sup>112</sup> *See id.* It should be noted that the district court also ruled that the banner was not of recognized stature and suggested that this ruling was sufficient to support summary judgment for the defendants. However, the Court of Appeals majority did not consider this issue. *See id.* at 268 (majority opinion) (citing *Pollara*, 206 F. Supp. 2d at 337).

“work of visual art.”<sup>113</sup> However, the court could have easily given a broader scope to the “work of visual art” definition to exclude only advertising or promotional works made for commercial purposes. This point was made by Judge Gleeson in his concurring opinion. He said that this definition “does not state that all works that ‘promote’ are not works of visual art,” that the majority’s broad construction of this limitation on the definition would exclude a painting commissioned to promote the Olympics, and that “there is nothing that suggests that a work originally created for the purpose of promoting an event, product or cause could never, over time, achieve the status of a work of recognized stature, and thus be deserving of protection under VARA.”<sup>114</sup> As noted above, he would have ruled for the defendants because the plaintiff’s destroyed banner had not achieved “recognized stature” status.<sup>115</sup>

Judge Gleeson’s opinion has merit and is consistent with the copyright principle of aesthetic nondiscrimination announced over a century ago by Justice Holmes in the United States Supreme Court’s influential *Bleistein* decision.<sup>116</sup> The Supreme Court held that posters used to advertise a circus were entitled to copyright protection. The Court stated:

Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use, - if use means to increase trade and to help make money. A picture is none the less a picture, and none the less a subject of copyright, that is used for an advertisement. And if pictures may be used to advertise soap, or the theater, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the

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<sup>113</sup> *Id.* at 267. After considering the banner’s message and purpose, as well as the goals of the sponsoring organization, it was reasonable to conclude the banner was promotional material. *See id.* *See generally* 17 U.S.C. § 101 (2012).

<sup>114</sup> *Pollara*, 344 F.3d at 271-72 (Gleeson, J., concurring). *Cf.* *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 251-52 (1903) (Justice Holmes explaining why copyright protection extended to advertising posters that promoted a circus, why judges should not pass judgment on the artistic merit of works, and that otherwise there was risk of excommunicating from protection the works of highly regarded artists).

<sup>115</sup> *See infra* notes 187-221 and accompanying text.

<sup>116</sup> *See Bleistein*, 188 U.S. at 251. “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits.” *Id.*

ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.<sup>117</sup>

Of course, Justice Holmes was interpreting and applying copyright law in *Bleistein*, not VARA with its legislative history. The majority in *Pollara* emphasized throughout its opinion that the scope of VARA was intended by Congress to be narrow, that the definition “is a critical underpinning of the limited scope” of VARA, and that the act “covers only a very select group of artists.”<sup>118</sup> It is not surprising that several other courts have, like the Second Circuit in *Pollara*, turned to the definition’s exclusions for advertising and promotional materials in section 101(A)(ii) as the basis for dismissing VARA claims.<sup>119</sup>

Moreover, a contrary result might have caused tremendous challenges for property owners. If *Pollara*’s claim had been successful, then the plaza manager would have violated VARA by removing the banner even though it was not properly on the plaza because no one obtained the required permit. If the plaintiff had won, then VARA would seem to require a disgruntled property owner to find the artist, tell him or her to remove the work, or obtain permission to remove it at the artist’s expense. Going through those steps would have posed a substantial problem for the manager of the government plaza. The banner could have had an offensive message yet the manager of the plaza might have

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<sup>117</sup> *Id.*

<sup>118</sup> *Pollara*, 344 F.3d at 269.

<sup>119</sup> See *Kleinman v. City of San Marcos*, 597 F.3d 323, 329 (5th Cir. 2010) (bashed-up Oldsmobile 88 created to serve as planter and advertising device not protected work of visual art within VARA because it was “promotional” material); *Rivera v. Méndez & Co.*, 824 F. Supp. 2d 265 (D.P.R. 2011) (reproduction of works of visual art for use in advertising and promotional materials for annual jazz festival falls outside of VARA’s protection but plaintiff still has a viable copyright infringement claim); *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138, 1158 (W.D. Mo. 2010) (defendant’s electronic images of plaintiff’s artwork on website, with watermark protection against copying, excluded from liability under VARA’s definition of work of visual art as merchandising or advertising item); *Berrios Noguerras v. Home Depot*, 330 F. Supp. 2d 48, 51 (D.P.R. 2004) (posting of plaintiff’s work of art in stores throughout Puerto Rico by means of promotional brochures or advertising for brands of paint excluded from the scope of VARA). The law does not protect merchandising items or advertising “presumably because the intent in such items is to successfully promote the artist, which requires preserving integrity in how the artist’s work is portrayed.” *Teter*, 723 F. Supp. 2d at 1158.

been forced to leave it up as he tracked down the artist. The risk of not taking those precautions would have been potential liability for violating VARA if the banner had been damaged. The plaza manager could assert that the destroyed or damaged work was not of “recognized stature”—and thus not subject to a destruction claim under VARA<sup>120</sup>—but even this seems to put too much of burden on the property manager.<sup>121</sup>

Instead of ruling that the banner was promotional material or concluding that it was not of recognized stature because it had never been seen, it might have been easier for the court to rule that VARA is inapplicable to works that are improperly placed on someone else’s property.<sup>122</sup> Some courts have announced rulings to this effect.<sup>123</sup> Otherwise, VARA would arguably apply to graffiti sprayed on walls without permission of the property owner,<sup>124</sup> and artists would be able to block development of vacant lots by installing artwork without permission. This would be irrational.<sup>125</sup>

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<sup>120</sup> This was Judge Gleeson’s reason for ruling against the plaintiff in *Pollara*. 344 F.3d at 271 (Gleeson, J., concurring).

<sup>121</sup> *Cf. Attlessey, supra* note 27, at 388-89 (“Forcing building owners to protect works which are attached to buildings without their knowledge or consent is a wholly undesirable result.”).

<sup>122</sup> *Pollara*’s banner had been placed on the plaza a day before the scheduled event even though the required permit had not been obtained.

<sup>123</sup> *See, e.g., Kleinman*, 597 F.3d at 329 (5th Cir. 2010) (a bashed-up Oldsmobile 88 created to serve as a planter and to promote the opening of a store was not protected by VARA against enforcement of a local ordinance banning junked vehicles); *English v. BFC&R East 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, at \*5 (S.D.N.Y. Dec. 3, 1997), *aff’d sub nom.*, *English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999) (holding that VARA was inapplicable to plaintiffs’ sculptures and murals that had been placed on the defendant’s property illegally). *Cf. Cohen v. G & M Realty L.P.*, No. 13-CV-5612 (FB)(JMA), 2013 WL 6172732 (E.D.N.Y. Nov. 20, 2013) (graffiti artists, who were given permission to decorate abandoned building by owner/developer, knew that their works would be temporary).

<sup>124</sup> *Cf. Botello v. Shell Oil Co.*, 280 Cal. Rptr. 535, 537 n.2 (Cal. Ct. App. 1991) (holding that California’s moral rights statute applied only to art that is affixed or attached by arrangement with the owner and saying it obviously does not apply to graffiti); *Cohen*, 2013 WL 6172732 (owner of the site had given plaintiffs permission to decorate the wall but had indicated from the beginning that the building would be demolished).

<sup>125</sup> *English*, 1997 WL 746444, at \*3. *See also* Mallika Rao, *Artists Bid Sad Farewell to 5 Pointz, New York City Graffiti Mecca*, HUFFINGTON POST, Nov. 21, 2013, available at [http://www.huffingtonpost.com/2013/11/21/5-pointz\\_n\\_4316483.html](http://www.huffingtonpost.com/2013/11/21/5-pointz_n_4316483.html) (owner of building who let artists use its walls as a canvas for graffiti received permission from the city to demolish the building and erect apartment buildings on the site). *But cf.*

3. A work of visual art does not include – (B) any work made for hire.<sup>126</sup>

The specific exclusion of works made for hire from VARA's definition of protected works of visual art is stated in the House Report to be self-explanatory<sup>127</sup> even though the idea that the employee-artist does not have moral rights in the creations done for an employer is antithetical to moral rights theory.<sup>128</sup> Still, perhaps it also can be explained by distinctions between the creative effort of an individual artist and the collaborative efforts of a group of creative persons working together on a project, consideration of who is bearing the financial risk for a work of visual art, and understanding the differences between how individual works and collaborative works are adapted after public exposure.<sup>129</sup> VARA's legislative history states:

Where an individual creating a work typically retains the economic rights in it, such as a visual artist does, an additional grant of rights such as those accorded [by VARA] will not impede distribution of the work. By contrast, those who participate in a collaborative effort, such as an audiovisual work, do not typically own the economic rights. Instead, audiovisual works are generally works-made-for-hire. Granting these artists the rights of attribution and integrity might conflict with the distribution and marketing of these works.

Motion pictures and other audiovisual works are generally produced and exploited in multiple copies. They are leased for theatrical and non-theatrical exhibition, licensed for broadcasting, shown on airplanes, and sold as videocassettes. Each market has its own commercial and technological configurations that effects how works will appear when presented. In contrast, the works of visual art covered by

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Attlesey, *supra* note 27, at 387-88 (discussing art attached to a building without the owner's consent and suggesting that this art may be protected by VARA).

<sup>126</sup> 17 U.S.C. § 101(B) (2012).

<sup>127</sup> H. REP., *supra* note 7, at 6919.

<sup>128</sup> See Damich, *supra* note 12, at 987.

<sup>129</sup> *Id.* at 988.

[VARA] are limited to originals: works created in single copies or in limited editions . . . .<sup>130</sup>

Although this selection from the House Report explains why Congress decided against extending moral rights to creators of audiovisual works, it notes that collaborative works like movies are typically works for hire. They are different from those single and limited edition works of visual art which are protected by VARA.

In general, the scope of the “work made for hire” doctrine under United States copyright law is broad and not as pro-author as in many countries that recognize moral rights. This means that an employee in the United States who creates a work of visual art for his employer is more likely to come within the “work for hire” doctrine than his or her counterpart in France or Germany who is creating a similar work of visual art for his or her foreign employer. As a result, the American employee will not have moral rights in regard to this work of visual art while the French or German employee might enjoy those rights.<sup>131</sup> In short, the “work made for hire” exclusion from VARA looms large even though a persuasive argument can be made that at least the attribution right is not incompatible with the policies underlying “work for hire.”<sup>132</sup>

A leading decision on this exclusion is *Carter v. Helmsley-Spear*, in which three artists were hired by the lessee of a building in Queens, New York to “design, create and install sculpture and other permanent installations in the building, primarily the lobby.”<sup>133</sup> They had “full authority in design, color and style,” while the lessee had “authority to direct the location and installation of the artwork within the building.”<sup>134</sup> The artists constructed a huge walk-through work with environmental and recycling themes. It consisted of a variety of materials that were affixed to the building’s walls and ceilings. There was also a large

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<sup>130</sup> H. REP., *supra* note 7, at 6919.

<sup>131</sup> Cf. JOYCE ET AL., *supra* note 1, at 273; see also *supra* note 2 and accompanying text.

<sup>132</sup> See Damich, *supra* note 12, at 989.

<sup>133</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80 (2d Cir. 1995).

