UNITED STATES LAW'S FAILURE TO APPRECIATE ART: HOW PUBLIC ART HAS BEEN LEFT OUT IN THE COLD

INTRODUCTION

Art is an integral mode of communication, identification, and innovation.[1] Artworks in public spaces in particular contribute to societal and cultural expression, especially because works of public art and their messages are accessible to all.[2] With heightened accessibility, however, comes a heightened need for protection. Public art's increasing popularity and visibility through projects like Banksy's viral graffiti art;[3] Anish Kapoor's popular *Cloud Gate* (commonly referred to as "The Bean") in Chicago;[4] and Kristen Visbal's *Fearless Girl*, appearing on Wall Street overnight on International Women's Day,[5] have generated much interest on the topic of public art and both its values and challenges.[6] Amidst calls to recognize and protect pieces of public art, this Note focuses on the needs of

1. "Public art instills meaning—a greater sense of identity and understandings of where we live, work, and visit—creating memorable experiences for all. It . . . can help communities thrive." *Public Art*, AM. FOR ARTS, https://www.americansforthearts.org/by-topic/public-art [https://perma.cc/S5KT-YZ7J].

2. *Id.*

3. *E.g.*, Banksy, *Girl with Balloon*, 2002, stencil mural series, various locations; *see also* Castillo v. G & M Realty L.P., 950 F.3d 155, 168 (2d Cir. 2020) ("[N]oted street artist Banksy has appeared alongside President Barack Obama and Apple founder Steve Jobs on *Time* magazine's list of the world's 100 most influential people. Though often painted on building walls where it may be subject to overpainting, Banksy's work is nonetheless acknowledged, both by the art community and the general public, as of significant artistic merit and cultural importance." (footnote omitted)); Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAG. (Feb. 2013), https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/ [https://perma.cc/9M83-RYG6]. A print of one of Banksy's most famous works, *Girl with Balloon*, sold for $1.4 million just before shredding itself. Emma Bowman, *'We Just Got Banksy-ed': 'Girl with Balloon' Sells for $1.4M Before Self-Destructing*, NPR (Oct. 6, 2018, 9:01 PM), https://www.npr.org/2018/10/06/655252676/wejust-got-banksy-ed-girl-with-ballon-sells-for-1-4m-before-self-destructing [https://perma.cc/P9YB-PABR].

4. Anish Kapoor, *Cloud Gate*, 2006, stainless steel sculpture, Millennium Park, Chicago, https://millenniumparkfoundation.org/art-architecture/cloud-gate/ [https://perma.cc/L4HV-GMGU]; *see also* LYNN BASA, THE ARTIST'S GUIDE TO PUBLIC ART: HOW TO FIND AND WIN COMMISSIONS 7 (2008) (using art in Chicago's Millennium Park, including *Cloud Gate*, as an example of public art as an "economic asset").

5. Kristen Visbal, *Fearless Girl*, 2017, bronze sculpture, New York Stock Exchange, https://www.atlasobscura.com/places/fearless-girl-statue [https://perma.cc/3NKR-MK7S]; *see also* Sandra E. Garcia, *'Fearless Girl' Statue Finds a New Home: At the New York Stock Exchange*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange-.html [https://perma.cc/NCE5-PP7M]. Relevant to Section II.B.iii of this Note, *Fearless Girl* has recently changed location. *Id.*

6. *Castillo*, 950 F.3d at 167 ("In recent years, 'street art' . . . has emerged as a major category of contemporary art.").

public artists, whose personal and moral rights were for the first time protected,[7] albeit incompletely, with the passing of the Visual Artists Rights Act (VARA).[8] Public art's unique nature and complex, difficult-to-define attributes mean that offering legal protection to artists is both absolutely essential and exceedingly challenging.[9] While the law has made strides in enacting protections for visual artists and their work,[10] the exclusionary, strictly defined contours of these laws are an ill fit for the amorphous and evolving field of public art. As a result, many artists who create public artworks are left with inadequate legal protection or, oftentimes, no protection at all.[11] At the heart of this unfortunate gap in legal protection lie attempts by Congress and the courts to articulate a satisfactory definition of art. These legal definitions of art determine which pieces will be considered protectable art in the eyes of the law, and are of necessity narrower than artistic reality.[12] As a result, the legal definition of art in any given context will depend upon the purpose of the statute and a balancing of competing interests.[13] The difficult exercise of creating a satisfactory legal definition of art is well demonstrated through visual art's problematic definition in the context of artists' moral rights,[14] particularly when viewed through the unique lens of public art. It is public artists that are perhaps most in need of moral rights, and yet the work of these artists is often ignored by and excluded from the legal definition of art in VARA. And this is despite the rise of public art in cultural importance and popularity.[15] An adequate definition of art must, in the case of public art, appropriately balance the interests of public artists, community members, and property owners. Instead, VARA's definition of visual art, and the resulting limited reach of

7. *See infra* text accompanying note 34.

8. 17 U.S.C. § 106A (2018).

9. Cameron Cartiere, *Through the Lens of Social Practice: Considerations on a Public Art History in Progress*, *in* THE EVERYDAY PRACTICE OF PUBLIC ART: ART, SPACE AND SOCIAL INCLUSION 13, 14 (Cameron Cartiere & Martin Zebracki eds., 2016) [hereinafter EVERYDAY PRACTICE OF PUBLIC ART].

10. *See* 17 U.S.C. § 106A.

11. U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 60 (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/8793-HLHU] ("The narrowness of [VARA], both as drafted and as interpreted by the courts, has, according to many, undermined the effectiveness of the moral rights afforded under VARA.").

12. A painting that is the identical copy of another artist's painting, for example, is technically considered art, but of course does not fall under the legal definition of art for copyright protection. *See* Leonard D. DuBoff, *What Is Art? Toward a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303, 305 (1990).

13. *Id.* at 350 ("[T]he legal definition of art greatly depends upon who is doing the defining."); *see also infra* Section III.B (discussion of the legal definition of art in the contexts of copyright, customs, and obscenity).

14. Cara L. Newman, Comment, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 53 DEPAUL L. REV. 121, 145 (2003).

15. *See supra* notes 3–6 and accompanying text.

the Act, denies artists basic, minimal protections, and weighs heavily in favor of those who own the property on which their works are displayed.[16] This imbalance undermines VARA's purpose and has resulted in the devastating loss of many precious public artworks.[17]

Section I of this Note will provide a history of both the legal and artistic developments of public art. Next, Section II will identify and discuss crucial problems with the way that VARA defines and limits visual art that prevent the statute from providing adequate protection to public artists. Section III will then compare the definition of visual art found in VARA to other attempts to define art both artistically and legally. Finally, in Section IV, this Note proposes removing unnecessary limitations on VARA's definition of visual art and expanding it to resemble copyright's definition of visual art. In order to recognize and protect artists who create the works that define the culture and spirit of communities across the country,[18] VARA must be made more inclusive of public art.

I. HISTORY

A. Legal Development

In general, "[t]he law of copyrights is the single most important area of visual arts law."[19] "Copyright protection allows a creator to profit economically from his or her investment of time, skill, and energy by giving a limited monopoly in his or her work."[20] Rather than broadly discussing copyright protection, codified in the Copyright Act,[21] this Note focuses more narrowly on the development and protection of an artist's moral rights, or "right[s] given to an artist to assert limited authority over a work of art even after the art is sold or transferred."[22] Unlike the economic protection provided by copyright law, moral rights were created to protect an artist's

16. Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35 (1998) (arguing that, while the passage of VARA was a positive step, the United States is far from recognizing moral rights in line with the requirements of the Berne Convention, as evident from statutory language and subsequent case law). As this Note will demonstrate, these deficiencies are even more acute in the context of public art.

17. *See, e.g.*, *infra* Section II.A; *infra* note 36 (describing the destruction of the beloved 5Pointz murals in New York City).

18. *See, e.g.*, *infra* note 49 (describing Miami's Wynwood Arts District, a formerly rundown community transformed into a vibrant, popular destination through public artworks).

19. Clarence S. Wilson, Jr., *Visual Arts & the Law*, *in* LAW AND THE ARTS – ART AND THE LAW: A HANDBOOK/SOURCEBOOK FOR ARTISTS, CRAFTSPEOPLE, ARTS ATTORNEYS & ARTS ADMINISTRATORS 82, 83 (Tem Horwitz ed., 1979).

20. DuBoff, *supra* note 12, at 304.

21. 17 U.S.C. §§ 101–805, 1001–1205 (2018).

22. MICHAEL E. JONES, ART LAW: A CONCISE GUIDE FOR ARTISTS, CURATORS, AND ART EDUCATORS 143 (2016).

honor and reputation.[23] This separate moral protection is based on the idea that "[a]n artist's professional and personal identity is embodied in each work created by that artist," and thus "[e]ach work is a part of his or her reputation . . . [and] is a form of personal expression (oftentimes painstakingly and earnestly recorded)."[24]

The concept of an artist's moral rights was first codified in French civil law.[25] The bundle of moral rights protects artists primarily through the inclusion of four rights: (1) the right of disclosure, or the right to control when a work is published, if at all;[26] (2) the right of attribution, or the right to claim and disclaim authorship;[27] (3) the right of integrity, or the right to prevent intentional modification of a published work;[28] and finally, (4) the right of withdrawal, or the right to remove a work from the public.[29] While not widely recognized, moral rights may also include protection from excessive criticism and attacks on an artist's personality.[30]

Moral rights are incorporated into the Berne Copyright Convention, which requires its members to protect artists' moral rights at a minimal

23. Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 212 (1994) ("Although limited, the protection afforded these artists has extended the economic rights provided by traditional copyright law to include the protection of the reputation and honor of the artist."); *see also* Derek Fincham, *Victory for 5Pointz Artists in the Second Circuit*, ILLICIT CULTURAL PROP. BLOG (Feb. 24, 2020), http://illicitculturalpropert y.com/victory-for-5pointz-artists-in-the-second-circuit/ [https://perma.cc/3G6J-P4EZ] ("[A] moral right is not an economic right. Instead it accounts for the psychological suffering which takes place when an artist's art has been harmed in some way.").

24. Martin v. City of Indianapolis, 192 F.3d 608, 611 (7th Cir. 1999) (quoting H.R. REP. NO. 101-514, at 15 (1990)).

25. DuBoff, *supra* note 12, at 333–34. In France today, moral rights are codified in the French Code of Intellectual Property. Vera Zlatarski, Note, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM.-VLA J.L. & ARTS 201, 204 (1999) (citing CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L. 121-1 to L. 121-9 (Fr.)). For a comprehensive yet critical discussion of moral rights in France, see *id.* at 201–09.