<sup>134</sup> *Id.* The artists retained copyright, and the lessee was to receive 50% of any proceeds from exploitation of the work. *Id.*

glass mosaic on the lobby's floor. The installation was made of many unusual items including "a giant hand fashioned from an old school bus, a face made of automobile parts, and a number of interactive components."<sup>135</sup>

The lessee eventually went bankrupt, and the owners of the building terminated the lease. The owners found a new lessee who hired Helmsley-Spear to manage the building.<sup>136</sup> Helmsley-Spear told the artists to stop working on the project, and that the installation was going to be removed. The artists filed suit under VARA to prevent removal.<sup>137</sup> They maintained that their lobby installation was a single interrelated work of visual art that was incorporated into the building's lobby. As a consequence, they claimed that removing the installation or taking it apart would be "a distortion . . . [or] modification . . . prejudicial to [their] honor or reputation," as well as the destruction of a work of recognized stature.<sup>138</sup> They obtained a preliminary injunction preventing modification and destruction,<sup>139</sup> and, following a bench trial, they were granted a permanent injunction prohibiting the defendants from modifying, distorting, or removing the art for their lifetimes. In reaching this decision the trial court concluded that the walk-through sculpture in the lobby was a single integrated work of visual art under VARA that had recognized stature.<sup>140</sup>

The trial court also determined that this work was not excluded from protection as a work made for hire because the three artists were not employees but independent contractors.<sup>141</sup> The court's thorough discussion and application of the factors

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<sup>135</sup> *Id.* The artists worked for over a year on the project, and although they were still working at the time of their disagreement with the building's owner, most of the installation had been completed. *Id.* at 81.

<sup>136</sup> *Id.* The ownership, leasehold, and management of the property were very complex. Most of the complexities are not important, but some facts are relevant. The owner of the building was 474431 Associates. *Id.* at 80. The lessee of the building was 47-44 31st Street Associates, L.P. *Id.* The company working for this lessee to manage the building was SIG Management Company. *Id.* SIG, as agent of the lessee, was the company that hired the artists to construct the artwork. *Id.* at 80-81

<sup>137</sup> *Id.* at 81.

<sup>138</sup> 17 U.S.C. § 106A(a)(3)(A)-(B) (2012).

<sup>139</sup> *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

<sup>140</sup> 861 F. Supp. 303, 337 (S.D.N.Y. 1994).

<sup>141</sup> *Id.* at 317-22.

enumerated by the *Reid* decision<sup>142</sup> emphasized that the hiring party did not have the right to control the manner and means of creation of the installation,<sup>143</sup> that a high degree of skill was required to create the work,<sup>144</sup> that the artists were hired only for this project,<sup>145</sup> and that the hiring party was not in the business of creating works of visual art.<sup>146</sup> The fact that the hiring party provided the artists with health and insurance benefits for three years along with W-2 forms supported the defendants' contention that the plaintiffs were employees but was not decisive to the district court since the artists continued to work on the project after the benefits were stopped.<sup>147</sup>

The owner of the building and the new lessee lost the right to remove or modify this massive lobby installation because the trial court held that it was a protected work of visual art. The installation could not be hidden nor could its effect on visitors be minimized. In addition, the owner and lessee were unable to use the lobby for other purposes due to the square footage occupied by the walk-through sculpture. Moreover, the work by the three artists had been commissioned by the prior lessee, who was now bankrupt. Neither the new owner nor the new lessee had anything to do with that commission yet they were stuck with the lobby installation due to the permanent injunction granted by the trial court.<sup>148</sup>

On appeal the Second Circuit had to decide whether to protect the art installation by affirming the trial court's ruling, or to find a way to protect the owner's and lessee's property rights.<sup>149</sup>

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<sup>142</sup> *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 731, 751 (1989) (to determine whether a work is made for hire under the Copyright Act a court needs to ascertain, using principles of the common law of agency, whether the work was prepared by an employee or an independent contractor).

<sup>143</sup> 861 F. Supp. at 318.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 319.

<sup>146</sup> *Id.* at 321.

<sup>147</sup> *Id.* at 319. The court discussed several other *Reid* factors as well.

<sup>148</sup> The term "owner" is often used in this discussion, but a lessee could also lose many of the same rights depending on the terms of the lease. For example, if a lessee would have the right to decorate the lobby under the terms of the agreement, then it would lose that right if the artists could force it under VARA to keep the installation in the lobby.

<sup>149</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995).

Although the Second Circuit agreed with the trial court's determination that the sculptural installation was one individual work,<sup>150</sup> it did not rule on the other issues. It stated that "we need not discuss [VARA's] broad protection of visual art and the protection it affords works of art incorporated into a building."<sup>151</sup> Instead, it held that the work was not covered by VARA because it was as a work for hire<sup>152</sup> and thus excluded from VARA's definition of a "work of visual art."<sup>153</sup>

Like the trial court, the Second Circuit applied the multiple factor "*Reid* test" to reach its conclusion. It noted that the test is easily misapplied, and that although it is usually reluctant to reverse a trial court's findings on the presence or absence of the *Reid* factors, the "ultimate legal conclusion as to whether or not the sculpture is a 'work for hire' is reviewed *de novo*."<sup>154</sup> The court went on to say that "[o]ur review of the legal conclusion drawn from balancing the various *Reid* factors persuades us that the factors that weigh in favor of finding the artists were employees outweigh those factors supporting the artists' claims that they were independent contractors."<sup>155</sup> The court explained that payroll formalities and benefits coupled with their assignment of additional projects, being paid weekly over two years, being furnished with supplies, and not being able to hire assistants without consent of the now bankrupt lessee were more than sufficient to demonstrate that they were employees and that the lobby sculpture was a work made for hire.<sup>156</sup>

The *Reid* test is fact dependent and involves balancing. The Second Circuit said that it did not intend to marginalize factors like artistic freedom and skills, nor did it intend to put too much weight on contract language and the deduction of FICA taxes. It

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<sup>150</sup> *Id.* at 83-84 (the finding of "singleness" was not clearly erroneous). The lower court and the court of appeals were not troubled that the installation was unfinished.

<sup>151</sup> *Id.* at 88.

<sup>152</sup> "Work for hire" is defined at 17 U.S.C. § 101; see also *Carter*, 71 F.3d at 85-88 (applying the factors from *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

<sup>153</sup> *Carter*, 71 F.3d at 85, 88 (discussing the exclusions from the definition of VARA's "works of visual art" as including any work for hire).

<sup>154</sup> *Id.* at 85.

<sup>155</sup> *Id.* at 87.

<sup>156</sup> *Id.* at 87-88. The court also said that some of the trial court's factual findings were clearly erroneous. *Id.* at 85.

said that this would run counter to the remedial purposes of VARA and ignore the moral rights of artists whose works come under this “pathbreaking legislation.”<sup>157</sup> It also said that future cases will not fit neatly in either the employee or independent contractor categories.<sup>158</sup> Notwithstanding this cautionary language, it is evident that the *Reid* test, like other tests with many factors, can be manipulated so results become unpredictable.<sup>159</sup> Moreover, the Second Circuit applied the “work for hire” doctrine in a way that avoided expansion of VARA and thereby protected property rights. This is evidenced by its statement that although Congress was encouraging artists by enacting VARA, it “did not mandate the preservation of art at all costs and without due regard for the rights of others.”<sup>160</sup> In stating this, the court emphasized that a property owner’s rights had to be given considerable weight.

*Carter v. Helmsley-Spear* is a relatively early VARA decision and the Second Circuit’s ruling may have started a judicial trend of protecting property rights when faced with a possible expansion of VARA.<sup>161</sup> At a minimum, it shows that in cases where the artist’s status as an employee or independent contractor is uncertain a court can avoid ruling on an artist’s attribution or integrity claims by holding that the work at issue is made for hire so that VARA is inapplicable.

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<sup>157</sup> *Id.* at 87.

<sup>158</sup> *Id.*

<sup>159</sup> JOYCE ET AL., *supra* note 1, at 274 n.5 (it is not clear whether some of the *Reid* factors are more important than others).

<sup>160</sup> *Carter*, 71 F.3d at 80.

<sup>161</sup> *Cf. Piotraut, supra* note 10, at 600-01 (discussing a French decision that denied an attribution claim by a commissioned draftsman against a car manufacturer, explaining that designer’s work was accessory in comparison with vehicle itself and the company that took an exploitation risk). Some cases are easy. *See, e.g., Kamanou v. Exec. Sec. of the Com’n on Econ. Cmty. of W. African States*, No. 10 Civ. 7286(GBD)(JLC), 2012 WL 162708, at \*7 (S.D.N.Y. Jan. 19, 2012) (plaintiff’s attribution claim under VARA fails because her written work for the UN was a work for hire and because it was not a work of visual art).

4. A work of visual art does not include – (C) any work not subject to copyright protection under this title.<sup>162</sup>

According to VARA's legislative history, the copyrightability exclusion makes the act's "scope consistent with current copyright law, but granting protection to only those works subject to copyright protection under title 17. This avoids any tension between the public's ability to exploit the work under copyright law and the rights granted under [VARA]."<sup>163</sup> For example, even if a golf course designer could persuade a judge that his or her work constituted a work of visual art as a kind of sculpture, it would still not qualify under VARA because a golf course is not eligible for copyright protection.<sup>164</sup>

This copyrightability limitation was critical to the 2011 decision in *Kelley v. Chicago Park District*.<sup>165</sup> Chapman Kelley is a nationally recognized artist known for his floral and woodland interpretations. He was given permission in 1984 by the Chicago Park District to do a wildflower display at the northern end of Grant Park. He planted two large elliptical flowerbeds with native wildflowers and edged them with borders of gravel and steel. This installation was titled *Wildflower Works*, and was promoted as "living art."<sup>166</sup> The exhibit covered approximately 1.5 acres and contained between 200,000 and 380,000 wildflowers which Kelley purchased, planted, cultivated, and pruned. The massive floral exhibit received glowing reviews.<sup>167</sup>

There were disagreements between Kelley and the Park District during the next twenty years about maintaining the

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<sup>162</sup> 17 U.S.C. § 101(C) (2012).

<sup>163</sup> H. REP., *supra* note 7, at 6924.

<sup>164</sup> Ryan C. Steinman, *Taking a Mulligan: Moral Rights and the Art of Golf Course Design*, 51 IDEA 47, 60 (2010).

<sup>165</sup> 635 F.3d 290 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011). The decision also addresses whether VARA applies to site-specific art. *See also* Michelle Chatelain, *Copyright Protection of a Garden: Kelley v. Chicago Park District Holds that Gardens are Not Artwork Subject to Intellectual Property Protection*, 14 TUL. J. TECH. & INTELL. PROP. 385 (2011).

<sup>166</sup> *Kelley*, 635 F.3d at 291. Grant Park is one of Chicago's major public parks. It is downtown and bordered by Michigan Avenue on the west and Lake Michigan on the east.

<sup>167</sup> *Kelley v. Chi. Park Dist.*, No. 04 C07715, 2008 WL 449886, at \*2 (N.D. Ill. Sept. 29, 2008). The seedlings cost between \$80,000 and \$152,000. *Kelley*, 635 F.3d at 293.

exhibit.<sup>168</sup> In 2004, the Park District decided it wanted to reconfigure the beds; reduce the display area from 66,000 to 30,000 square feet and to make them rectangular. The Park District sought Kelley's input and approval but he did not okay the proposed reconfiguration. The Park District implemented the new plan anyway with wildflowers replanted on a smaller scale with rectilinear borders. Because of this reconfiguration, Kelley brought suit for VARA violations.<sup>169</sup>

Kelley claimed, and the trial court agreed, that *Wildflower Works* could be treated as both a painting and as sculpture, thus qualifying as a work of visual art under VARA.<sup>170</sup> He contended that the Park District's reconfiguration of his work was an "intentional distortion, mutilation, or other modification" that was "prejudicial to his reputation,"<sup>171</sup> but the court ruled against him, holding that the work "lacked sufficient originality to be eligible for copyright, a foundational requirement in the statute."<sup>172</sup> The trial court also followed the lead of the First Circuit in *Phillips v. Pembroke Real Estate* in ruling that the garden was site specific art excluded from protection under VARA.<sup>173</sup>

The Seventh Circuit affirmed. It initially discussed, in extended dicta, the Park District's failure to challenge the trial court's conclusion that *Wildflower Works* was either a painting or

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<sup>168</sup> Under the terms of Kelley's agreement with the Park District he was to install and maintain this "permanent" floral exhibit at his expense, and the District reserved the right to terminate the installation by giving the artist ninety days notice to remove the planting. *Kelley*, 635 F.3d at 292. The District wanted to discontinue the exhibit in 1988 but Kelley sued, the parties settled, and the District agreed to extend a "temporary permit" for another year. *Id.* at 294. This permit did not have the ninety-day notice of termination provision but it did state "this agreement does not create any proprietary interest for Chicago Wildflower Works, Inc. or Mr. Chapman Kelley in continuing to operate or maintain the Display after September 1, 1989." *Id.* Temporary extensions of this permit were granted until 1994. *Id.* Nevertheless, Kelley and his volunteers continued to cultivate the garden without a permit until 2004. *Id.*

<sup>169</sup> *Id.* at 294, -95.

<sup>170</sup> *Id.* at 295. The court arguably misread the statute by failing to recognize that a work cannot be covered by VARA if it is not copyrightable. Roberta Rosenthal Kwall, *The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights*, 14 VAND. J. ENT. & TECH. L. 889, 901 (2012).

<sup>171</sup> *Kelley*, 635 F.3d at 295.

<sup>172</sup> *Id.* at 292.

<sup>173</sup> *See id.* at 295 (citing *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006)). However, the trial court ruled in Kelley's favor on a breach of contract claim and awarded him nominal damages. *Id.* at 292.

sculpture. According to the court, “[t]his is an astonishing omission. VARA’s definition of ‘work of visual art’ operates to narrow and focus the statute’s coverage; only a ‘painting, drawing, print or sculpture,’ or exhibition photograph will qualify.”<sup>174</sup> The appellate court agreed with the lower court’s concern about “tension between the law and the evolution of ideas in modern or avant garde art” and about being “too literalist” as to whether an object is a painting or sculpture.<sup>175</sup> However, it stated “there’s a big difference between avoiding a literalistic approach and embracing one that is infinitely malleable. The judge appears to have come down too close to the latter extreme.”<sup>176</sup> It added that the case raised serious questions about VARA’s definition of work of visual art that had decisive consequences for many moral rights claims. Nevertheless, since the Park District did not challenge this aspect of the lower court ruling, the Seventh Circuit turned to the copyrightability exclusion.<sup>177</sup>

The court explained that VARA supplements copyright protection for a limited subcategory of works and that these VARA-eligible works “comprise a discrete subset of otherwise copyrightable pictorial and sculptural works” and “[i]f a work is so lacking in originality that it cannot satisfy the basic requirements for copyright, then it can hardly qualify as a painting or sculpture eligible for *extra* protection under VARA.”<sup>178</sup> It proceeded to discuss the originality requirement at length, said that the district court made the mistake of equating originality with novelty, and then explained that the “real impediment to copyright here is . . . that a living garden lacks the kind of authorship and stable fixation normally required to support copyright.”<sup>179</sup> It accepted that artists might regard Kelley’s garden as postmodern conceptual art, and it acknowledged that copyright’s prerequisites of authorship and fixation are broadly defined, but said that “the

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<sup>174</sup> *Id.* at 300.

<sup>175</sup> *Id.* at 301 (quoting *Kelley v. Chi. Park Dist.*, No. 04-C-07715, 2008 WL 4449886, at \*4 (N.D. Ill. Sept. 29, 2008)) (internal quotation marks omitted).

<sup>176</sup> *Id.*

<sup>177</sup> *See id.* at 301-02.

<sup>178</sup> *Id.* at 302.

<sup>179</sup> *Id.* at 303.

law must have some limits; not all conceptual art may be copyrighted.”<sup>180</sup>

In essence, Kelley’s Wildflower Works was neither authored nor fixed in the senses required by copyright. It was planted and cultivated, not authored; its elements were alive and changing, not fixed; and it owed most of its form to natural forces, though, the gardener/designer assists nature.<sup>181</sup> The court did not go so far as to state that artists who incorporate natural or living elements in their works can never claim copyright protection, but it rejected as inapt Kelley’s comparisons of his garden to a fountain-sculpture in Chicago’s Millennium Park, the mobiles of Alexander Calder, and Jeff Koons’ forty-three foot flowering topiary ‘Puppy.’<sup>182</sup> Given the failure of Kelley’s garden to satisfy these basic requirements for copyright protection, it could not qualify for moral rights protection under VARA.<sup>183</sup>

One can take issue with the Seventh Circuit’s conclusions about authorship, fixation, and copyrightability in *Kelley*. The ellipse shaped gardens and the placement of particular wildflowers in those spaces owed their origin to Chapman Kelley. The artistic judgment he exercised in planning and then executing Wildflower Works easily satisfies the “modicum of creativity” required by the *Feist* decision.<sup>184</sup> According to the Supreme Court, an author is “he to whom anything owes its origin; originator;

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<sup>180</sup> *Id.* at 304.

<sup>181</sup> *See id.*

<sup>182</sup> *Id.* at 305. The court explained that the surfaces of the Millennium Park fountain were embedded with LED screens that replay video images, thus satisfying the fixation requirement; that although the aesthetic effects of a Calder mobile’s movements were attributable to air currents, there was no doubt that the mobile itself was fixed; and that Koons’ huge dog had a fixed metal frame covered with flowers sustained by an irrigation system. *See id.*

<sup>183</sup> *See id.* at 306. The Seventh Circuit also discussed, but did not decide, questions raised by the trial court’s determination that the garden was site-specific art and thus outside of VARA’s scope. It took issue with the First Circuit’s all or nothing approach to site-specific art in *Phillips v. Pembroke Real Estate* and explained that a categorical exclusion of site-specific art from VARA was not so obvious to it. Still, since it resolved Kelley’s VARA claim on other grounds, the court did not have to say whether the statute was inapplicable to such art. *See id.* at 306-07. It ultimately reversed the trial court ruling in Kelley’s favor on his breach of contract claim, saying there was no evidence that the Park District authorized a Commissioner to enter a contract with Kelley. *See id.* at 307-08.

<sup>184</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

maker; one whom completes a work,”<sup>185</sup> and writings include all forms “by which the ideas in the mind of the author are given visible expression.”<sup>186</sup> Wildflower Works certainly changed with the seasons, and it does not fit nicely within our traditional conceptions of painting and sculpture, but it was very much the tangible creation of Chapman Kelley, and it received glowing reviews as living art. It was “sufficiently permanent . . . to permit it to be perceived . . . for a period of more than a transitory duration.”<sup>187</sup> The garden’s fluidity due to weather, changes in the seasons, the varied times when flowers bloom should not automatically rule out copyrightability.<sup>188</sup> Nevertheless, the Seventh Circuit, like other courts which have had to grapple with VARA claims that seek to expand the statute’s reach, interpreted VARA restrictively and arguably consistently with legislative intent; “to provide very circumscribed federal statutory protection for only certain types of visual art.”<sup>189</sup>

### *B. Limitations on the Attribution and Integrity Rights*

1. The right to “prevent any destruction of a work of recognized stature.”<sup>190</sup>

The creator of a work of visual art with recognized stature enjoys the right to prevent the destruction of that work. “[A]ny intentional or grossly negligent destruction of that work is a

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<sup>185</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

<sup>186</sup> *Id.*

<sup>187</sup> 17 U.S.C. § 101 (2012) (definition of fixation).

<sup>188</sup> *Cf. Kwall, supra* note 170, at 916-17.

<sup>189</sup> *Id.* at 915. *Cf. Chatelain, supra* note 165, at 393-94. The copyrightability exclusion could be used to deny VARA claims by illegal graffiti artists seeking to prevent their works from being painted over, washed away or otherwise removed. *Cf. Jamison Davies, Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 ME. L. REV. 28, 31 (2012). This author also states that it is unlikely that graffiti can be protected under VARA. *See id.* at 43-44. *See also Michelle Bougdanos, The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 565 (2002). *But see Cohen v. G & M Realty LP*, No. 13-CV-5612(FB)(JMA), 2013 WL 6172732, at \*13 (E.D.N.Y. Nov. 20, 2013) (no authority under VARA to prevent destruction of graffiti art decorating walls of an abandoned building even though the owner had given the artists permission to decorate, but the artists might have a claim for damages under VARA after the site owner painted over all the works).

<sup>190</sup> 17 U.S.C. § 106A(a)(3)(B).

violation of that right.”<sup>191</sup> The recognition of this moral right acknowledges “that destruction of works of art has a detrimental effect on the artist’s reputation, and that it also represents a loss to society.”<sup>192</sup> However, in order for this right to be invoked, the work must be of “recognized stature.”

The bill, as first introduced, established a virtual *per se* standard with regard to protecting works of “recognized stature” in respect to all aspects of the integrity right; distortions, mutilations, and certain modifications as well as destruction. However, the drafters eventually endorsed the “prejudicial to honor and reputation” standard with respect to all covered works, not just those with recognized stature. This was done to avoid experts battling in every case over whether a work of visual art had recognized stature. The revision also acknowledges that less well known or appreciated artists have honor and reputations worthy of protection.<sup>193</sup> The deletion of the general “recognized stature” language is seen as being “consistent with the fact that . . . many works now universally acknowledged as masterpieces have been rejected and often misunderstood by the general public at the time they were created.”<sup>194</sup>

However, the “recognized stature” requirement was retained as a limit to the artist’s moral right against destruction. One court stated in regard to the destruction of a banner, that:

It defies the underlying purposes of VARA to assume that the statute was intended to protect works of artistic merit *without regard* to whether such works were ever intended as ‘art’ or whether they were intended to be displayed as art or were otherwise intended to be preserved for posterity as works of artistic merit.<sup>195</sup>

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<sup>191</sup> *Id.* This right, and the right to prevent distortion and mutilations that are prejudicial to the artist’s honor or reputation, are also subject to the limitations set forth in section 113(d). 17 U.S.C. § 106(A)(a)(3).

<sup>192</sup> H. REP., *supra* note 7, at 6926. Recognition of a moral right against destruction is not universal. *See generally* Lipton, *supra* note 12, at 546-47.

<sup>193</sup> *See* H. REP., *supra* note 7, at 6925.

<sup>194</sup> *Id.*

<sup>195</sup> *Pollara v. Seymour*, 206 F. Supp. 2d 333, 336 (S.D.N.Y. 2002) (the banner was meant to be used to publicize a one-time event and would not have been preserved – it was not of recognized stature).

Sometimes the parties might agree that a work has recognized stature because the artist is well known and his or her works are held in very high esteem in the arts community. This is arguably illustrated by the sculptures of David Phillips, which are often integrated in their surrounding environment and regarded as site specific. When he sued an entity responsible for the redesign of his nautical themed sculpture park on Boston's harbor, the defendant did not dispute that his work was of recognized quality.<sup>196</sup> On the other hand, a defendant who is about to destroy, or has already destroyed, a work of visual art that is not well known or created by a relatively unknown artist may want to assert that the work is not of recognized stature. VARA does not define this limitation on the right against destruction.