26. Kelly, *supra* note 23, at 216–17.

27. *Id.* at 217–18.

28. *Id.* at 218–19.

29. *Id.* at 219.

30. *Id.* at 219–20; Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 319 (1989) (citing Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 573 (1940)). An example of the right against excessive criticism in France is found in *Editions Gallimard v. Hamish Hamilton Ltd.* Lenka Řádková, Moral Rights of Authors in International Copyright of the 21st Century: Time for Consolidation? 76 (Dec. 18, 2001) (unpublished LL.M. thesis, University of British Columbia), https://dx.doi.org/10.14288/1.0077577 (citing Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Feb. 15, 1984, [1985] E.C.C. 574 (Fr.)). These moral rights in particular raise First Amendment concerns outside the scope of this Note. *See* Kelly, *supra* note 23, at 248–49 (suggesting definitional balancing when conflicts between the two arise). For a First Amendment argument in the context of public art, specifically graffiti walls, see Kelly Oeltjenbruns, Note, *Legal Defiance: Government-Sanctioned Graffiti Walls and the First Amendment*, 95 WASH. U. L. REV. 1479 (2018).

level.[31] In response to the increased recognition of moral rights around the world, the United States became the Berne Convention's eightieth member on March 1, 1989.[32] To minimally comply with the obligations of the convention, Congress passed VARA in 1990, with an effective date of June 1, 1991.[33] Upon its passage, VARA became the first federal copyright law in the United States to protect certain moral rights of artists.[34] This was groundbreaking for the artistic community, as federal copyright laws had previously protected only an artist's economic rights.[35] Despite the fact that VARA is nearly three decades old, it has recently returned to the public spotlight after the Eastern District of New York's decision to award substantial money damages to creators of the destroyed 5Pointz murals[36] in *Cohen v. G & M Realty L.P.*[37] The Second Circuit affirmed the decision in a major victory for public artists.[38]

Modeled after the protections provided by the Berne Convention, VARA incorporates two of the previously described moral rights, the right of attribution and the right of integrity, into federal copyright law.[39] The Act achieves this by protecting an artist's right to choose when to claim ownership of an artwork,[40] and by protecting artists' work from "intentional distortion, mutilation, or modification" that is damaging to their honor or reputation.[41] In addition, for works of recognized stature, VARA provides further protections preventing destruction.[42] These moral rights are

31. Article 6*bis* of the Berne Convention protects the moral rights of attribution and integrity. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, S. TREATY DOC. No. 99-27, 1161 U.N.T.S. 3 (revised 1908, 1928, 1948, 1967, and 1971); *see also* Carter v. Helmsley-Spear, Inc. (*Carter II*), 71 F.3d 77, 82 (2d Cir. 1995) (calling the Berne Convention "the international agreement protecting literary and artistic works").

32. Kelly, *supra* note 23, at 220–21; Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.).

33. JONES, *supra* note 22, at 144.

34. *Id.*

35. *Id.* at 143.

36. For photos of the 5Pointz murals before and after destruction, see Mallika Rao, *Artists Bid Sad Farewell to 5 Pointz, New York City's Graffiti Mecca*, HUFFINGTON POST (Nov. 21, 2013, 3:00 PM), https://www.huffingtonpost.com/2013/11/21/5-pointz_n_4316483.html [https://perma.cc/NN47-ZVVM]; *see also 5Pointz*, HUFFINGTON POST (July 5, 2010), https://www.huffpost.com/entry/5-pointz_n_4316483?slideshow=true#gallery/5bb26777e4b0171db6a006df/0 (photo gallery of 5Pointz murals); *5 Pointz NYC*, GOOGLE ARTS & CULTURE (2013), https://artsandculture.google.com/exhibit/5-pointz-nyc/wRU6hVET?hl=en [https://perma.cc/XDE5-LKC9] (same).

37. Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421 (E.D.N.Y. 2018) (awarding a total of $6,750,000 in damages to the artist-plaintiffs), *aff'd sub nom.* Castillo v. G & M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

38. Amanda Ottaway, *Court Upholds Massive Judgment for 5Pointz Graffiti Artists*, COURTHOUSE NEWS SERV. (Feb. 20, 2020), https://www.courthousenews.com/court-upholds-massive-judgment-for-5pointz-graffiti-artists/ [https://perma.cc/8SU5-FBR4].

39. VARA protections are limited to only these two moral rights. JONES, *supra* note 22, at 144.

40. 17 U.S.C. § 106A(a)(1)–(2) (2018).

41. 17 U.S.C. § 106A(a)(3)(A).

42. 17 U.S.C. § 106A(a)(3)(B).

waivable but not transferable, and last for the lifetime of the artist.[43] As a whole, VARA affords protection only to a narrowly defined category of works of visual art.[44] This shortcoming and its impact on public artists is the focus of this Note.

B. Artistic Development

In order to understand VARA's strengths and weaknesses in protecting the moral rights of artists, an analysis of public art and its history is illuminating. Through recognizing the importance of art in public spaces, this Note seeks to find an appropriate balance between the needs of artists creating modern public art, and the landowners and communities that own and use the spaces into which the art is incorporated.

1. The Importance of Public Art

The law must protect the rights and interests of the artists who create public art in order to foster their artistic freedom and creativity, and subsequently the development of public art. Accessible artistic expression plays an important role in individual freedoms, democracy, and shared cultural identities in communities.[45] More concretely, there is also an economic value to public art.[46] A city with public art attracts young, creative, and educated people; communicates that the city is vibrant, innovative, and diverse; and even appeals to tourists.[47] Art, exemplified through the dynamic and functional nature of public art, "cultivat[es] and sustain[s] human culture."[48] Public art is a growing commodity in many communities and has become an integral part of urban development. In fact,

43. 17 U.S.C. § 106A(d)–(e).

44. 17 U.S.C. § 101 (defining "work of visual art"). For the complete definition of works of visual art, see *infra* Section II.

45. Nicole Marroquin, *Art in Public Space: Democracy in Action*, *in* ART AGAINST THE LAW 111 (Rebecca Zorach ed., 2014).

46. *See* BASA, *supra* note 4, at 3–7.

47. *Id.* at 3–5. For these reasons and more, many groups are interested in acquiring and displaying public art. *See, e.g.*, *id.* at 3–7 (why governments are buying art, including quotes from the managers of public art programs in cities around the country); *id.* at 163–65 (why corporations are acquiring art); *id.* at 165–67 (why hotels desire art); *id.* at 167–68 (why hospitals collect art).

48. Jessica Short, Book Note, *One Culture and the New Sensibility*, CLASSIC J. (Nov. 4, 2016) (reviewing SUSAN SONTAG, AGAINST INTERPRETATION AND OTHER ESSAYS (1966)), http://theclassicjournal.uga.edu/index.php/2016/11/04/review-one-culture-and-the-new-sensibility/ [https://perma.cc/653E-ZBDY].

not only does public art play a role in building the culture of a community, some community cultures are built around public art.[49]

2. What Is Public Art?

A complete, precise definition of public art, with all its variations, is impossible to articulate.[50] One attempt at a working definition identifies four broad categories of public art:

> Public art is art outside of museums and galleries and must fit within at least one of the following categories: 1) in a place freely accessible or visible to the public: *in public*; 2) concerned with, or affecting the community or individuals: *public interest*; 3) maintained for or used by the community or individuals: *public place*; 4) paid for by the public: *publicly funded*.[51]

After recognizing that public art can come in many forms, another definition distinguishes public art from other types of art:

> What distinguishes public art is the unique association of how it is made, where it is, and what it means. Public art can express community values, enhance our environment, transform a landscape, heighten our awareness, or question our assumptions. . . . Public art is a reflection of how we see the world—the artist's response to our time and place combined with our own sense of who we are.[52]

Yet another definition of public art begins with this simple statement: "[P]ublic art is art in public spaces."[53] Finally, "[t]he most common and all-encompassing definition of public art is: 'work created by artists for places

---

49. *See, e.g.*, Shayne Benowitz, *Explore Street Art and Culture in the Wynwood Arts District*, GREATER MIAMI CONVENTION & VISITORS BUREAU (Dec. 12, 2017), https://www.miamiandbeaches.com/things-to-do/arts-culture/wynwood-s-thriving-arts-culture-scene [https://perma.cc/76UE-2CGA] (describing the art viewable in Miami's Wynwood Arts District, which transformed the community from a "dilapidated warehouse district" to a "canvas for world class street art" and tourist destination). For before-and-after photographs of Wynwood in Google Map's street views, see Kyle Munzenrieder, *In Photos: Ten Miami Neighborhoods that Have Changed the Most in the Past Decade*, MIAMI NEW TIMES (May 26, 2016, 9:58 AM), https://www.miaminewtimes.com/news/in-photos-ten-miami-neighborhoods-that-have-changed-the-most-in-the-past-decade-8480285 [https://perma.cc/Y5V9-7JNC].

50. Cameron Cartiere & Martin Zebracki, *Introduction* to EVERYDAY PRACTICE OF PUBLIC ART, *supra* note 9, at 1, 2 ("[A] definitive, single-sentence definition of public art may never be attainable . . . .").

51. *Id.* at 2–3 (footnote omitted) (quoting Cameron Cartiere, *Coming In from the Cold: A Public Art History*, *in* THE PRACTICE OF PUBLIC ART 7, 15 (Cameron Cartiere & Shelly Willis eds., 2008)).

52. *What Is Public Art?*, ASS'N FOR PUBLIC ART (citing PENNY BALKIN BACH, PUBLIC ART IN PHILADELPHIA (1992)), https://www.associationforpublicart.org/what-is-public-art [https://perma.cc/P565-HLHD].

53. *Public Art*, *supra* note 1.

accessible to and used by the public.'"[54] Recognizing that public art cannot be precisely defined, this Note will focus specifically on the many variations of public art that are easily accessible to the public.[55] Using these definitions as a starting point, it is next necessary to examine the history and evolution of public art in order to better understand what public art is and the role it plays in modern communities.