The accepted test for determining whether a work is of recognized stature was stated by the trial court in the *Carter v. Helmsley-Spear* litigation, in which the court enjoined the removal of a large art installation that was integrated into a building's lobby.<sup>197</sup> Even though the trial court's ruling was reversed by the Second Circuit because the installation was deemed to be a work for hire unprotected by VARA,<sup>198</sup> the lower court's thoughtful discussion of how to determine recognized stature has been used by other courts.<sup>199</sup> The trial court stated:

[T]he recognized stature requirement is best viewed as a gate-keeping mechanism – protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature. A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti. As one commentator has noted, “The advantages

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<sup>196</sup> See *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 103 (D. Mass. 2003). I say arguably because Phillips had affidavits and articles about his work generally and this park specifically from several art experts and critics. On appeal, the First Circuit did not resolve whether this public sculpture park was of recognized stature because it held that VARA did not protect site specific art. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

<sup>197</sup> See 861 F. Supp. 303, 325 (S.D.N.Y. 1994). See *supra* notes 133-161 and accompanying text.

<sup>198</sup> See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995).

<sup>199</sup> See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *English v. BFC & R 11th St.*, No. 97 Civ. 7446(HB), 1997 WL 746444, at \*6 (S.D.N.Y. Dec. 3, 1997); *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

of the ‘of recognized stature’ qualification include barring nuisance law suits,” . . . Nor must the trier of fact personally find the art to be aesthetically pleasing; indeed, courts have persistently shunned the role of art critic.<sup>200</sup>

The court also said that this determination should be based on the testimony of experts on both sides of the issue, and that satisfying the “recognized stature” test requires the work to be viewed as meritorious.<sup>201</sup>

The *Carter* test was used in *Martin v. City of Indianapolis*, one of the rare reported VARA decisions in which the artist won.<sup>202</sup> Jan Randolph Martin erected a twenty-by-forty-foot metal sculpture on private property in Indianapolis. There was an agreement by which the city’s Department of Metropolitan Development was obligated to give the owners of this land and the sculpture ninety days to remove it in the event the department reached certain determinations about future use of the property.<sup>203</sup> Recognizing that his work might have to move, Martin engineered it so that it could be disassembled.<sup>204</sup> In 1992, the City notified the landowner that it was considering acquiring the property as part of an urban renewal project, and the City was reminded about the agreement. The artist then appeared before the development commission to offer input about relocating his work, and the city responded by saying that he would be contacted in the event it had to be removed. Nevertheless, the city “awarded a contract to demolish the sculpture, and demolition followed, all without prior notice” to the artist or the property owner.<sup>205</sup>

Martin’s one-count complaint under VARA was for the city’s violation of his right against destruction of a work of recognized stature.<sup>206</sup> The district court considered Martin’s sculpture to be of “recognized stature” and granted summary judgment in his

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<sup>200</sup> *Carter*, 861 F. Supp. at 325 (quoting Damich, *supra* note 12, at 954). In a footnote the court said that this test was consistent with an earlier version of VARA providing that the court should take into account the opinions of artists, art dealers, and collectors. *Id.* at 325 n.10.

<sup>201</sup> *Id.* at 325.

<sup>202</sup> *See* 192 F.3d 608, 612 (7th Cir. 1999).

<sup>203</sup> *See id.* at 610.

<sup>204</sup> *See id.* at 611.

<sup>205</sup> *Id.*

<sup>206</sup> *See id.* at 612 (quoting 17 U.S.C. § 106A(a)(3)(B)).

favor.<sup>207</sup> The primary issue on appeal was the “recognized stature” finding. Martin asserted that the test from *Carter v. Helmsley-Spear* was more rigorous than Congress intended, but the court said there was no need for it to refine that rule. It then noted that Martin’s evidence on stature was not as complete as in the *Carter* litigation, because Martin’s work “was destroyed by the City without the opportunity for experts to appraise the sculpture in place.”<sup>208</sup>

Instead of offering evidence of experts or others by affidavit or otherwise, Martin’s evidence of stature included favorable newspaper and magazine articles from 1982, various positive letters from that time period including one from an art gallery director and another to the editor of a local paper, and the program from a show at which his model for the sculpture won a prize. One of the letters said that the proposed sculpture was “an interesting and aesthetically stimulating configuration of forms and structure” and another said that it “unites the area, providing a nexus, a marker, a designation, an identity and, presumably, a point of pride.”<sup>209</sup> Notwithstanding the defendant’s hearsay and inadequate foundation arguments, the trial court found that Martin had met his “recognized stature” burden of proof, and the appellate court agreed with its assessment.<sup>210</sup>

Judge Manion dissented on the recognized stature determination, saying that summary judgment was inappropriate.<sup>211</sup> He pointed out that VARA was not meant to regulate urban renewal, but to protect great works of art from destruction and he agreed with the trial court in *Carter* that the “recognized stature” requirement serves as a gatekeeper so that protection is afforded only to works that art experts and the artistic community view as having stature. Experts have to weigh in on the issue. “A plaintiff cannot satisfy his burden of

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<sup>207</sup> *Id.* at 610, 612. The trial court awarded Martin “statutory damages in the maximum amount allowed for a non-wilful statutory violation.” *Id.* at 610. The destruction was the result of bureaucratic failure as opposed to willful conduct. *See id.* at 614.

<sup>208</sup> *Id.* at 612.

<sup>209</sup> *Id.* at 613.

<sup>210</sup> *Id.* at 612-13.

<sup>211</sup> *See id.* at 615.

demonstrating recognized stature through old newspaper articles and unverified letters.”<sup>212</sup>

The *Carter* test can be pushed too far.<sup>213</sup> One court noted that it “would be hard pressed to hold that a newly discovered Picasso is not within the scope of VARA simply because it has not been reviewed by experts in the art community.”<sup>214</sup> However, this court added that ordinarily it will not be enough for an artist to show that some of his or her other creations have been highly acclaimed. An artist’s local notoriety may not be enough because the focus is on the work that is the subject of the litigation, not on the artist’s general body of work.<sup>215</sup> The provision’s language suggests that the work must have attained recognized stature at the time it is destroyed, or at risk of being destroyed, and it arguably follows that a work that has never been publicly displayed cannot, as a matter of law, be of recognized stature.<sup>216</sup> This seems unduly harsh if it limits protection of a newly discovered work by a recognized master, but this interpretation of the requirement does give a court a way out of having to rule on a difficult conflict between an artist and a property owner.

The “it cannot have recognized stature if no one has seen it” interpretation was critical to the decision in *Scott v. Dixon*.<sup>217</sup> This case presents another sharp conflict between moral rights and property rights. The plaintiff was an artist in Suffolk County, New York, who had gained some local notoriety by creating a tall

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<sup>212</sup> *Id.* at 616.

<sup>213</sup> See generally *supra* note 196 (stating the *Carter* test for determining whether a work is of recognized stature has been cited, quoted, and used by other courts). The test makes sense. However, it is important to remember that the Second Circuit ultimately held in *Carter* that the art in question fell outside of VARA’s coverage because it was a work for hire. Similarly, the First Circuit in *Phillips v. Pembroke Real Estate* did not resolve whether the plaintiff’s public sculpture park was of recognized stature because it determined that VARA did not protect site-specific art.

<sup>214</sup> *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

<sup>215</sup> See *id.*; *Martin v. City of Indianapolis*, 982 F. Supp. 625, 631 (S.D. Ind. 1997).

<sup>216</sup> Unless the work is known, the artist does not have a destruction claim. *Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) (Gleeson, J., concurring) (quoting Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 480 n.19 (1990)). In this case a large banner was taken down and torn up before it was displayed publicly. It had not achieved recognized stature according to one of the judges.

<sup>217</sup> 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

sculpture (fifty-two feet high) called Stargazer Deer. It was made of plywood over steel and located in a field so it was visible from a county highway. Dixon asked the artist to create a work for the backyard of his property so Scott created a massive swan, fabricated out of steel. It was forty feet long and ten feet high. It was delivered to Dixon's property, assembled there, and then maintained by Dixon and his wife. Because their property was surrounded by hedges twelve feet high this massive swan could not be seen from the street, and Mr. and Mrs. Dixon never opened their property for the general public to see the swan sculpture.<sup>218</sup>

Several years passed and the Dixons sold their property. The sales contract required removal of the sculpture prior to closing. Dixon testified that he told the plaintiff of his plans to remove the sculpture, but the plaintiff testified to the contrary. In any event, Dixon paid a company \$5,400 to dismantle the swan and move it to storage. There was some correspondence about moving the sculpture to another location on Long Island or to a museum in New England, but Dixon was not willing to absorb those costs.<sup>219</sup> The sculpture deteriorated because it was left uncovered and could not be restored to its former condition.<sup>220</sup>

The plaintiff claimed that her right to prevent destruction had been violated.<sup>221</sup> The court determined that the plaintiff had not presented sufficient evidence to establish that the swan was of recognized stature and dismissed. It quoted the test from *Carter*<sup>222</sup> and said that it is not sufficient that other works by the claimant artist have achieved stature; "[i]nstead, it is the artwork that is the subject of the litigation that must have acquired this stature."<sup>223</sup> The huge swan may have had artistic merit, but it was not of recognized stature; it was not visible from the public street, and the plaintiff's notoriety for her Stargazer Deer did not make the swan a recognized work. In addition, the plaintiff did not call a

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<sup>218</sup> See *id.* at 397.

<sup>219</sup> See *id.* at 398-99.

<sup>220</sup> See *id.* at 399-400.

<sup>221</sup> To prove this claim she had to show that the swan sculpture was a work of recognized stature and that the defendant destroyed it in an intentional or grossly negligent manner. See *id.* at 400 (citing 17 U.S.C. § 106A(a)(3)(B) & *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 2005)).

<sup>222</sup> See *id.*

<sup>223</sup> *Id.* (citing *Martin v. City of Indianapolis*, 982 F. Supp. 625, 631 (S.D. Ind. 1997)).

witness to testify as to whether a member of the artistic community had ever reviewed the swan, and the several newspaper clippings regarding the massive deer did not prove anything about the swan.<sup>224</sup>

2. “The modification of a work . . . which is a result of the passage of time or the inherent nature of the materials is not” a violation of the integrity right<sup>225</sup> nor is the “modification of a work . . . which is the result of conservation, or of the public presentation, including lighting and placement . . . unless the modification is caused by gross negligence.”<sup>226</sup>

Subsections 106A(c)(1) and (2) purport to account for standard practices in the artistic community, as well as, supplement the several exclusions in the definition of “work of visual art.”<sup>227</sup> There is not a gross negligence exception for modifications due to the passage of time or the nature of the materials in (c)(1), unlike modifications caused by conservation efforts or public presentation in (c)(2). In other words, if a work of visual art is modified as a result of grossly negligent conservation efforts, or as a result of gross negligence in its public presentation, then that modification could violate the integrity right.<sup>228</sup> On the other hand, changes in a work of visual art due to a curator’s reasonable conservation efforts, or resulting from the way a gallery owner or museum displays it do not violate VARA.<sup>229</sup>

*Flack v. Friends of Queen Catherine*<sup>230</sup> discusses and applies both of these subsections. The plaintiff, Audrey Flack, is a well-regarded artist who was commissioned to sculpt a statue of Queen Catherine of Braganza, the namesake for the Borough of Queens. This work, upon its casting in bronze, was to be installed on a site

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<sup>224</sup> See *id.* at 397.

<sup>225</sup> 17 U.S.C. § 106A(a)(c)(1).

<sup>226</sup> 17 U.S.C. § 106A(a)(c)(2).

<sup>227</sup> H. REP., *supra* note 7, at 6927.

<sup>228</sup> See *id.* See generally, Davis, *supra* note 22, at 217 (arguing that VARA’s narrow scope confers inconsistent and unpredictable protections over artworks such that even the best practices of those who work to conserve art may jeopardize artists’ rights).

<sup>229</sup> See Davis, *supra* note 22, at 225-27.