3. The Evolution of Public Art

The historical roots of public art in the United States run deep.[56] Traditionally, public art was created to meet the goals of commemoration, education, and enculturation, such as through memorials, monuments, sculptures, and decoration.[57] Public art in the nineteenth century was concerned with the "filling of public space with sculptures of political and colonial figures," often raised and positioned in the center of large spaces.[58] In the early twentieth century, however, public art evolved to become about "civic rather than colonial expression," and was created for the purpose of urban beautification and as symbols of a city's desirability and success.[59] Rather than being placed in the center of open spaces, public art at this time was woven "into the very fabric of the city."[60] In the 1980s, the art world experienced a "public art boom."[61] This rapid development of public art was linked to developments in the fields of architecture and urban planning, as well as public patronage.[62]

As it grew in popularity, public art became more abstract than its traditional models. The term grew to encompass "an amorphous new category in which art could be almost anything: LED signs, billboards, slide

54. Joni Palmer, *Why Public Art? Urban Parks and Public Art in the Twenty-First Century*, *in* EVERYDAY PRACTICE OF PUBLIC ART, *supra* note 9, at 208, 210 (quoting Jack Becker, *Public Art: An Essential Component of Creating Communities*, MONOGRAPH 5 (Mar. 2004), https://www.americansfortarts.org/sites/default/files/PublicArtMonograph_JBecker.pdf [https://perma.cc/BC5E-Z6JT]).

55. This Note's understanding of public art is interchangeable with the term "street art."

56. For a visual timeline of public art practice from 1950 to 2015, see Cameron Cartiere, Sophie Hope, Anthony Schrag, Elisa Yon & Martin Zebracki, *A Collective Timeline of Socially Engaged Public Art Practice 1950–2015*, *in* EVERYDAY PRACTICE OF PUBLIC ART, *supra* note 9, at 225.

57. *See* John Bingham-Hall, *Public Art as a Function of Urbanism*, *in* EVERYDAY PRACTICE OF PUBLIC ART, *supra* note 9, at 161, 163 (noting also that public art in the nineteenth century was designed to send messages of "the triumph of colonialism and industrial power," and thus public art at this time often took the shape of political monuments); Harriet Senie & Sally Webster, *Editor's Statement: Critical Issues in Public Art*, 48 ART J. 287, 287–88 (1989).

58. Bingham-Hall, *supra* note 57, at 163.

59. *Id.*

60. *Id.* For example, mid-twentieth-century public art could be understood as "an embellishment of small urban spaces and a backdrop to public life rather than a monumental totem to be gazed upon in reverence," as was the traditional function. *Id.* In line with this view, community murals became popular in the late twentieth century. *Id.* at 164.

61. Senie & Webster, *supra* note 57, at 287.

62. *Id.* at 288.

or video projections, guerrilla actions, [or] suites of waterfalls."[63] Branching out from traditional murals, monuments, and sculptures, this so-called "new public art" has been distinguished from previous forms by its "dedication to extra-aesthetic concerns," where use is a primary focus.[64]

Interestingly, public art seems to have come full circle, back to its traditional forms.[65] Due to the use of public art in urban real estate to attract professionals, developers, and tourists,[66] artworks "must once again angle for maximum visibility . . . [including] at the focal points of commercial plazas."[67] The utilitarian and abstract modes of public art have now combined with these more traditional, municipal modes to create the extremely varied forms of public art recognized today.[68] Because modern public art exists in both conventional and nonconventional forms,[69] the narrow definition of visual art protected by VARA is exceedingly difficult to apply on a case-by-case basis to individual works of art. As this Note will demonstrate, this difficulty is particularly problematic for artists desiring moral rights protection whose creations fall into the latter category.

II. PUBLIC ART NOT ADEQUATELY PROTECTED BY VARA'S DEFINITION OF ART

In its protection of artists' rights, VARA's largest shortcoming is that its protections are only available to "author[s] of a work of visual art."[70] A "work of visual art" is defined as a "painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer."[71]

---

63. Roberta Smith, *Public Art, Eyesore to Eye Candy*, N.Y. TIMES (Aug. 22, 2008), https://www.nytimes.com/2008/08/24/arts/design/24smit.html [https://perma.cc/QV95-6542].

64. Rosalyn Deutsche, *Public Art and Its Uses*, *in* CRITICAL ISSUES IN PUBLIC ART: CONTENT, CONTEXT, AND CONTROVERSY 158, 163 (Harriet F. Senie & Sally Webster eds., 1992) (quoting Nancy Princenthal, *In the Waterfront: South Cove Project at Battery Park City*, VILLAGE VOICE, June 7, 1988, at 99, 99). Such uses include: "to provide a place to sit for lunch, to provide water drainage, to mark an important historical date, or to enhance and direct a viewer's perception." *Id.* (quoting Douglas C. McGill, *Sculpture Goes Public*, N.Y. TIMES MAG. (Apr. 27, 1986), https://www.nytimes.com/1986/04/27/magazine/sculpture-goes-public.html [https://perma.cc/R6DU-ZPCK]). In describing this new public art, Deutsche also provides a critical perspective. *Id.* at 158–68.

65. Smith, *supra* note 63 (describing, with examples, the resurrection of public sculpture, and nothing that "over the past 15 years public sculpture—that is, static, often figurative objects of varying sizes in outdoor public spaces—has become one of contemporary art's more exciting areas of endeavor and certainly its most dramatically improved one").

66. *See supra* note 47 and accompanying text.

67. Bingham-Hall, *supra* note 57, at 164.

68. *See id.* ("What was perhaps a final stage bringing public art to the situation we recognize today has been the amalgamation of both planning-led public sculpture and artist-led public art practice into a 'cultural economy.'").

69. *See, e.g.*, sources cited *infra* notes 117, 157 (examples of abstract and controversial art forms).

70. 17 U.S.C. § 106A(a) (2018).

71. 17 U.S.C. § 101 (2018).

The statute also details what is not considered a work of visual art, including: "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, . . . any merchandising item or advertising, . . . any work made for hire[,] . . . [and] any work not subject to copyright protection."[72] This definition is a threshold matter that excludes many pieces of art at the outset of a VARA inquiry.[73] Unfortunately, "[t]he range of art that is not covered by VARA is substantial."[74] The exclusionary definition of visual art in VARA affects public art more profoundly than other types of art, as pieces of street art are more likely to take nontraditional forms or use atypical mediums not protected by the statute.[75] VARA should play an important role in protecting and guaranteeing the basic rights of the most vulnerable artists, and yet, in many instances, it largely fails public artists.[76] Not only does limiting protectable works to a narrowly defined category of visual art leave some public artists with no protection under VARA at all, it also demonstrates an attempt by the legislature, and subsequently by the courts, to engage in the problematic business of defining what is, and what is not, considered art, or at the very least what forms of art are worthy of protection.[77] Of course, the reality of the legal system and the successful operation of VARA require that there be some categorization of art such that the law can be administered in a fair and consistent manner. Accepting the difficulty, if not impossibility, of defining art,[78] however, demonstrates that VARA's definition of visual art must at least be made broader and more inclusive.[79]

Instead, the definition of art found in VARA fails to allow for an application to many unique art forms, as its rigidness and exclusivity leaves some creators of public art with no moral rights protection, and therefore no recourse for modified, damaged, or destroyed artwork. VARA's limited scope hurts public artists in particular because its narrow definition not only

72. *Id.*

73. "VARA's definition of 'work of visual art' operates to narrow and focus the statute's coverage . . . ." Kelley v. Chi. Park Dist., 635 F.3d 290, 300 (7th Cir. 2011).

74. JONES, *supra* note 22, at 147.

75. *See infra* Section II.A.

76. JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 328 (4th ed. 2002) ("Because it must to an extent appeal to the taste of the community and because it is often placed out of doors, public art is particularly vulnerable to modification and destruction, as well as to publicity. Examples abound of cases where sculptures or murals . . . have been altered or removed without the artist's consent.").

77. As Justice Holmes observed, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [visual art]." Castillo v. G & M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020) (alteration in original) (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

78. *See infra* Section III.A.

79. *See infra* Section IV.

denies unusual forms of public art protection,[80] it also *explicitly* excludes specific art forms commonly employed in public art, including applied art[81] and works made for hire,[82] and has additionally been interpreted to exclude site-specific art,[83] a common form of public art.[84] Finally, the Act protects from destruction only "work[s] of recognized stature."[85] VARA, then, presents two key definitional problems for street artists hoping to protect their work: (1) the categorical and narrow definition of visual art is at odds with the mutable nature of art, and thus denies protection to new and unique public art forms; and (2) the definition, both explicitly and impliedly, excludes a range of valid art forms, particularly common within the field of public art, that are deserving of protection.

A. VARA's Narrow Definition of Visual Art

VARA's limited protection in the context of public art is exemplified by the experience of Chapman Kelley. Kelley, using wildflowers to create a living painting,[86] planted a 1.5-acre garden at his own expense in Chicago's Grant Park, just to see it destroyed after nearly twenty years of efforts to preserve and maintain the work.[87] When Kelley's wildflower art installation, titled *Wildflower Works*, was reconfigured and destroyed, the Seventh Circuit concluded that he could not bring an action under VARA because the piece was not copyrightable,[88] and furthermore suggested that a living garden could not be considered a painting or a sculpture under the Act's definition of visual art.[89] The district court, in contrast, found that

80. *See supra* notes 70–71 and accompanying text; *infra* Section II.A.

81. *See supra* note 72 and accompanying text; *infra* Section II.B.2.

82. *See supra* note 72 and accompanying text; *infra* Section II.B.1; *see also Carter II*, 71 F.3d 77, 85–88 (2d Cir. 1995) (denying protection to a sculpture that was found to be a work made for hire by an employee).

83. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006); *infra* Section II.B.3. *But see* Kelley v. Chi. Park Dist., 635 F.3d 290, 306–07 (7th Cir. 2011) (questioning the categorical exclusion of site-specific art in *Phillips*).

84. Lauren Ruth Spotts, Note, Phillips *Has Left VARA Little Protection for Site-Specific Artists*, 16 J. INTELL. PROP. L. 297, 300–02 (2009).

85. 17 U.S.C. § 106A(a)(3)(B) (2018).

86. Chapman Kelley, *Wildflower Works*, 1984–2004, wildflower public art, Grant Park, Chicago, http://chapmankelley.com/Gallery.asp?GalleryID=18115&AKey=JLBDK6W2 [https://perma.cc/XX5M-PJH3]. Kelley described this work as a physical realization of the paintings he was creating at the time. Telephone Interview with Chapman Kelley (Sept. 17, 2019) (notes on file with author).

87. Deanna Isaacs, *Chapman Kelley's Mutilated Garden*, CHI. READER (Dec. 3, 2009), https://www.chicagoreader.com/chicago/chapman-kelleys-mutilated-garden/Content?oid=1246833 [https://perma.cc/YQW7-LJXN].

88. *Kelley*, 635 F.3d at 306 (finding that *Wildflower Works* was not "authored" or "fixed").

89. *Id.* at 300–02 (despite the fact that the Park District did "not challenge[] the district court's conclusion that Wildflower Works [was] a painting and a sculpture," the Seventh Circuit questioned this conclusion).

Wildflower Works[90] "could be classified as both a painting and a sculpture and therefore qualified as a work of visual art under VARA."[91] The Seventh Circuit was deeply critical of this conclusion, fearing that interpreting *Wildflower Works* as either a sculpture or a painting would result in an "infinitely malleable" approach.[92] The court's concern in this case echoes the very problem inherent in VARA's inclusion of only limited categories of visual art, particularly when strictly defined by the courts: art, in essence, *is* infinitely malleable.[93] This realization does not mean that a sufficient legal definition cannot be created, but simply that such definitions must be inclusive.

As demonstrated by the Seventh Circuit, in *Kelley*, VARA's narrow definition of visual art is largely due to an "express concern over the breadth of the definition of art" and subsequent attempts "to prevent the law from being used for unintended purposes."[94] The way courts and the legislature have dealt with these concerns, however, has at times resulted in "dubious distinctions concerning what is art."[95] While it is true that for practical purposes the definition of art can and must have some limit, the overly strict and exclusionary lines drawn by VARA and courts interpreting the Act have resulted in the denial of protection to unique pieces of public art like Kelley's *Wildflower Works*, despite clear artistic function and value. The loss of these artworks is a disgrace to the public art community that can only be remedied through expanding VARA's definition of visual art.

---

90. *Wildflower Works* consisted of "two large-scale elliptical flower beds . . . spann[ing] 1.5 acres of parkland and . . . set within gravel and steel borders," and was described as "living landscape art." *Id.* at 293. For a photograph, see source cited *supra* note 86.

91. *Kelley*, 635 F.3d at 295 (citing Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *5 (N.D. Ill. Sept. 29, 2008)).

92. *Id.* at 301.

93. In *Kelley*, the Seventh Circuit narrowly interpreted VARA's use of the nouns "sculpture" and "painting" to mean that artwork "cannot just be 'pictorial' or 'sculptural' in some aspect or effect, it must actually *be* a 'painting' or a 'sculpture.' Not metaphorically or by analogy, but *really*." *Id.* at 300. The Seventh Circuit found this interpretation to be necessary to distinguish "painting" and "sculpture" in VARA, 17 U.S.C. § 101 (2018), from "pictorial" and "sculptural" in copyright, 17 U.S.C. § 102(a)(5) (2018), noting that the former must be a limitation on or subset of the latter. *Kelley*, 635 F.3d at 300. This interpretation is also premised on the assumption that terms such as "painting" and "sculpture" can be strictly defined, an assumption that many artists and philosophers would almost certainly deny. *See supra* Section III.A.

94. DuBoff, *supra* note 12, at 351 (describing concerns regarding the scope of the definition of art across several contexts, including copyright, customs, and state moral rights and consignment statutes).

95. *Id.*; *see also* Zlatarski, *supra* note 25, at 221 ("VARA's definition of visual art broadly covers public art in the form of sculpture and painting, but nonetheless fails to protect architectural, garden, and park design.").

B. Statutory Exclusions and Limitations

In addition to excluding nontraditional forms of public art through rigid interpretations of the terms "painting" and "sculpture," VARA also disproportionately limits moral rights protection by excluding, either explicitly in the statute or implicitly through subsequent judicial interpretation, art forms that are common to public art: works made for hire,[96] applied art,[97] site-specific art,[98] and art lacking recognized stature.[99]

1. Works Made for Hire

A "work made for hire" is "a work prepared by an employee within the scope of his or her employment," or "a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[100] Because "employee" is not defined by the Act, determining whether an artwork is a work made for hire involves a balancing test from the law of agency, which considers whether an artist was an employee or an independent contractor.[101] In *Carter v. Helmsley-Spear, Inc.* (*Carter II*), three sculptors sought to prevent the alteration of their artwork installed in a building lobby.[102] The Second Circuit denied the artists VARA protection because the court found that the sculpture installation was a work made for hire.[103] The court came to this conclusion based on the combination of several factors, including the existence of employee benefits and tax treatment, and a weekly salary.[104] The artists, however, had "complete artistic freedom," meaning that they controlled the "manner and means" of the production of the artwork, and created the

96. 17. U.S.C. § 101 (2018) ("A work of visual art does not include . . . any work made for hire . . . .").

97. § 101 ("A work of visual art does not include . . . applied art . . . .").

98. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006). *But see* Kelley v. Chi. Park Dist., 635 F.3d 290, 306–07 (7th Cir. 2011).

99. 17 U.S.C. § 106A(a)(3)(B) (2018) (adding additional protections "to prevent any destruction of a work of recognized stature").

100. 17 U.S.C. § 101. The "work made for hire" doctrine originates in copyright law. *See* William O'Meara, *"Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations*, 15 CREIGHTON L. REV. 523, 523–25 (1982). The distinction was first codified in 1909. Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, 1087–88. The current statutory definition of a work made for hire was added in 1976. Copyright Act of 1976, Pub. L. No. 94-553, §§ 101, 201, 90 Stat. 2541, 2544, 2568.

101. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989); *Carter II*, 71 F.3d 77, 85 (2d Cir. 1995) (applying the *Reid* balancing test).

102. John Carter, John Swing & John Veronis, *Jx3*, 1991, sculpture installation, Queens, New York. For photographs of the artwork installed in the building lobby and later removed, see Bryan K. Wheelock, *Visual Artists Rights Act Review*, HARNESS DICKEY (Apr. 30, 2017), https://www.hdp.com/blog/2017/04/30/visual-artists-rights-act-review/ [https://perma.cc/U5YJ-NXVN].

103. *Carter II*, 71 F.3d at 87–88.

104. *Id.*

sculptures with "great skill in execution."[105] The conclusion that the sculpture installation was a work made for hire is therefore troubling for artists because it suggests that property owners can manipulate the works made for hire exclusion to their advantage by controlling the financial aspects of their business relationship with an artist, even though the relationship is not otherwise an employment relationship in practice.[106]

Denying works made for hire protection serves, in particular, to disadvantage artists who create commissioned public art.[107] Removing the works made for hire exclusion from VARA is necessary to remedy this disadvantage to public artists.[108] In addition, this removal would not burden property owners hiring artists because these parties are likely working through contracts and are therefore already in the best position to negotiate a waiver of VARA rights if one is desired.[109] Furthermore, the works made for hire exclusion makes little sense in the context of VARA, as moral rights are personal to the artist. Artists can certainly still suffer a loss of honor or reputation as a result of the presentation or modification of works created for someone else, but that are on public display.

2. Applied Art

Applied art,[110] also explicitly excluded from VARA protection, is defined as "two- and three-dimensional ornamentation or decoration that is

105. *Id.* at 86.

106. The central inquiry in distinguishing between an employee and an independent contractor is whether, in practice, the hiring party had the "right to control the manner and means by which the product is accomplished," *Reid*, 490 U.S. at 751, though other factors are also considered. *Id.* at 751–52 (listing additional factors).

107. MERRYMAN & ELSEN, *supra* note 76, at 328 ("[S]ince public art is often commissioned art, the artist can be treated as an employee creating the work of art within the scope of his employment.").

108. When the works made for hire exclusion was created, "VARA's authors did not perceive a significant relationship between the visual art works they were seeking to protect and the types of visual art that tend to be made for hire," as works made for hire are typically mass produced. U.S. COPYRIGHT OFFICE, *supra* note 11, at 64. Single-copy commissioned works, common to public art, were therefore not fairly considered when the exclusion was included in VARA. Furthermore, removing the exclusion and allowing these works to receive protection would not also grant protection to mass-produced works made for hire, because § 101 would still require a work of visual art to "exist[] in a single copy, [or] in a limited edition of 200 copies or fewer." 17 U.S.C. § 101 (2018). Eliminating the exclusion, then, would protect commissioned public artists without unduly expanding the reach of the Act.

109. *See* 17 U.S.C. § 106A(e) (2018); *infra* note 210 and accompanying text (discussing waiver).

110. 17 U.S.C. § 101 (defining "[p]ictorial, graphic, and sculptural works" to "include . . . applied art" and clarifying that these works are protectable as "useful article[s] . . . only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article"). This limited copyright protection for applied art was added in 1976. Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2543; *see* Jane C. Ginsburg, *"Courts Have Twisted Themselves into Knots": U.S. Copyright Protection for Applied Art*, 40 COLUM. J.L. & ARTS 1, 3–5 (2016).

affixed to otherwise utilitarian objects."[111] In *Carter II*, the Second Circuit limited the reach of the applied art exclusion when it held that merely being affixed to a utilitarian object is not enough to transform artwork into applied art.[112] Despite this one useful limitation on applied art's application, the reach of excluded applied art is troublingly wide, particularly for public artists.[113] For example, the Ninth Circuit defines applied art as an artwork that retains *any* utilitarian function.[114] Under this standard, no matter how transformed or creatively designed and decorated, artists who create public artworks that double as, for instance, park benches, bike racks, or fountains are denied all moral rights protections.[115] In *Cheffins v. Stewart*, artists Simon Cheffins and Gregory Jones had no recourse when their artwork, *La Contessa*,[116] was dismantled, burned, and sold for scrap.[117] Even though the artistic value of the ship outweighed any utilitarian function, the Ninth Circuit found *La Contessa* to be applied art, and thus ineligible for VARA protection, merely because it was affixed to an out-of-commission but working school bus.[118]

Decisions like this one undermine not only the artistic nature of applied artworks, but also, more significantly, the value of these pieces in our communities.[119] Removing the applied art exclusion would encourage functional public art in our streetscapes, negate the need for courts to interpret the term, and respect the artistic value inherent in these works.[120]

---

111. *Carter II*, 71 F.3d 77, 84–85 (2d Cir. 1995) (quoting Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 315 (S.D.N.Y. 1994)).

112. *Id.* at 85.

113. *See* Brandon J. Pakkebier, Note, *Form over Function: Remedying VARA's Exclusion of Visual Art with Functional Qualities*, 103 IOWA L. REV. 1329, 1340, 1358–59 (2018) (arguing that courts' refusal to recognize art as visual art if it has functional characteristics is too broad and renders VARA ineffective).

114. Cheffins v. Stewart, 825 F.3d 588, 593–94 (9th Cir. 2016).

115. Pakkebier, *supra* note 113, at 1331 ("[C]ourts crafted tests that refuse to recognize any art with functional characteristics—no matter how small—as visual art. Under this current approach, even sculpture fountains would not be considered visual art and thus not be protected by VARA. As a result, VARA has had a relatively small impact on moral rights protection." (footnote omitted)).

116. Simon Cheffins & Gregory Jones, *La Contessa*, 2002, mobile sculptural replica of Spanish galleon, Black Rock Desert, Nevada.