<sup>230</sup> See 139 F. Supp. 2d 526 (S.D.N.Y. 2001). This opinion is discussed in depth in Davis, *supra* note 22, at 230-37.

on the East River overlooking Manhattan. The artist completed several phases of the project including making large maquettes from which molds could be made for casting.<sup>231</sup> The project became controversial and the company that was doing the casting, Tallix, terminated its work on the project until the commissioning entity could make certain assurances.<sup>232</sup> Flack then discovered that her clay sculpture of the statue's head had been left outside by Tallix and damaged. She offered to reconstruct the damaged clay face for an additional fee, but Tallix hired another artist to do this work. In Flack's opinion, this second artist's work distorted the model, making the facial features uneven and in the wrong size. Tallix was about to cast the altered head in bronze when Flack sued, alleging both copyright infringement and violations of VARA.<sup>233</sup>

Her VARA claims included partial destruction of a work of recognized stature by placing the sculpted clay head outside, hiring the second artist to reconstruct the face, and casting the modified work without her approval.<sup>234</sup> After conceding that Flack's sculpted head was a protected work of visual art even though it was still an unfinished model,<sup>235</sup> the court determined that she had stated a claim as to how hiring the second artist to work on the damaged face resulted in a distorted, mutilated model that violated the integrity right. Her claim was outside the protected conservation efforts limitation in (c)(2) because she had made sufficient allegations to support an inference that the hiring of the second artist was grossly negligent.<sup>236</sup>

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<sup>231</sup> See 139 F. Supp. 2d at 529-30. The agreement from the commissioning party – Friends of Queen Catherine (FQC) – called for Flack to be paid \$125,000. See *id.* at 529. FQC contracted with Tallix, Inc. to fabricate the bronze sculpture. See *id.*

<sup>232</sup> The public became aware that the Queen had profited from the slave trade. In addition, the project had not gone through the appropriate review and approval processes. See *id.* at 530-31.

<sup>233</sup> See *id.* Tallix hired one of Flack's assistants to re-sculpt the face, and Flack felt that he lacked the requisite skills for this job.

<sup>234</sup> See *id.* at 531-32.

<sup>235</sup> See *id.* at 532-34. "In the artistic community, 'models' such as the clay sculpture are considered works of art in their own right. . . . such works are not 'models as used in the exclusionary portion of the definition . . .'" *Id.* at 533-34. But see Elizabeth Bock, *Using Public Disclosure as the Vesting Point for Moral Rights Under the Visual Artists Rights Act*, 110 MICH. L. REV. 153 (2011) (arguing that VARA protection should not vest until the artist determines that his work is complete and presents it to the public).

<sup>236</sup> See 139 F. Supp. 2d at 535.

The court dismissed her claim that leaving the sculpted head outside violated VARA by causing its partial destruction. It explained that due to the language in section 106A(c)(1), modification of a work due to the inherent nature of the materials is not a violation of the integrity right even if the modification results from gross negligence.<sup>237</sup> Moreover, the court rejected Flack's contention that the sculpted head had been destroyed because photos showed it was capable of being repaired and the plaintiff had offered to repair it.<sup>238</sup> The court also dismissed her claim that VARA was violated when the defendant authorized casting without her permission. According to the court, such a claim could not be maintained under VARA because it mandates the preservation of works, not the creation of works.<sup>239</sup>

Legislative history explains that the removal of a work from a particular spot should generally come within the "public presentation, including lighting and placement" exclusion "because the location is a matter of presentation, unless the work cannot be removed without causing the kinds modifications described in . . . 106A(a)(3)."<sup>240</sup> Similarly, entities displaying protected works "have normal discretion to light, frame, and place works of art. However, conduct that goes beyond presentation . . . to physical modification of it is actionable."<sup>241</sup> The public presentation exception was reportedly crafted in response to the "Tilted Arc" case, in which the artist Richard Serra sued the General Services Administration for removing a massive work he had done for Federal Square in lower Manhattan.<sup>242</sup> The Second Circuit rejected his claim that removing this integrated, site

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<sup>237</sup> See *id.* at 534. See Davis, *supra* note 22, at 235-37 (critical of the court's handling of this VARA claim in Flack's suit).

<sup>238</sup> See 139 F. Supp. 2d at 534-35.

<sup>239</sup> See *id.* at 535 (quoting *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 329 (S.D.N.Y. 2005)).

<sup>240</sup> H. REP., *supra* note 7, at 6927.

<sup>241</sup> *Id.* The legislative history, as an example, states that the public presentation exclusion would protect an entity that "temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time." *Id.*; but see *Snow v. Eaton Centre Ltd.* (1982) 70 C.P.R. 2d 105 (Can. Ont. H.C.J.). *Snow* involved a successful claim by a Canadian artist against a Toronto shopping mall that decorated his sculpture of geese in flight with ribbons. This case is cited in VARA's legislative history after indicating that putting ribbons on the sculpture would be allowed under the public presentation exception. See also Bird, *supra* note 15, at 67-68.

<sup>242</sup> See *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 138 (1st Cir. 2006).

specific, government owned work from government owned property violated his due process and free exercise rights.<sup>243</sup> One court has said that the premise of the public presentation exception is:

artwork that can be moved in some fashion, such as paintings or sculptures—that is, art that is not permanently affixed or ‘integrated’ in such a way that the mere act of moving it would destroy it. The possibility of change without destruction is implicit in the public presentation exception. The public presentation exception defines the types of changes, such as those in lighting and placement, that do not constitute “destruction, distortion, or mutilation.”<sup>244</sup>

3. The integrity right is “subject to the limitations set forth in section 113(d).”<sup>245</sup>

Section 113(d) is called the buildings exception. It was summarized briefly in the discussion of how *Crimi*, the 1949 case involving the destruction of a fresco painted on the wall of a church, might come out today.<sup>246</sup> Section 113(d) sets forth a general rule that creators of works incorporated into buildings are protected by VARA and that when a building owner and artist agree to the installation, the agreement extends to all subsequent owners of the building. It also distinguishes between works of visual art integrated into a building that can be removed and those works that are incorporated in a structure in such a way that they would be destroyed on removal.<sup>247</sup>

Under section 113(d)(1), a building owner’s destruction of a non-removable work will violate the integrity right unless the artist (a) consented to the installation of the work of a building before VARA’s effective date on June 1, 1990, or (b) entered a written agreement with the owner of the building, signed by both of them, that installation of the work may subject it to destruction by reason of its removal. This requirement insures that the artist

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<sup>243</sup> See *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988) (discussed in *Phillips*, 459 F.3d at 138).

<sup>244</sup> *Phillips*, 459 F.3d at 141.

<sup>245</sup> 17 U.S.C. § 106A(a)(3) (2012).

<sup>246</sup> See *supra* notes 49-52 and accompanying text.

<sup>247</sup> See H. REP., *supra* note 7, at 6930.

is fully aware of the circumstances surrounding the installation and understands that he is subjecting the work to “possible modifications that otherwise would be actionable under section 106A.”<sup>248</sup>

If the work is removable, and the owner of the building wishes to remove it without violating the integrity right, then the owner must (a) make a diligent, good faith attempt to notify the artist of his or plans to remove the work from the building; if this effort is not successful, the owner can remove the work, or (b) the owner can remove the work if the artist, within ninety days of receiving notice of the owner’s plans in writing, fails to remove the work or to pay for its removal.<sup>249</sup> According to legislative history, this provision “presumes that an attempt to notify the author by registered mail constitutes a diligent, good faith effort.”<sup>250</sup> These subsections of 113(d), along with the public presentation exception in section 106A(c)(2), “implicitly address” and simultaneously reject the assertion “that the artist should have some control over the framework” or context in which his work is incorporated.<sup>251</sup>

*Board of Managers of Soho International Arts Condominium v. City of New York*<sup>252</sup> is a drawn out battle over the removal of artwork attached to steel reinforcement braces on an outer wall of a twelve story loft building in New York City. The building, 599 Broadway, was erected in 1917.<sup>253</sup> The art installation was proposed in the early 1970s and paid for by City Walls, a non-

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<sup>248</sup> 17 U.S.C. §§ 113(d)(1)(A), (B); H. REP., *supra* note 7, at 6930. *Cf.* Cohen v. G&M Realty LP, No. 13-CV-5612(FB)(JMA), 2013 WL 6172732 (E.D.N.Y. Nov. 20, 2013) (court refuses to preserve abandoned commercial buildings in order to protect graffiti decorating the structures in part because the artists knew that their works would be temporary because the building might be demolished).

<sup>249</sup> *See id.* §§ 113(d)(2)(A)-(B). Congress separated works fitting the definition of section 113(d) into two categories – removable and non-removable. Attlesey, *supra* note 27, at 385.

<sup>250</sup> H. REP., *supra* note 7, at 6930.

<sup>251</sup> *Cf.* Hughes, *supra* note 71, at 26.

<sup>252</sup> No. 01 Civ.1226 DAB, 2003 WL 21403333 (S.D.N.Y. June 17, 2003). This is the first of four rulings during several years of litigation. These ruling are discussed in depth in Davis, *surpa* note 22, at 237-44. In the 1940s the city widened Houston Street and in doing so, it destroyed most a building abutting 599 Broadway. As a result, 599 Broadway needed additional support so a system of 42 steel braces was installed. There were seven rows of six evenly spaced braces with the lowest hanging 17 feet above the street.

<sup>253</sup> *See Soho*, 2003 WL 21403333 at \*2.

profit organization interested in enhancing the urban landscape. It commissioned Forrest Myers to create and install the work. He attached aluminum bars perpendicularly to the forty-two reinforcement braces and then painted the braces, the perpendicular bars, and the wall different colors.<sup>254</sup>

This wall and the attached artwork, referred to as “The Wall,” were repaired several times during the 1980s. Discussions about removing the artwork led to the artist’s strenuous protests and did not go anywhere. In 1997, the artist was informed that the wall needed to be repaired again, and that the artwork would have to be removed. Myers responded through his attorney that removal would violate VARA. Eventually, after a series of meetings and hearings with various boards and commissions lasting several years, the artwork was removed.<sup>255</sup>

The owners of the building sued Myers, the City, and the Landmarks Preservation Commission seeking a declaratory ruling that Myers had no rights under VARA because, under section 113(d)(1), this artwork was not removable, and the artist had consented to its installation before VARA’s effective date. Myers counterclaimed, asserting that the work was removable without destruction under section 113(d)(2), and that its permanent removal constituted its destruction.<sup>256</sup> The court, in considering

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<sup>254</sup> See *id.* at \*3-4. In the 1970s, a prior owner agreed to the installation of artwork on the side of the building utilizing these steel braces. Various city commissions approved the installation of the work. The City’s Board of Estimate specifically stated in 1973 that its consent would not endure longer than 10 years. While it is clear that the building’s owner consented to the installation of the work, few details of the parties’ agreements were put in writing.

<sup>255</sup> See *id.* at \*6. The owners sought permission from the Landmark Preservation Commission to remove the work. See *id.* at \*4-5. That body approved interim removal of unstable braces along with the projecting sculpture in order to enable the owners to address structural deterioration of the actual wall and “future reinstallation of the sculpture, if feasible.” *Id.* at \*5. The commission also stated that “[any] proposal to permanently eliminate portions, or the entirety, of the braces, sculpture or the underlying masonry, will be reviewed at a Public Hearing for a Certificate of Appropriateness.” *Id.* The owner’s next step was to seek permission for permanent removal of the work. Public hearings were held during which the “Committee to Save the Wall” fought for preservation of the “beloved Soho landmark.” The commission eventually denied the application in 2000, but in 2002 it apparently authorized the repair work including removal of the artwork. There was disagreement over whether the commission had conditioned removal and repair on the reinstallation of the work. *Id.* at \*6.