117. *See* Derek Fincham, *Judges Just Don't Like VARA and Applied Art*, ILLICIT CULTURAL PROP. BLOG (Aug. 8, 2016), http://illicitculturalproperty.com/judges-just-dont-like-vara-and-applied-art/ [https://perma.cc/7NU5-JPJ7].

118. *Cheffins*, 825 F.3d at 595 (noting that *La Contessa* was "visually transformed through elaborate artistry," but finding it conclusive that it "continued to serve a significant utilitarian function upon its completion," since it was "used for transportation").

119. *See* Asmara M. Tekle, *Rectifying These Mean Streets: Percent-for-Art Ordinances, Street Furniture, and the New Streetscape*, 104 KY. L.J. 409, 434–35 (2015) (noting that public art has evolved to favor small and utilitarian pieces, and recommending the installation of artistic yet functional street furniture to transform urban streetscapes).

120. The proposal in Part IV ensures that the removal of the applied art exception would not expand VARA's coverage to include purely utilitarian public objects, as works would be subject to copyright's separability analysis. *See infra* note 187.

3. Site-Specific Art

While not explicitly excluded by the statute, VARA has also been interpreted to exclude site-specific art, a denial of protection that almost exclusively limits the rights of public artists.[121] Site-specificity is "a technique in which context [is] incorporated into the work itself,"[122] or, in other words, in which the work's location is part of the art. Public art is uniquely suited to site-specific art, as the placement of public art in various locations is often intentional and powerful. In *Phillips v. Pembroke Real Estate, Inc.*, for example, David Phillips objected to the removal and relocation of his artwork, a sculptural installation,[123] during a redesign of Eastport Park in Boston.[124] The First Circuit denied Phillips any remedy under VARA because, under the Act, changing the placement of a piece of artwork is not considered a destruction or modification, and therefore does not trigger protection.[125] Because location is incorporated into site-specific artwork as an integral component of the piece, "[t]o remove a work of site-specific art from its original site is to destroy it."[126] The ruling in *Phillips*, then, enables property owners to change the location of site-specific pieces at their whim, altering the meaning of artworks and diminishing the value of public art placed intentionally in certain spaces, without giving the artist a voice or even minimal notice. Expressly including site-specific art in VARA's definition of visual art would resolve any disagreement among the circuits regarding the status of site-specific art,[127] and rightfully protect works specifically created to respond to the nature, community, or history of a site, which would be effectively destroyed if moved.[128]

---

121. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 139–43 (1st Cir. 2006). *But see* Kelley v. Chi. Park Dist., 635 F.3d 290, 306–07 (7th Cir. 2011).

122. Deutsche, *supra* note 64, at 159. Site-specificity can also "encompass the individual site's symbolic, social, and political meanings as well as the discursive and historical circumstances within which artwork, spectator, and site are situated." *Id.*

123. David Phillips, *Chords*, 2000, granite sculptural installation, Eastport Park, Boston. For a photograph of Phillips's site-specific sculpture pieces, see Aleks Berger, *Eastport Park Public Art*, URBAN CULTURE INST., https://www.urbanculturein stitute.org/uploads/1/1/4/6/11465358/eastportpark_aleksberger.pdf [https://perma.cc/BT5A-BBNV]; Wheelock, *supra* note 102.

124. *Phillips*, 459 F.3d at 131.

125. *Id.* at 133, 139–41; 17 U.S.C. § 106A(c)(2) (2018) ("The modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . .").

126. *Phillips*, 459 F.3d at 129.

127. *Compare Phillips*, 459 F.3d 128, *with* Kelley v. Chi. Park Dist., 635 F.3d 290, 306–07 (7th Cir. 2011).

128. One commentator noted that explicitly including site-specific works in VARA would be "barely more burdensome to property owners, and, appropriately, a good deal more respectful to authors." U.S. COPYRIGHT OFFICE, *supra* note 11, at 73. The proposed changes discussed in Part IV preserve pre-existing protections for property owners to minimize the burden of including protection for site-specific works. Property owners, for example, would only need to give ninety-days' notice to the

4. Works of Recognized Stature

While all artwork falling within VARA's definition of visual art can receive protection from intentional, reputation-damaging "distortion, mutilation, or other modification," only creators of art of recognized stature can bring suit under VARA to prevent or receive compensation for the complete destruction of their art.[129] This presents several key issues: it creates both a definitional problem resulting in costly litigation and harmful incentives for property owners, neither of which are justified by a balancing of interests between property owners and artists.

First, the recognized stature requirement results in a definitional problem that goes hand in hand with the complexity of defining what is and is not art. In other words, even accepting that a particular work should be considered art, how is a court to then assess if the work is of recognized stature? The meaning of recognized stature, though of less practical import than the definition of visual art, is even more difficult to identify. As an initial matter, VARA provides no guidance on how the term should be understood.[130] The need to assess recognized stature, then, has resulted in costly litigation for both artists and landowners alike.[131] Because a definition of recognized stature is not included in the statute, deciding whether or not a work is eligible for protection from destruction under § 106A(a)(3)(B) has been a matter of interpretation for the courts.[132]

In *Cohen*, for example, a district court in the Eastern District of New York had to assess the stature of each of forty-nine individual murals at the whitewashed 5Pointz site.[133] In doing so, the court considered, among other evidence, expert testimony, the careers and artistic recognition of the artists, and the appearance of the 5Pointz murals in media such as movies, television, and even social media.[134] Based on this evidence, forty-five of

author of a site-specific work should they want to remove or destroy the work, or they can negotiate a waiver of VARA rights at the outset. *See infra* Part IV.B.

129. 17 U.S.C. § 106A(a)(3) (2018).

130. *See* Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421, 437–38 (E.D.N.Y. 2018) (noting that recognized stature "is not defined in VARA" and debating the appropriate evidentiary standard), *aff'd sub nom.* Castillo v. G & M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

131. *See, e.g.*, *Cohen*, 320 F. Supp. 3d at 430 (recognizing the "extraordinary work" of the advisory jury in completing the "difficult task . . . [of] having to assess the defendants' liability in respect to each of the 49 works of art," which turned on the issue of recognized stature); Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999) (artist's ability to recover under VARA turned on whether a destroyed outdoor sculpture was a work of recognized stature).

132. *Martin*, 192 F.3d at 612 ("In spite of its significance, [recognized stature] is not defined in VARA, leaving its intended meaning and application open to argument and judicial resolution."); Carter v. Helmsley-Spear, Inc. (*Carter I*), 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994).

133. *Cohen*, 320 F. Supp. 3d at 439–41.

134. *Id.* at 438–39. While the court made independent conclusions, it was aided by advisory jury findings. *Id.* at 430–31.

the forty-nine works passed muster under the recognized stature standard.[135] Four murals, however, were not found to be of recognized stature and received no remedy.[136] In explaining this conclusion, the court noted a lack of "third-party attention" and "social media buzz" for all four.[137] Despite the overall victory for public artists in the case and its affirmance, the court's focus on third-party recognition in excluding four pieces from relief does not bode well in future cases for new artists or artists who have yet to gain a large following.

In addition to creating litigation in the courts, the recognized stature limitation on protection from destruction incentivizes property owners to destroy artwork that they have damaged or wish to modify. Modified or damaged artwork can trigger VARA protections, but destroyed works, if not of recognized stature, cannot.[138] This incentive creates a loophole that makes no sense given VARA's purpose of protecting artists and their works: if not of recognized stature, a modified or damaged work may give rise to liability—completely destroy that work, and the liability vanishes.[139]

In light of these problems, the recognized stature requirement for protection from destruction is unjustified, and removing the requirement would place minimal burdens on property owners. To start, VARA only prohibits the actual destruction of artworks, and thus a property owner no longer wishing to display a piece of art could remove the work and store it out of sight.[140] In addition, for pieces incorporated into a building (such as painted onto a wall) whose removal would automatically cause their destruction, all that is required under VARA is a good faith effort to provide ninety-days' notice prior to destruction so that artists, if they choose, can retrieve their work at their own expense.[141] This added protection for property owners for works affixed to buildings, commonly called the

135. *Id.* at 439–40. The prevailing standard used by courts in assessing recognized stature was articulated in *Carter I*: "(1) that the visual art in question has 'stature,' *i.e.* is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." *Carter I*, 861 F. Supp. at 325. This standard was recently re-worded by the Second Circuit: "We conclude that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community." *Castillo*, 950 F.3d at 166 (citing *Carter I*, 861 F. Supp. at 324–25).

136. *Cohen*, 320 F. Supp. 3d at 440 (adopting the advisory jury's findings that Jonathan Cohen's *Drunken Bulbs*, Akiko Miyakami's *Japanese Irish Girl*, Carlos Game's *Faces on Hut*, and Jonathan Cohen and Rodrigo Henter de Rezende's *Halloween Pumpkins* were not of recognized stature).

137. *Id.* The court also took into account the obscure location of one of the pieces and the seasonal nature of another. *Id.*

138. Compare 17 U.S.C. § 106A(a)(3)(A) (2018), *with* 17 U.S.C. § 106A(a)(3)(B).

139. *Cohen*, 320 F. Supp. 3d at 441 (finding that "*Japanese Irish Girl* was destroyed and therefore not 'distorted, mutilated, or otherwise modified'").

140. 17 U.S.C. § 106A(a)(3)(B). This would allow an artist to at least recover his or her piece, rather than losing it altogether. *But see supra* Section II.B.3 (for site-specific art specifically, a removal may result in destruction).

141. 17 U.S.C. § 113(d)(2) (2018).

Building Exception, would effectively balance the interests of artists and property owners even if protection from destruction was expanded to include artwork at all levels of recognition.[142] Given these minimal burdens and major drawbacks, it seems not only reasonable but also desirable to extend § 106A(a)(3)(B) protection to any and all works of visual art, no matter the perceived stature. While the purpose of the recognized stature requirement is to balance artists' interests with the interests of landowners who no longer wish to display certain artworks, VARA protections are not onerous.[143] As a result, every artist, regardless of fame or success, should have the right to save his or her work from destruction.[144]

Taken as a whole, the narrow definition of visual art, which excludes works for hire, applied art, and potentially site-specific art, and the requirement of recognized stature in the context of destroyed works, both threshold inquiries, demonstrate that VARA disproportionately disadvantages artists who create public art. This not only denies basic rights to public artists, but also undermines public art's importance in cultural expression, social cohesion, education, and community and economic development.