<sup>256</sup> See *id.* at \*8-10.

cross motions for summary judgment on the VARA claims, discussed section 113(d) at length, noted that it generally affords lesser protection to removable than non-removable works, said that if the art is removable, the building owner need only provide the artist with notice, and if the artist fails to arrange for removal then he loses his VARA rights; thus, allowing the owner to remove the work. “However, for non-removable pieces, the premise is that the artist does enjoy” integrity rights unless the installation occurred with the artist’s consent before VARA’s effective date.<sup>257</sup>

The key issue boiled down to whether the artwork was removable, and the court said that the record did not have any evidence on this point.<sup>258</sup> In discussing the parties’ contentions, the court explained, “there are no temporal adjectives modifying ‘remove’ in the statute such as ‘temporary’ or ‘permanent.’ As such, it is clear that what Congress intended in bifurcating § 113(d)’s protection was to separate removal situations based not on the temporality of the removal but on the *consequences* of the removal.”<sup>259</sup> It added that the statute is not intended to preserve a work of art where it is, but rather to preserve it as it is.<sup>260</sup> The court ultimately denied the cross motions for summary judgment because the record lacked sufficient evidence about the consequences of removing the artwork.<sup>261</sup>

Several years later, following a bench trial in which the artist and experts testified, the court held VARA protection was unavailable because the Wall could not be removed without destruction and the work was installed before VARA’s effective

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<sup>257</sup> *Id.* at \*9. *See also* Pavia v. 1120 Ave. of the Ams. Assocs., 901 F. Supp. 620, 629 (S.D.N.Y. 1995) (Congress recognized that VARA modifies important understandings and responsibilities between parties, and that it would be inappropriate to apply the new standards to conduct occurring before VARA’s effective date so alterations or modification of a work before June 1, 1991 do not give rise to any rights under VARA).

<sup>258</sup> *See Soho*, 2003 WL 21403333 at \*9.

<sup>259</sup> *Id.* at \*10.

<sup>260</sup> *See id.*

<sup>261</sup> *See id.* *See also* Bd. of Managers of Soho Int’l Arts Condo. v. City of New York, No. 01 Civ. 1226(DAB), 2003 WL 21767653 (S.D.N.Y. July 31, 2003) (denial of cross motions to reconsider the denials of the parties’ summary judgment motions saying that reconsideration of the work’s removability was not warranted, if the work was removable there were factual issues as to whether the property owner had fully complied with section 113(d)(2), and that VARA made no distinction site-specific and free standing works).

date. Thus, the work fell within the ambit of section 113(d)(1).<sup>262</sup> The artist argued that a work is not destroyed if it is capable of being recreated, but he and his expert hurt their claim by stating that the work had been “disbanded,” which the court said was synonymous with “destroy.”<sup>263</sup> Moreover, the court also said that the original work as conceived and created by the artist in the early 1970s had “metamorphosed” due to repainting by the artist in 1981 and removal of the braces in 1997. As a result, the original work no longer existed. The court said those changes by the artist might have been sufficient to constitute destruction of the work.<sup>264</sup>

The court’s suggestion that the work done to the Wall in 1981 and 1997 might have been sufficient to constitute destruction was unnecessary in view of the court’s determination that the complete removal of art destroyed it. In addition, it would have been reasonable to treat the 1981 and 1997 actions as reasonable conservation efforts, instead of conduct that undermined the artist’s moral rights claim.<sup>265</sup> The court’s rejection of the artist’s argument that the artwork could be recreated was ultimately undermined by the Wall’s restoration to the building’s north side.<sup>266</sup>

The saga of the extended litigation over removal of the Wall is another illustration of the problems associated with trying to accommodate an artist’s rights under VARA with our traditional notions about the rights of property owners. More specifically, this litigation underscores the need for persons who are commissioning the creation of works of visual art that will be incorporated into their buildings to have a written agreement with the artist, signed

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<sup>262</sup> See *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ. 1226(DAB), 2005 WL 1153752, at \*3-4 (S.D.N.Y. May 13, 2005).

<sup>263</sup> *Id.* at \*3.

<sup>264</sup> See *id.* See also Davis, *supra* note 22, 240-41 (highly critical of the court for making these additional determinations). The court also ruled that the property owners did not own the artwork, that the city could not force them to maintain the work, and that if the city ordered restoration of the work, it would have to pay the property owners fair compensation. See *Soho*, 2005 WL 1153752 at \*12-13. See also Ronda Kaysen, *Effort to Save Soho Public Artwork Hits a Wall in Court*, THE VILLAGER, May 18-24, 2005; Davis, *supra* note 22, at 244 (the Wall was eventually restored to the north side of the building and the building owners were able to use the lower section of the wall for advertising).

<sup>265</sup> See Davis, *supra* note 22, at 242-43.

<sup>266</sup> See *id.* at 243-44.

by the artist, spelling out what will happen in the event the owner wants to remove the work. In addition, if the artist wants his or her work to survive changes in the building's ownership or its renovation without the costs and trauma of a lawsuit, then he or she should consider making the work in a way that would permit removal without its destruction.

#### IV. VARA AND SITE-SPECIFIC ART

Some artists create works for specific locations so that the work's beauty, integrity, and aesthetic qualities are dependent on how it is integrated with the property where it is located like a city park or a town square. Robert Smithson's *Spiral Jetty* in the Great Salt Lake and Maya Lin's *Vietnam Veterans Memorial* in Washington, D.C. are examples.<sup>267</sup> In regard to works which are integrated with their surroundings, some artists assert that "[b]ecause the location of the work contributes to its meaning, site-specific art is destroyed if it is moved from its original site."<sup>268</sup> This assertion might also cover what is termed "conceptual destruction" of the work: the artist's structure or installation can be moved from its site intact, but its relocation to another site conceptually destroys it.<sup>269</sup>

The fundamental question is whether site-specific art is covered by VARA. As just discussed, the act distinguishes between removable and non-removable works incorporated in buildings, but "nowhere . . . does the statute make any legal distinction between site-specific or free-standing works."<sup>270</sup> Even though the General Services Administration has commissioned many works

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<sup>267</sup> See Garson, *supra* note 27, at 234-36.

<sup>268</sup> *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128,134 (1st Cir. 2006). A work of "integrated art" is comprised of two or more objects that must be presented together as the artist intended for the work to have its meaning and integrity. *Id.* In contrast, "plop art" is a separately conceived art object that does not incorporate its surroundings. *Id.* "The artists who create these works explain that the meaning and purpose behind the art lie squarely within its physical location. They are clear that relocation of the work destroys its meaning and purpose, obliterating its existence." Garson, *supra* note 27, at 239.

<sup>269</sup> *Id.* at 205. See generally, Hughes, *supra* note 71, at 23 (contending that 'framework control' takes artists' rights too far and that advocating for such rights undermines efforts to gain acceptance of the core of moral rights).

<sup>270</sup> *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 Civ. 1226(DAB), 2003 WL 21767653, at \*3 (S.D.N.Y. July 31, 2003).

in public places since 1963, and notwithstanding the highly publicized dispute over the removal of Richard Serra's site specific 'Tilted Arc' sculpture from Federal Plaza in lower Manhattan in the 1980s, Congress failed to address artwork integrated with real estate in VARA.<sup>271</sup> If the legislation does apply to site-specific works then the owner of land where a site-specific work is located might be unable to remove it, absent a written waiver from the artist.<sup>272</sup>

VARA's application to site-specific art was confronted head on by the First Circuit in *Phillips v. Pembroke Real Estate*.<sup>273</sup> Eastport Park is on Boston's harbor. Pembroke Real Estate, Inc. (Pembroke) leases the park from the Massachusetts Port Authority and commissioned David Phillip, a renowned sculptor, to help design the park.<sup>274</sup> Phillips "created approximately twenty-seven sculptures for the Park, comprised of fifteen abstract bronze and granite pieces and twelve realistic bronze sculptures of various aquatic creatures, including frogs, crabs, and shrimp."<sup>275</sup> He was in charge of the design and installation of

stone walls, granite stones inlaid into the Park's walkways, and other landscape design elements. Most of Phillips' work in the Park is organized along the diagonal axis . . . at the center of which is his large spherical sculpture entitled 'Chords', the centerpiece of the Park, which Phillips personally carved from granite.<sup>276</sup>

Phillips designed and created a large bronze medallion to adorn a circular granite path. He also selected and placed large rough-cut stones in the park. "Phillips' work in the Park is unified by a theme of spiral and circular forms."<sup>277</sup>

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<sup>271</sup> Garson, *supra* note 27, at 205-06, 220-21. See also Hughes, *supra* note 71, at 28-29 (discussing the Tilted Arc litigation).

<sup>272</sup> Cf. Garson, *supra* note 27, at 206, 240 (asserting that section 113(d) needs to be amended to include a waiver clause because courts should find that removing a site-specific work from its context destroys the work and violates VARA).

<sup>273</sup> See 459 F.3d 128 (1st Cir. 2006).

<sup>274</sup> See *id.* at 129-30. The port authority has authority to approve changes in the park's design.

<sup>275</sup> *Id.* at 130. Three other artists also crafted art for the park. *Id.*

<sup>276</sup> *Id.* at 130-31.

<sup>277</sup> *Id.*

A couple years after this nautical themed sculpture park was completed, Pembroke decided that it wanted to redesign it. Pembroke hired another landscape artist to do this work, hoping to simplify walkways, remove much of the original stone, add more plants, and remove or relocate many of Phillips' sculptures. After Phillips objected, Pembroke agreed to retain his rough stone walls and keep all but one his sculptures, but there were still substantial changes in the original design. Unhappy with this redesign, Phillips sought an injunction under VARA and the Massachusetts Art Preservation Act (MAPA) to stop Pembroke from making the changes.<sup>278</sup>

A temporary restraining order was granted and then Pembroke announced its intention to implement the original redesign plan, which would move most of Phillips' work from the park.<sup>279</sup> Following an evidentiary hearing, the court held that even though Phillips' work constituted an integrated work of visual art, the free standing sculptural works could be moved and that the multi-element, integrated work of art along one axis could be disassembled and moved piecemeal so long as the individual pieces were not altered or modified.<sup>280</sup> The court based this result in large part on VARA's public presentation exception, stating "an artist has no right to the placement or public presentation of his sculpture under the exception in § 106Ac(2)."<sup>281</sup>

Even though Phillips' VARA claim was unsuccessful, he prevailed on his claim under the state's art preservation statute. The district court, relying on MAPA's broad protections for site-specific art, granted a preliminary injunction preventing Pembroke from altering the park.<sup>282</sup> This success was, however,

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<sup>278</sup> Phillips was claiming that the removal of any or all of his work from the park would violate VARA by destroying or mutilating his work. *See id.* at 134. He argued that all of his sculptural works in the park were once integrated work so that removal of any one piece would destroy the whole. Cite? More importantly, he argued that all of his pieces were site-specific, either individually or as one integrated work. *See id.* Site-specific artwork is designed specifically for the location where it is to be placed. "Essentially, for site-specific art, the location of the work is an integral element of the work. Because the location of the work contributes to its meaning, site-specific art is destroyed if it is moved from its original site." *Id.*

<sup>279</sup> *See id.*

<sup>280</sup> *See id.*

<sup>281</sup> *Id.*

<sup>282</sup> *See id.* at 131-32.

short lived because the Supreme Judicial Court of Massachusetts subsequently ruled on a certified question from the federal district court that MAPA did not protect site-specific art.<sup>283</sup> In light of this ruling, and its earlier determination that Phillips' sculptures could be removed from the park due to VARA's public presentation exception, the federal district court vacated the injunction and entered judgment for Pembroke. Phillips appealed to the First Circuit.<sup>284</sup>

The Court of Appeals stated that the district court purported to protect site-specific art under VARA while permitting its destruction under the public presentation exception. According to the appellate panel, this was not a sensible reading of VARA. It either did or did not apply to site-specific art.<sup>285</sup> Phillips contended that site-specific and integrated art was covered by VARA, but that the public presentation exception did not permit the removal of such works. His pivotal question was "does the word placement [in the exception] include something that is securely fixed in a particular position as in the case . . . [of his] integrated work of visual art . . . ?"<sup>286</sup> The public presentation provision states: "The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless modification is caused by gross negligence."<sup>287</sup>

The court agreed with Phillips that the premise of this exception is artwork that can be moved in some fashion, such as paintings and sculptures. The work is not permanently fixed in a way that the act of moving it destroys it.<sup>288</sup> The court did not, however, agree with his contention that the exception applied only to "plop art" and not to site-specific, integrated works. The court was unwilling to interpret VARA as creating a kind of "dual regime." The statute made no reference to site-specific or integrated art and provided no guidance for distinguishing such

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<sup>283</sup> See *id.* at 132 (citing *Phillips v. Pembroke Real Estate, Inc.*, 819 N.E.2d 579 (Mass. 2004)).

<sup>284</sup> See *id.* at 132.

<sup>285</sup> See *id.* at 140.

<sup>286</sup> *Id.* at 141.

<sup>287</sup> 17 U.S.C. § 106Ac(2) (2012).

<sup>288</sup> See *Phillips*, 459 F.3d at 141.

works from "plop art." In essence, if Congress wanted special protection for site-specific art, VARA would have addressed the issue. Moreover, accepting the plaintiff's dual regime argument would be a virtual rewriting of the statute with far-reaching effects.<sup>289</sup> "Once a piece of art is considered site-specific, and protected by VARA, such objects could not be altered by the property owner absent consent of the artist. Such a conclusion could dramatically affect real property interests and laws."<sup>290</sup>

The court underscored this point by quoting *Pembroke Real Estate's* brief:

[N]ot only would *Pembroke's* ability to move [Phillips'] work or alter Eastport Park be subject to Phillips' approval, but also the owners of nearby property who had nothing to do with the purchase or installation of Phillips' works would be subject to claims that what they do with *their* property has somehow affected the site and has, as a result, altered or destroyed Phillips' works.<sup>291</sup>

The court noted that similar concerns about affording artists rights that would encumber private and public property led the Supreme Judicial Court of Massachusetts to refuse to extend MAPA to site-specific art.<sup>292</sup> It also quoted the United States Supreme Court's emphasis on the principle that "statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."<sup>293</sup> The First Circuit concluded "VARA does not apply to site-specific art at all."<sup>294</sup>

This conclusion is not inevitable. In extended dicta in the *Kelley* decision, the Seventh Circuit stated VARA's definition of a "work of visual art" does not explicitly or by implication exclude

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<sup>289</sup> *See id.* at 140-42.

<sup>290</sup> *Id.* at 142.

<sup>291</sup> *Id.* (alteration in original).

<sup>292</sup> *See id.* (discussing *Phillips v. Pembroke Real Estate, Inc.*, 819 N.E.2d 579, 584-85 (Mass. 2004)).

<sup>293</sup> *Id.* (alteration in original) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

<sup>294</sup> *Id.* at 143.

site-specific art from protection.<sup>295</sup> It added that the public presentation exception does not “eliminate *every* type of protection VARA grants to the creators of site specific art.”<sup>296</sup> The court asserted that the First Circuit’s all-or-nothing approach to site specific art was not warranted because such works, though modified if moved, are not necessarily destroyed when moved.<sup>297</sup> Moreover, the creator of a site-specific work of visual art should enjoy his or her attribution right as well as integrity rights against having the work “defaced and damaged in ways that do not relate to its public display.”<sup>298</sup> Finally, section 113(d), dealing with works that have been incorporated in or made part of a building, covers a kind of site-specific art and “suggests that site-specific art is not categorically excluded from VARA.”<sup>299</sup>

One take-away from *Philips v. Pembroke Real Estate, Inc.*, as well as *Kelley v. Chicago Park District*, for any individual or organization commissioning a major installation on their real estate which could be regarded as an integrated work of visual art or site-specific art, is to reach an understanding with the artist about removal and put that understanding in writing. Even though VARA does not address site-specific art directly, the statute’s provision on works of visual art incorporated in or made part of a building, section 113(d), provides guidance for how the property owner and the artist can protect their respective rights and interests.<sup>300</sup>

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<sup>295</sup> *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 306 (7th Cir. 2011) (the court acknowledged that it did not have to resolve the several issues surrounding site-specific art and the application of VARA’s public presentation and building exceptions). *See also supra* notes 165-88 and accompanying text (generally discussing the *Kelley* decision).

<sup>296</sup> *Kelley*, 635 F.3d at 306.

<sup>297</sup> *See id.* at 307; *see also* *Jackson v. Curators of the Univ. of Mo.*, No. 11-4023-CV-C-MJW, 2011 WL 5838432, at \*4 (W.D. Mo. May 15, 2011) (noting that *Kelley* calls into question the interpretation of VARA not applying to site specific art), *vacated*, 2012 WL 3166654 (W.D. Mo. May 15, 2012).

<sup>298</sup> *Kelley*, 635 F.3d at 307.

<sup>299</sup> *Id.* The city had argued that the 113(d) building exception applied because Wildflower Works accommodated air vents for a parking garage but the court said this was a stretch because being on top of a garage is not the same as being incorporated in or made part of the garage. *See id.* at 307 n.8.

<sup>300</sup> *See also* *Hughes, supra* note 71, at 26, 36-38 (discussing section 113(d) specifically and then some of the general problems associated with protecting site specific public art).

## V. A FINAL LESSON ON ALWAYS GETTING IT IN WRITING!

The First Circuit, following its 2006 ruling against VARA protection for site-specific art in *Phillips v. Pembroke Real Estate, Inc.*, decided another major VARA case in 2010, when it held in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Buchel* that the statute protected a huge, unfinished museum installation.<sup>301</sup> Even though this was not the first case to decide VARA extended to unfinished works of visual art,<sup>302</sup> this heated and publicized dispute provides several other lessons about protecting moral rights.<sup>303</sup> Also, it is fair to think of this litigation as one of the rare reported artist victories under VARA. However, it was a small victory because the court did not go as far as the artist would have liked in protecting his moral rights.

The Massachusetts Museum of Contemporary Art includes an exhibition space the size of a football field. Its ambitious goals include “catalyz[ing] and support[ing] the creation of new art, expos[ing] its visitors to bold visual and performing art in all stages of production” and striving to “make the whole cloth of art making, presentation and public participation a seamless continuum.”<sup>304</sup>

Christoph Buchel is a Swiss artist with a reputation for elaborate and huge politically provocative works through which viewers can wander and even crawl. He visited the Boston museum’s facility in 2005, discussed a major project, and at some point, proposed to do an installation titled “Training Ground for Democracy” that the museum agreed to prepare and exhibit. In August 2006, he spent ten days at the museum preparing a model of the installation, and the museum agreed to purchase the materials and items needed for the project. However, nothing was

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<sup>301</sup> See 593 F.3d 38, 65 (1st Cir. 2010).

<sup>302</sup> See *supra* notes 230-39 and accompanying text.

<sup>303</sup> See *Buchel*, 593 F.3d at 41.

<sup>304</sup> *Id.* at 42. The museum offers artists the time to create works of scale and duration “impossible to realize in the time and space-cramped conditions of most museums” that will expose people to “all stages of art production: rehearsals, sculptural fabrication, and developmental workshops are frequently on view, as are finished works of art.” *Id.* (quotes are from the museum’s mission statement).

put in writing and the specifications, scope, and cost of the installation were never spelled out.<sup>305</sup>

The museum's investment in this exhibition was substantial, but over time its working relationship with Buchel deteriorated, communications broke down, and the project was never completed.<sup>306</sup> In May 2007, the museum announced that Buchel's "Training Ground" exhibit was cancelled and that a new exhibit was opening titled "Made at MASS MoCA." In order for patrons to see this new exhibit, they had to walk through the space where Buchel's unfinished installation was housed, covered with yellow tarpaulins.<sup>307</sup> At the same time, the museum sued for declaratory relief under VARA, seeking a ruling that it was entitled to show Buchel's unfinished work. The artist counterclaimed, asserting that the museum had violated his rights under VARA and the Copyright Act. He sought to enjoin the museum from publicly displaying his unfinished work.<sup>308</sup> He also sought moral rights damages caused by the museum's intentional distortion and modification of his work of art and by allowing the public to see and walk through his unfinished installation.<sup>309</sup>

The district court ruled from the bench in the museum's favor after cross motions for summary judgment. It said that nothing in VARA prevented the museum from showing an incomplete project so long as it posted a disclaimer informing the viewing public that

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<sup>305</sup> See *id.* at 42-43. The project was supposed to be completed by December 2006. Anandashankar Mazumdar, *Appeals Court Vacates Summary Judgment Against Installation Artist Christoph Buchel*, 79 BNA P.T.C.J. 402 (Feb. 5, 2010). The project was to be Buchel's largest venture to date. He saw it as "essentially a village . . . containing several major architectural and structural elements integrated into a whole, through which a visitor could walk (and climb)." *Buchel*, 593 F.3d at 42-43.

<sup>306</sup> See *Buchel*, 593 F.3d at 43-44; Mazumdar, *supra* note 305, at 402. See also, Monica Pa, *Mass MOCA v. Buchel: The Creation Debate*, LANDSLIDE, July/Aug. 2010, at 54 (ABA Section of Intellectual Property Law 2010) (explaining the museum kept working on the project, following the artist's instructions, "and even toyed with the idea of completing the installation itself, calling it 'Mass MOCA interprets Buchel'"). See also *Buchel*, 593 F.3d at 43-46 (describing everything which transpired while the relationship deteriorated).

<sup>307</sup> See *Buchel*, 593 F.3d at 45-46.

<sup>308</sup> See *id.* at 46; Pa, *supra* note 306, at 54. In particular, the museum wanted a declaration that it was "entitled to present to the public the materials and partial constructions assembled in connection with an exhibit planned with the Swiss artist Buchel." *Buchel*, 593 F.3d at 46.

<sup>309</sup> *Buchel*, 593 F.3d at 46; Mazumdar, *supra* note 305, at 402.

the assembled materials “constitute[d] an unfinished project that did not carry out the installation’s original intent.”<sup>310</sup> Shortly thereafter, the museum announced that it would be removing the exhibit, and that it would no longer permit the public to enter the installation. A couple months later, the district court issued a written opinion stating, in essence, that when an artist agrees to the creation, installation, and fabrication of a work of art on someone else’s property, with the actual installation and fabrication of the work handled by someone else’s staff, at someone else’s expense, and following someone else’s suggestions; then nothing in VARA or the Copyright Act gives that artist the right, when things go wrong in that relationship, to specify what is done with what is left behind so long as that someone else does not label what is left behind as the artist’s work.<sup>311</sup> In addition, the district court questioned whether VARA applied to all unfinished works and said that an artist seeking protection for an unfinished work had to demonstrate violation of one of VARA’s rights with “special clarity.”<sup>312</sup> In short, the trial court ruled in the museum’s favor on its declaratory judgment action and denied all of Buchel’s counterclaims.<sup>313</sup>

The First Circuit had no difficulty concluding that VARA applied to unfinished works. It explained that VARA is part of the copyright statute, that copyright protection attaches when a work (or a portion of a work prepared over a period of time) is fixed in a tangible medium of expression, and it was not surprising that other courts had held that copyright protection extends to unfinished works.<sup>314</sup> Accordingly, it was appropriate to read VARA as protecting unfinished works of art that would, upon completion,

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<sup>310</sup> *Id.* at 46-47. The court denied Buchel’s request for injunctive relief and stated that it would issue a detailed memorandum opinion in the coming weeks. The parties did not dispute that Buchel’s installation was a sculpture that qualified as a work of visual art under VARA. *See id.* at 48 n.7.