III. DEFINING ART: AN ARTISTIC AND LEGAL INQUIRY

As has been demonstrated, what makes VARA so problematic for public artists is not the scope of moral rights that it provides, but the scope of the definition of visual art that is eligible to receive these protections. Providing basic moral rights protection for public art therefore would not require artists to receive additional and unprecedented protections.[145] Instead, it

142. "[The] 'Building Exception' in section 113(d) . . . expressly balances the conflict between the moral rights of artists (including the social and cultural value of preserving the artwork those artists create) and the property rights of building owners who have allowed the artwork to be created on their buildings." Susanna Frederick Fischer, *Who's the Vandal?: The Recent Controversy over the Destruction of 5Pointz and How Much Protection Does Moral Rights Law Give to Authorized Aerosol Art?*, 14 J. MARSHALL REV. INTELL. PROP. L. 326, 328 (2015).

143. *See infra* Section IV.B.

144. After the whitewashing of the 5Pointz murals, one graffiti artist, William Tramontozzi, commented that the destruction was "a crime against the culture of the city." Greg Howard, *Graffiti Gets Paid at 5Pointz. Now What?*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/nyregion/graffiti-artists-5pointz.html [https://perma.cc/4DPB-EAJJ].

145. It is worth noting that VARA is deficient in more ways than are discussed in this Note. Adding additional moral rights protections would be a good step, especially given that VARA only minimally complies with the Berne Convention. E. Scott Johnson, *International Copyright*, *in* THE MUSICIAN'S BUSINESS & LEGAL GUIDE 91, 93 (Mark Halloran ed., 2017) (noting that "some still believe the United States is not in compliance with Berne's minimum standards with respect to moral rights," as VARA "amended the U.S. Copyright Act to include a very limited and rather anemic moral rights provision"). VARA's other deficiencies are valid, but are out of the scope of this Note, which is focused on advocating for an expansion of VARA's coverage to include works of public art that are currently receiving no moral rights protections.

would involve expanding VARA's definition of art to provide pre-existing protections to a larger category of worthy artworks, and, in the process, removing arbitrary and subjective distinctions between what works are legally protectable visual art and what works may be freely moved, modified, and destroyed without the artist's consent or even knowledge. In order to better understand why VARA's definition of visual art fails public artists, it is necessary to delve deeper into the definition of art on two levels: first, the scholarly and artistic struggle to define art; and second, successful and unsuccessful attempts in other art law contexts to craft both a flexible and appropriately tailored legal definition of art.

A. Definitions of Art from Art Theory

While drafting a definition of art is a necessary part of passing coherent and enforceable laws, creating an effective legal definition requires first recognizing the impossibility of defining art from artistic, linguistic, and philosophical perspectives.[146] When the definition of art is inflexible, legal protection of artwork is awarded, limited, or completely denied based on the assumption that art can be readily recognized and delineated, a notion that even scholars in the field of art, much less law, cannot agree upon.[147] In fact, even when developing complex theories attempting to create coherent definitions of art, many art scholars have advised against adopting a concrete definition.[148]

Over the centuries, art scholars, historians, and philosophers alike have attempted to create varied and at times conflicting theories of art, which each present different ways of discovering characteristics that all art has in common, and by which art can therefore be identified.[149] These definitional attempts are rooted in many varying types of aesthetic theories, including

146. For a discussion of developing a definition of art in the legal sphere, see DuBoff, *supra* note 12.

147. *See infra* notes 148–153 and accompanying text.

148. *See, e.g.*, Warren L. d'Azevedo, *A Structural Approach to Esthetics: Toward a Definition of Art in Anthropology*, 60 AM. ANTHROPOLOGIST 702, 712 (1958) ("The concept of art proposed in this paper is clearly tentative and heuristic. No attempt will be made to reduce it to a compact, definitive statement.").

149. *See* Thomas Adajian, *The Definition of Art*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., rev. ed. 2018), https://plato.stanford.edu/archives/fall2018/entries/art-definition/ [https://perma.cc/V6P5-JPMG].

naturalism,[150] pluralism,[151] essentialism,[152] and anti-essentialism.[153] Anti-essentialism is particularly relevant here because the theory rejects the notion that art can have an identifiable essence, or set of characteristics used to define it.[154] This anti-essentialism viewpoint uncovers why attempts to create categorical definitions of art will ultimately fail. After all, a thing's essence depends on the historical and cultural context in which it is located.[155]

Art scholars have also attempted to articulate what, exactly, characterizes public art specifically.[156] The process of identifying and characterizing public art is even more complex due to the added elements of public interaction[157] and public perception,[158] as well as public art's often ephemeral nature.[159] Attempts by art scholars to define elusive categories of public art prove that any effort to define visual art too narrowly in a statute such as VARA is a mistake. The law, and the courts interpreting it, have been engaging in exactly this type of inquiry, as VARA and its precedents divide art into concrete categories along lines as bright as the art they interpret. Overly exclusionary definitions, however, must be avoided, as they are not adaptable to the flexible and at times transitory nature of art and the art movement, and thus cannot adequately protect artists and their unique visions.[160] While it makes sense for the law to strive towards a clear

150. *See* Denis Dutton, *A Naturalist Definition of Art*, 64 J. AESTHETICS & ART CRITICISM 367 (2006).

151. *See* Roundtable Discussion, *Pluralism in Art and in Art Criticism*, 40 ART J. 377 (1980).

152. *See* Arthur C. Danto, *Art, Essence, History, and Beauty: A Reply to Carrier, a Response to Higgins*, 54 J. AESTHETICS & ART CRITICISM 284 (1996); T.J. Diffey, *Essentialism and the Definition of 'Art,'* 13 BRIT. J. AESTHETICS 103 (1973); Robert T. Cole, *Essentialism in Art*, ROBERT COLE STUDIOS, http://www.studiocole.com/essentialism.html [https://perma.cc/64YJ-PSAM].

153. *See* Lauren Tillinghast, *Essence and Anti-Essentialism About Art*, 44 BRIT. J. AESTHETICS 167 (2004).

154. *Id.* at 169. Anti-essentialists recognize that art can have inherent properties, but contend that these features do not amount to a complete definition of art. *Id.*

155. *See* Diffey, *supra* note 152, at 118–19 (criticizing his own essentialist views).

156. *See* Nicholas Alden Riggle, *Street Art: The Transfiguration of the Commonplaces*, 68 J. AESTHETICS & ART CRITICISM 243, 244–51 (2010); David H. Fisher, *Public Art and Public Space*, 79 SOUNDINGS 41, 43–45 (1996).

157. As an extreme example, works of Félix González-Torres ask the viewer to unwrap a piece of candy and contribute to the eventual erosion of the piece over time. *E.g.*, Félix González-Torres, *Untitled (Portrait of Ross in LA)*, 1991, candies individually wrapped in multicolor cellophane, Art Institute of Chicago, https://www.artic.edu/artworks/152961/untitled-portrait-of-ross-in-l-a [https://perma.cc/6S46-LKFP]; *see* Gregory S. Alexander, *Objects of Art; Objects of Property*, 26 CORNELL J.L. & PUB. POL'Y 461, 462–65 (2017) (describing González-Torres's works as "blurring . . . the line between the public and the private" by asking audiences to participate in and change the art).

158. Martin Zebracki, *Beyond* Public Artopia*: Public Art as Perceived by Its Publics*, 78 GEOJOURNAL 303, 303 (2013); *see also* Senie & Webster, *supra* note 57, at 288 ("All discussions of public art should consider a meaningful definition of the public.").

159. Castillo v. G & M Realty L.P., 950 F.3d 155, 167 (2d Cir. 2020) (noting that much of public art is temporary); *see also* Patricia C. Phillips, *Temporality and Public Art*, 48 ART J. 331, 333 (1989).

160. *See supra* Section II.

and predictable definition of art, it is also simultaneously important to protect, and therefore encourage, the artists who create new and inventive art in the public spaces that communities enjoy, come together around, and learn from every day. A broader and more flexible definition would better balance these goals.

B. Legal Definitions of Art

Keeping the disagreements and warnings of the artistic community in mind, a legal definition of art can and should be codified. Because the concept of art is so malleable, its legal definition must be specific to the context, or law, to which it is applied, keeping in mind the varying interests at stake and the overall purposes of the statute. Copyright, customs, and obscenity law are three areas that have endeavored to create such a legal definition. In each of these art law contexts, as in VARA, the definition of art is crucial as a threshold matter. Copyright and customs provide positive examples of areas of the law where the definition of art has been meaningfully expanded to respond to both the needs of the field and the purposes of the statutes in question, whereas obscenity law serves as a counterexample in which, as in VARA, the definition of art has been unduly restrained.

1. Copyright

Before VARA established moral rights for artists, artists could rely on the Copyright Act to protect only their economic interests in an artwork. The Copyright Act protects "original works of authorship fixed in any tangible medium of expression."[161] The visual art included in this protection is defined as "pictorial, graphic, and sculptural works."[162] Fortunately, this definition is broad:

> [T]he definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and work of "applied art."[163]

161. 17 U.S.C. § 102(a) (2018).
162. *Id.*
163. H.R. REP. NO. 94-1476, at 54 (1976).

Though the categories of protected art are broad,[164] the Copyright Act imposes some limitations on this definition of art, as the language of the Act requires that works be "original" and "fixed."[165] Two key issues courts focus on in determining copyright eligibility are originality [166] and separability.[167] Thus, visual art for copyright purposes must be original, fixed, and severable from purely functional features.[168] In contrast to the recognized stature limitation for VARA claims involving destruction, the copyright inquiry focuses on "originality and creativity" as opposed to "financial returns or public favor."[169] The broad, flexible definition of art in the copyright context reflects a desire to protect, reward, and encourage artists who create new and inventive works.[170]

2. Customs

Copyright is not the only area of law in which art must be defined. In the context of customs law, "[t]he legal definition of art . . . is crucial since certain items, if classified as works of art, enter the United States duty-free."[171] While customs laws originally applied duty-free status only to more traditional forms of art, the legal definition of art in customs law was expanded to include modern art in unique forms and media.[172] The 1989 Harmonized Commodity Description and Coding System then expanded the

164. *See* Kelley v. Chi. Park Dist., 635 F.3d 290, 300 (7th Cir. 2011) ("The use of the adjectives 'pictorial' and 'sculptural' suggests flexibility and breadth in application.").

165. 17 U.S.C. § 102(a).

166. DuBoff, *supra* note 12, at 305. For non-derivative works, only a "minimal amount of originality" is required. *Id.*

167. This second test is used when determining whether a piece that incorporates utilitarian objects is copyrightable applied art or uncopyrightable industrial design. *Id.*

168. For a concise summary of DuBoff's two-step analysis for "[l]egally defining art for copyright purposes," see *id.* at 321; *see also supra* note 110.

169. Atari Games Corp. v. Oman, 693 F. Supp. 1204, 1207–08 (D.D.C. 1988), *rev'd on other grounds*, 888 F.2d 878 (D.C. Cir. 1989).

170. *A Brief Introduction and History*, U.S. COPYRIGHT OFF., https://www.copyright.gov/circs/circ1a.html [https://perma.cc/EFK3-ZJZ7] ("[T]he purpose of the copyright system has always been to promote creativity in society . . . .").

171. DuBoff, *supra* note 12, at 322 (noting also that "[t]he customs courts have been grappling with the definition of art for customs regulation purposes for decades").

172. *Id.* at 323. This was achieved first in *Brancusi v. United States*, in which a customs court expanded the definition of art for customs purposes to include modern art. T.D. 43063, 54 Treas. Dec. 428 (Cust. Ct. 1928) ("We think that under the earlier decisions this importation would have been rejected as a work of art, or, to be more accurate, as a work within the classification of high art. Under the influence of the modern schools of art the opinion previously held has been modified with reference to what is necessary to constitute art within the meaning of the statute, and it has been held by the Court of Customs Appeals that drawings or sketches, designs for wall paper and textiles, are works of art, although they were intended for a utilitarian purpose."). The definition of art was expanded further with the inclusion of the language "in any other media" in the 1959 Customs Law Amendments, Act of Sept. 14, 1959, Pub. L. No. 86-262, 73 Stat. 549, *repealed by* Tariff Classification Act of 1962, tit. I, § 101, 76 Stat. 72, 72–73.

legal definition of art even further when it removed previous limitations to duty-free art, including eliminating the requirement that sculptures be created by a professional sculptor, and removing references that excluded artwork associated with industrial use.[173] Reasonable limitations were also imposed, such as that frames will only be considered part of an artwork if they "are of a kind and of a value normal" to the work to avoid manipulation of customs law by importing cheap art in expensive frames.[174] Overall, the legal definition of art in the customs context has been broadened over time to eliminate overly complex and outdated limitations, and to better serve the purpose of the statute to assign duty-free status to those items that will not compete with American-made goods.[175]

3. Obscenity

The legal definition of art is also important in the context of obscenity and the First Amendment, as the law draws a line between art and obscenity. The Supreme Court held in *Miller v. California* that the standard for determining whether a piece is obscene, and therefore not protected by the First Amendment, is: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . . ; and (c) whether the work, taken as a whole, *lacks serious . . . artistic . . . value*."[176] Troublingly, this test requires courts to go beyond the definition of art itself to the even more elusive distinction between good art (that has artistic value) and bad art (that does not).[177] Like VARA, this language is problematic because it asks courts to make subjective and arbitrary distinctions that they are simply not equipped to make.[178]

In contrast, copyright and customs law protects all artworks falling within the field's legal definition of art regardless of perceived merit. While VARA does not explicitly call for a value determination of artwork in its definition of visual art, its limitation to more traditional forms of art effectively causes courts to make such determinations, such as whether or not Kelley's *Wildflower Works* maintained enough artistic merit to qualify

173. Harmonized Tariff Schedule of the United States, § XXI, ch. 97, USITC Pub. 2232 (1990); DuBoff, *supra* note 12, at 324, 328.

174. Harmonized Tariff Schedule of the United States, § XXI, ch. 97, USITC Pub. 2232 (1990); DuBoff, *supra* note 12, at 332.

175. DuBoff, *supra* note 12, at 323, 333.

176. Miller v. California, 413 U.S. 15, 24 (1973) (emphasis added) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

177. Newman, *supra* note 14, at 145.

178. *Id.* at 152 ("Rather than drawing a firm line between art and obscenity, the *Miller* test abdicates obscenity decisions to fact finders unsuited to making the determination . . . .").

as a painting or a sculpture under the Act.[179] Furthermore, the recognized stature requirement for destroyed works injects a similar, more explicit value determination into the statute.[180] Rather than continue to impose limitations and exclusions that result in subjective value judgments, as in obscenity law, VARA would benefit from a broader definition of art, as has been accomplished in the copyright and customs contexts. As in copyright, VARA's coverage must be broadened to protect and foster creativity. As in customs, VARA must evolve to respond to changes in the practice of art over time. In both copyright and customs law, broad definitions of art have been adopted and appropriately tailored in line with the purposes of the law in question. VARA should be amended to accomplish the same.

IV. A PROPOSAL TO REFORM VARA: A MORE INCLUSIVE DEFINITION OF VISUAL ART

In response to a growing recognition of the need to increase protection for public art, diverse solutions have been presented.[181] In order to fulfill its purpose to preserve art and protect the moral rights of artists, as well as the culture of communities,[182] VARA should be amended to be more inclusive of the types of artwork protected, and the level of recognition of artwork allowed heightened protections. This Note's suggested expansion of the definition of visual art to more closely match copyright law would adequately balance the interests of artists and property owners, both of whom have a stake in the scope of moral rights protection.

A. Expanding the Definition of Visual Art

In order to adequately protect public artists and serve VARA's purposes,[183] the definition of visual art in 17 U.S.C. § 101 should be expanded to encompass a wide and flexible array of artistic techniques, styles, and mediums.[184] Rather than attempt to codify strict limits of

179. *See supra* notes 86–93 and accompanying text.

180. *See supra* Section II.B.4.

181. *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 11, at 68, 80–81 (recommending several legislative changes to VARA using language from the California Art Preservation Act); Christian Ehret, Note, *Mural Rights: Establishing Standing for Communities Under American Moral Rights Laws*, PITT. J. TECH. L. & POL'Y, Spring 2010, at 1, 11–15 (arguing in favor of granting communities standing to assert VARA rights in order to protect beloved public artworks when the artist is unavailable).

182. VARA does not just protect artists, but also the public. Castillo v. G & M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020) ("VARA protects 'the public interest in preserving [the] nation's culture.'" (alteration in original) (quoting *Carter II*, 71 F.3d 77, 81 (2d Cir. 1995))).

183. JONES, *supra* note 22, at 144 (identifying policy reasons for VARA as including "recogniz[ing] society's interest in encouraging artists to work creatively" and "respect[ing] the public cultural value in preserving works of art").

184. *See* Appendix A.

protectable visual art, VARA must allow courts to openly examine works on a case-by-case basis, guided by the testimony of artists, art experts, and even, particularly in the case of public art, public opinion. In making this inquiry, a flexible, broad definition of visual art is essential, and can be achieved in a way that is already definable by and familiar to the courts by expanding the visual art protected under VARA to more closely match the broad definition of visual art already protected by copyright law. When assessing VARA eligibility for a work of visual art, instead of asking whether a work qualifies as a "painting" or "sculpture," courts would ask if the work of visual art in question is copyrightable, or if it is an "original work of authorship fixed in any tangible medium or expression."[185]

Applying the broader definition of art found in the context of copyright law[186] to moral rights protection would result in more efficient legal change, as its contours have already been extensively litigated and interpreted by courts.[187] In fact, copyright law has already in a sense been incorporated into VARA, as any artwork not subject to copyright protection is also not subject to moral rights protection.[188] By broadening VARA's definition of visual art to encompass works of visual art protected under the copyright definition as shown in Appendix A, VARA would be extended to protect a wider variety of public artists whose works are currently copyrightable but not eligible for moral rights protection.[189] Furthermore, the more expansive

185. *See* 17 U.S.C. § 102 (2018); *supra* Section III.B.1; *infra* Appendix A.

186. *See supra* notes 161–170 and accompanying text.

187. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08 (2019). For example, rather than denying moral rights protection to artists of any applied art, courts in the moral rights context could use the already existing (and more generous) separability test. *See supra* notes 110, 167.

188. 17 U.S.C. § 101 (2018); *see* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06[A][1] (2007) ("[G]eneral copyright doctrine is inextricably implicated in the analysis of artists' rights.").

189. An engaged reader may be wondering: what about protection for Kelley's *Wildflower Works*? While the Seventh Circuit expressed skepticism that Kelley's work could be considered a painting or a sculpture, its decision ultimately rested on the fact that it was not copyrightable, as it found *Wildflower Works* was not authored or fixed. *See supra* notes 86–93 and accompanying text. The Seventh Circuit reasoned that planting material "is not stable or permanent enough" to result in a fixed work of art, and that "gardens are planted and cultivated, not authored." Kelley v. Chi. Park Dist., 635 F.3d 290, 304–05 (7th Cir. 2011). Based on this ruling alone, Kelley's work and others like it would not benefit from this Note's proposed solution. This Note, however, further argues that art like *Wildflower Works* should receive copyright protection, and therefore the full benefit of VARA rights under the proposed changes. Kelley's medium of wildflowers was certainly atypical, but he designed the piece just like he would any other painting. He planned every part of the design, including the shape of the walkways, the color of the gravel, the shape of the flower beds, and the placement of the flowers within the beds, and he additionally continuously maintained the work. Telephone Interview with Chapman Kelley (Sept. 17, 2019) (notes on file with author). In fact, due to the living nature of Kelley's medium, he had to work much harder to create and maintain *Wildflower Works* than would have been required to create a painting, and he visited the piece every day to care for it. *Id.* In discussing his efforts to arrange the wildflowers and ensure that they would bloom year-round, Kelley described the project as a shotgun wedding between the arts and the sciences. *Id.* These efforts show that Kelley's *Wildflower Works* was

definition would eliminate the need to litigate complex and subjective questions, such as what qualifies as a "painting" or a "sculpture,"[190] or whether or not a work has recognized stature.[191] It also makes sense to have similarly broad definitions of visual art for copyright and VARA purposes because these laws ultimately have the same overall purpose: fostering creativity and encouraging innovative artistic design. Tellingly, expanding moral rights protection for visual art under VARA to match copyright would be more consistent with the Berne Convention, which protects *all* copyrightable works.[192]

In conjunction with an expansion of the definition of visual art, certain exclusions and limitations qualifying this definition should also be eliminated as shown in Appendices A and B. This would require removing the exclusions for applied art and works for hire, explicitly allowing site-specific work to receive protection, and removing the recognized stature limitation.[193] These exceptions waste judicial resources by requiring parties to litigate difficult-to-define distinctions,[194] and bar worthy or lesser-known artists from preserving their work at the outset.[195]

This proposal is qualified by the assumption that such a change would be difficult to accomplish, as amending legislation is no simple feat, and property owners would likely oppose change. The consequences for public artists and the future of public art, however, are too high to ignore VARA's

---

a far cry from planting seeds and seeing what would happen, or even from planting a regular garden—he designed the piece from start to finish, and meticulously maintained it in accordance with his artistic vision. In this way, it can be argued that Kelley authored the piece for the purposes of copyright. In addition, the fact that the flowers were not technically permanent should not preclude them from being considered "fixed" for copyright purposes, Castillo v. G & M Realty L.P., 950 F.3d 155, 168 (2d Cir. 2020) (noting in the context of VARA that "[a]lthough a work's short lifespan means that there will be fewer opportunities for the work to be viewed and evaluated, the temporary nature of the art is not a bar to recognized stature"), and the Seventh Circuit admitted this themselves. *Kelley*, 635 F.3d at 305 ("We are not suggesting that copyright attaches *only* to works that are static or fully permanent . . . , or that artists who incorporate natural or living elements in their work can *never* claim copyright."). Indeed, Kelley's consistent efforts to maintain the piece for nearly two decades call into question if the work can even be considered temporary at all, and further highlight not only the stability of *Wildflower Works* but also Kelley's authorship.