<sup>311</sup> *See id.* at 47 (citing *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 565 F. Supp. 2d 245, 248-49 (D. Mass. 2008), *aff’d in part, vacated in part, and remanded*, 593 F.3d at 38). This statement arguably suggests that the museum could be considered a co-creator of the project – a joint author. The First Circuit rejected the co-creation argument. *See Pa, supra* note 306, at 54.

<sup>312</sup> *Buchel*, 593 F.3d at 50 (quoting *Buchel*, 565 F. Supp. 2d at 258). *See also* Mazumdar, *supra* note 305, at 402-03.

<sup>313</sup> *See Buchel*, 593 F.3d at 47.

<sup>314</sup> *See id.* at 51.

qualify under the statute. The court said this conclusion was based on the statute's plain language so it was unnecessary to turn to VARA's legislative history.<sup>315</sup> Still, that history supported the court's reading of the statute as did common sense and the fact that the history of art is full of highly acclaimed unfinished works.<sup>316</sup>

Since Buchel enjoyed protection under VARA for his partially completed installation, the court of appeals had to review the district court's grant of summary judgment for the museum on its alleged violations of his attribution and integrity rights. After an extended discussion of the differences between VARA's provisions on these two moral rights, the court agreed with "Nimmer's surmise that VARA does not provide a damages remedy for an attribution violation. Where the statutory language is framed as a right 'to prevent' conduct, it does not necessarily follow that a plaintiff is entitled to damages once the conduct occurs."<sup>317</sup> In addition, the court said it was "noteworthy that Congress created a damages remedy for the destruction of a work of recognized stature that is narrower than the right to prevent destruction of such works. . . . This narrowing further indicates that Congress did not intend a damages remedy to arise automatically from the right to prevent conduct."<sup>318</sup> Accordingly, Buchel did not have a claim for damages caused by the museum's alleged violation of his attribution right, and any basis for injunctive relief had been eliminated by the museum's dismantling of the installation thereby, preventing any more use of his name.<sup>319</sup>

The court concluded that one of Buchel's integrity claims should have withstood the museum's summary judgment motion. Specifically, the museum had disregarded his instructions by continuing to work on the project and this may have resulted in modifications in violation of VARA. The court said that there was sufficient evidence in the record from which a jury could find that the museum's continued work on the project was detrimental to

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<sup>315</sup> *See id.*

<sup>316</sup> *See id.* at 51-52. *See also* Mazumdar, *supra* note 305, at 403.

<sup>317</sup> *Buchel*, 593 F.3d at 55.

<sup>318</sup> *Id.* at 55-56. "Congress may have concluded that artists could obtain adequate relief for the harms of false attribution by resorting to the Copyright Act and other traditional claims." *Id.* at 56.

<sup>319</sup> *See id.* at 56, 63.

Buchel's honor and reputation.<sup>320</sup> On the other hand, the court affirmed the grant of summary judgment against Buchel's other integrity claims. It said that covering the art with tarps might have been disparaging, but this was not an intentional act of distortion or modification.<sup>321</sup> Similarly, the museum's showing of the unfinished work without Buchel's authorization could not be treated as intentional distortion. It added that the unauthorized exhibition of the work implicated the moral right of disclosure or divulgation, but emphasized that the United States, unlike most European countries, had not provided this particular moral right in VARA.<sup>322</sup>

The saga of Mass MoCA and Christoph Buchel teaches several lessons about VARA. First, the court of appeals held, consistent with earlier rulings by other courts, that unfinished works of visual art are protected by VARA. The statute does not exclude unfinished works. Moreover, VARA is part of the Copyright Act, which has been interpreted to afford protection to unfinished works that are fixed in a tangible medium of expression.<sup>323</sup> Second, VARA does not provide a damages remedy for violations of the attribution right but the artist can seek injunctive relief to assert or disclaim authorship.<sup>324</sup> Third, in order to recover for violation of the integrity right, the artist must show that any distortion, mutilation, or modification of the work is prejudicial to his or her honor or reputation; and this prejudice has to be shown for both injunctive relief and damages.<sup>325</sup> Fourth, the intentional modification of a work of visual art in disregard of an artist's specific instructions might harm an artist's honor and reputation; and thus, give rise to a viable claim for a violation of the integrity right.<sup>326</sup> Fifth, covering a work of visual art temporarily so that the public cannot see it, is not an intentional act of distortion or modification in violation of the integrity

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<sup>320</sup> See *id.* at 57-61.

<sup>321</sup> See *id.* at 61-62.

<sup>322</sup> See *id.* at 62. However, the museum's unauthorized exhibition of Buchel's work may have violated his public display right under section 106(5) of the Copyright Act.

<sup>323</sup> See *id.* at 50-52. *But see also* Bock, *supra* note 235, at 170-72.

<sup>324</sup> See *Buchel*, 593 F.3d at 55.

<sup>325</sup> See *id.* at 54.

<sup>326</sup> See *id.* at 57-61.

right.<sup>327</sup> Sixth, since VARA does not provide a right of disclosure, the unauthorized display of a work of visual art is not a violation of VARA. However, this conduct may constitute a violation of the artist's public display right under the Copyright Act.<sup>328</sup> Finally, the most practical lesson from this saga is to get it in writing. The court of appeals stated at the outset that:

[T]his case . . . may well serve as 'the ultimate how-not-to guide in the complicated world of installation art.' . . . Unfortunately, the parties never memorialized the terms of their relationship or their understanding of intellectual property issues involved in the installation in a written agreement. Even more unfortunately, the project was never completed.<sup>329</sup>

#### CONCLUSION

The Visual Artists Rights Act, as enacted by Congress in 1990, recognized moral rights for the first time and might have brought our copyright law into compliance with Article 6<sup>bis</sup> of the Berne Convention. However, it is a narrow statute with several exclusions from coverage. For example, VARA affords protection only to works of visual art, which are defined restrictively. It protects only a select group of artists. Works of visual art created by employees in the scope of their employment fall outside of VARA because of the act's exclusion of works made for hire. The law grants the two most important moral rights; the integrity and attribution rights, but none of the other moral rights recognized in many other countries. It permits creators of protected works to waive their moral rights, and it limits protection to the life of the artist instead of the copyright term of life plus 70 years.<sup>330</sup> The statute's language and its legislative history make it clear that Congress intended to limit its application.<sup>331</sup> It is no wonder that

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<sup>327</sup> See *id.* at 61.

<sup>328</sup> See *id.* at 62-64.

<sup>329</sup> *Id.* at 41. See also Pa & Robinson, *supra* note 14, at 27 (discussing VARA best practices).

<sup>330</sup> See *supra* notes 16-48 and accompanying text.

<sup>331</sup> See *supra* notes 44-48 and accompanying text.

doubts were raised whether VARA, as enacted, fulfilled our obligations under article 6<sup>bis</sup> of the Berne Convention.<sup>332</sup>

There also is no doubt that the federal judiciary, in interpreting and applying VARA, has effectuated legislative intent, and, at the same time, shown that those persons who expressed doubts about our compliance with article 6<sup>bis</sup> were correct. This article discusses and analyzes most of the reported decisions that have interpreted and applied VARA.<sup>333</sup> In the vast majority, the artist's integrity right is implicated, and it is rare to find a victorious artist in these reported decisions.<sup>334</sup> One artist win that stands out is the Seventh Circuit decision affirming the award of damages to Jan Martin for the destruction of his sculptural work of recognized stature by the City of Indianapolis.<sup>335</sup> An artist won a small battle when the First Circuit ruled that Christoph Buchel stated a viable integrity right claim against the Massachusetts Museum of Contemporary Art in alleging that the museum's continued work on his massive unfinished installation without his permission was detrimental to his honor and reputation.<sup>336</sup> These decisions are not, however, landmark wins for the community of visual artists. The *Martin* litigation could have been avoided entirely had the City of Indianapolis lived up to its agreement with the artist so he could dismantle the sculpture, and perhaps many of the disputes between Buchel and the museum could have been avoided through a written agreement. These two cases support a basic point made throughout this article; it is best to put expectations and understandings in a written agreement, signed by the artist and the party commissioning or purchasing the work of visual art.<sup>337</sup>

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<sup>332</sup> See Damich, *supra* note 12, at 947-48 (pointing out how the legislation fell short of full compliance with 6<sup>bis</sup> in four areas). See generally *supra* note 12 and accompanying text.

<sup>333</sup> See generally Bird, *supra* note 15, at 64, 69 (noting that there are not many reported decisions).

<sup>334</sup> But see Pa & Robison, *supra* note 14, at 26-27 (discussing substantial settlements in several disputes in California over damages to sculpture and murals).

<sup>335</sup> See *Martin v. City of Indianapolis*, 192 F.3d 608, 609 (7th Cir. 1999).

<sup>336</sup> See *Mass. Museum of Contemporary Art Found. v. Buchel*, 593 F.3d 38, 57-61 (1st Cir. 2010).

<sup>337</sup> This is not a new recommendation about the best way of deal with an artist's rights under VARA. See Pa & Robinson, *supra* note 14, at 27-28 (discussing best practices under VARA).

Aside from these decisions, visual artists do not seem to have fared well in the courts. The vast majority of the trial and appellate decisions reported since the passage of VARA substantiate the arguments made years ago that this is a weak and anemic statute that does not fulfill our obligation to comply with Article 6<sup>bis</sup> of the Berne Convention.<sup>338</sup>

Even though VARA's attempt to accommodate moral rights with our copyright law has not resulted in major victories by visual artists, there are some scholars who want to expand moral rights protection in the United States to cover additional categories of works of authorship and the creators of those works including performers, film directors, and literary authors.<sup>339</sup> There are, of course, scholars making strong arguments against moral rights and against expanding protection in the United States.<sup>340</sup> The doctrine continues to attract considerable attention in the academy. In fact, one scholar noted that the number of journal notes and law review articles on moral rights and VARA far exceeds the number of published legal disputes on those topics.<sup>341</sup> Notwithstanding the passage of VARA over twenty years ago, the moral rights doctrine remains a relatively foreign concept in American law<sup>342</sup> that does not fit nicely with our copyright law and our established notions about the rights of owners of real and personal property. The rhetoric surrounding the enactment of VARA promised more than Congress delivered.

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<sup>338</sup> See *supra* note 13 and accompanying text.

<sup>339</sup> JOYCE ET AL., *supra* note 1, at 596-97; see also *supra* notes 16, 17, 20. See generally ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010); Bird, *supra* note 13; Tanja Makovec Petrik, *Moral Rights of Composers: The Protection of Attribution and Integrity Available to Musicians in the European Union and the United States*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 359 (2011); Zemer, *supra* note 1.

<sup>340</sup> See, e.g., Adler, *supra* note 9, at 265; Carter, *supra* note 44, at 100-01; Gorman, *supra* note 15, at 422; Mills, *supra* note 14, at 444; Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 *UTAH L. REV.* 789, 822 (2007).

<sup>341</sup> Bird, *supra* note 15, at 64 n.8.

<sup>342</sup> Bird, *supra* note 13, at 414-15.