190. *See* discussion of Kelley's *Wildflower Works*, *supra* notes 86–93 and accompanying text.

191. *See* discussion of the 5Pointz murals, *supra* notes 129–144 and accompanying text.

192. Patrick Flynn, Annotation, *Validity, Construction, and Application of Visual Artists Rights Act (17 U.S.C.A. §§ 101 et seq.)*, 138 A.L.R. Fed. 239, § 2[a] (2020) ("While the Berne Convention (and the European, primarily French, civil law on which many of its moral rights provisions are based) protects all copyrightable works, Congress chose to limit the application of moral rights to a narrowly enumerated list of visual art works.").

193. For the removal of the applied art and works for hire exclusions, as well as the inclusion of site-specific works, see Appendix A; for the removal of the recognized stature limitation, see Appendix B.

194. In *Cohen*, for example, the court had to assess the stature of each of forty-nine individual murals at the whitewashed 5Pointz site. Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421, 439–41 (E.D.N.Y. 2018), *aff'd sub nom.* Castillo v. G & M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

195. For more in-depth arguments supporting these changes, see *supra* Section II.B.

shortcomings any longer. This proposal, which minimizes change to existing law by borrowing from copyright law, demonstrates, at the very least, that legislative change is achievable.

B. Balancing of Interests

Courts and lawmakers have resisted expanding protectable art under VARA beyond its narrow confines due to a fear of creating unlimited, unintended, and overly burdensome coverage.[196] These concerns are fair, but unfounded in the context of VARA. After all, the Act already contains appropriate safeguards to balance the needs of artists and property owners even under an expanded definition of visual art. Much of these fears likely stem from the tension between the legal system's value of the free transfer of property interests and VARA's recognition of inalienable moral rights, retained by the artist even after transfer.[197] This conflict should not hinder the expansion and strengthening of VARA for four reasons: (1) VARA only protects two limited yet important moral rights; (2) VARA already contains appropriate limitations; (3) in practice, property owners are often able to waive VARA liability; and (4) in order to receive protection, public artists must receive permission from landowners when placing public art on their property. Because "the American legal system highly values property rights and often resists protecting more conceptual rights, such as moral rights,"[198] VARA is currently imbalanced heavily in favor of property owners. The expansion of the definition of visual art in Appendices A and B would therefore merely help to even the balance by providing public artists basic moral rights, while still maintaining built-in protections for property owners.

To start, VARA protects only the most basic and essential moral rights of artists: the right of attribution and the right of integrity.[199] Real estate and property owners, against whom public artists most typically assert VARA rights, should therefore be easily able to comply with any restrictions imposed by VARA, even if the definition were extended to encompass a wider range of public art. The protections given artists under the right of attribution merely include artists' right to claim ownership of their work and to prevent affiliation with work that has been modified or that they did not

196. *See supra* note 94 and accompanying text.

197. JONES, *supra* note 22, at 144 ("The economic and legal system of the US is one that historically and philosophically recognizes and encourages the transfer of property interests and therefore does not blend easily with a set of inalienable personality rights."). For a discussion of the intersection between property law and art law, see Alexander, *supra* note 157.

198. *See* Christopher R. Mathews, *VARA's Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future*, 10 UCLA ENT. L. REV. 139, 140 (2003).

199. JONES, *supra* note 22, at 144.

create.[200] In addition, VARA protects the right of integrity by preventing artwork from being modified only if the modification is prejudicial to the artist's reputation.[201] Any modification, furthermore, must be intentional, and any destruction must be intentional or grossly negligent.[202] While protection from destruction may appear restrictive to landowners wishing to remove displayed artwork, when public art is attached to buildings or real property, the Act accounts for any added difficulty to property owners by allowing the owner of a building on which art is incorporated to destroy the art after a good-faith attempt to notify the artist or ninety-days' notice.[203] In order to more fully balance artistic and property interests following the proposed removal of the recognized stature limitation, the Building Exception found in 17 U.S.C §113 for the removal and destruction of works attached to a building should be incorporated into 17 U.S.C § 106A and applied to all artworks, not just those affixed to buildings.[204] With this change, all public artists would receive protection from destroyed or damaged work. Property, however, would remain unencumbered, as a property owner would merely need to provide ninety-days' notice in order to give the artist the option to remove the work at the artist's own expense before being able to freely destroy or remove artworks.

VARA has numerous additional built-in protections that balance artists' interests in preserving their work with real estate owners' interests in unencumbered property, and would continue to do so under an expanded definition of protected art. Unlike copyright protection, VARA protections last only for the life of the artist.[205] In addition, VARA protections belong only to the artist and cannot be transferred to or asserted by anyone else.[206] Significantly, VARA also protects property owners by providing that any modifications resulting from "the passage of time" or "the inherent nature of the materials" are not a violation of the Act,[207] nor are any modifications due to "conservation" or "public presentation."[208] These limits are especially relevant in the context of public art displayed outdoors and in the

200. 17 U.S.C. § 106A(a)(1)–(2) (2018).
201. 17 U.S.C. § 106A(a)(3)(A).
202. 17 U.S.C. § 106A(a)(3)(A)–(B).
203. 17 U.S.C. § 113(d)(2) (2018); *see supra* Section II.B.4.
204. *See* Appendix B.
205. *Compare* 17 U.S.C. § 302(a) (2018) ("Copyright . . . endures for a term consisting of the life of the author and 70 years after the author's death."), *with* 17 U.S.C. § 106A(d)(1) ("[R]ights conferred . . . shall endure for a term consisting of the life of the author.").
206. 17 U.S.C. § 106A(e).
207. 17 U.S.C. § 106A(c)(1).
208. 17 U.S.C. § 106A(c)(2). The public presentation exception includes changes to "lighting and placement." *Id.*

elements, and ensure that property owners will not be held responsible for inevitable wear and tear.[209]

In accounting for the interests of property owners, VARA goes even further than these limitations on the scope of moral rights: VARA allows art purchasers to entirely avoid the possibility of VARA liability by contracting with artists to waive their VARA rights.[210] The ability to waive VARA rights when artists sign contracts with property managers to create and install public art pieces does not make it any less crucial to create an inclusive definition of art in order to further the Act's policy goals.[211] Even when waived, placing the initial right in the artist gives artists significantly more bargaining power, such as to ask for more favorable contract terms in exchange for a waiver.[212] Expanded VARA protections will also send the message to property owners and society at large that public art should be valued and encouraged.

It lastly must be made clear that this Note does not advocate for public art to receive protection under VARA if it has been placed on a site illegally.[213] Landowners will not violate VARA, for example, if they remove graffiti that was placed on their property without permission.[214] Property owners, therefore, need not be afraid of increased VARA protections sanctioning or protecting vandalism, and such illegal acts will

209. *See, e.g.*, Flack v. Friends of Queen Catherine Inc., 139 F. Supp. 2d 526, 534 (S.D.N.Y. 2001) (applying the passage of time exception).

210. This is explicitly allowed under 17 U.S.C. § 106A(e) (allowing for the waiver of VARA rights through express agreement "in a written instrument signed by the author"). The waiver provision, while advantageous to property owners, also balances artists' interests by requiring the waiver to be express and in writing. *Id.*

211. *See supra* note 183 and accompanying text.

212. *See* Mathews, *supra* note 198, at 154 ("The waiver's effect on the bargaining positions of artists and art purchasers is arguably more important than the actual frequency of the waiver."); *see also* NIMMER & NIMMER, *supra* note 188, § 8D.06[D] (discussing waiver in light of the "imbalance in the economic bargaining power of the parties" and noting the threat of "routine waivers" (quoting H.R. REP. NO. 101-514, at 18, 22 (1990))).

213. English v. BFC & R E. 11th St. LLC, No. 97 Civ. 7446(HB), 1997 WL 746444, at *4 (S.D.N.Y. Dec. 3, 1997) ("VARA is inapplicable to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question."), *aff'd sub nom.* English v. BFC Partners, 198 F.3d 233 (2d Cir. 1999). *But see* Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295, 330–36 (2013); Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. ONLINE 54 (2016). While this Note proposes changes seeking to expand and promote the creation of public art, including graffiti, it does not advocate for artists to create public works without consent, and hopes instead that more property owners will be open to contracting with public artists.

214. Graffiti is used as an example here because it is a common and well-known form of vandalism. However, it must be acknowledged that graffiti *art* is different from graffiti *vandalism*, and the latter is what is meant here. *See* Marisa A. Gómez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 697 (1993) ("[N]ot all graffiti is vandalism, but . . . graffiti may become vandalism when it is done in an inappropriate place and without permission. Vandalism is a crime; graffiti can be art.").

not be encouraged. Instead, an expansion of VARA would protect deserving public art from modification or destruction when, for instance, a previously obliging landowner changes his or her mind regarding display.[215]

Given these limitations on VARA's scope, expanding the definition of visual art and the works included within it will both better encourage the creation and preservation of art and appropriately recognize the needs of the property owners who make the public display of art possible. In fact, as these limits show, VARA would *still*, even if expanded as proposed, favor property owners.[216] An expanded definition of visual art as outlined by this Note is therefore necessary to merely give public artists basic protections—not a lot to ask.

C. Cultural Shift

Because VARA is perceived to be cumbersome for property owners, expanding the definition of visual art could have the unintended consequence of hurting the development of public art if property owners will no longer want to purchase artworks due to fear of liability. This means that expanding the definition of visual art alone is not enough. In addition to legislative reform, we need to create a culture that values public art in its communities. Currently, property rights dominate in the United States.[217] Rather than one interest dominating the other, however, artists' and property owners' interests can dovetail to create mutually beneficial arrangements. This would involve educating artists about their legal rights and giving them appropriate bargaining tools,[218] while at the same time educating property owners both about the value of displaying a robust collection of public artworks and the low burden that VARA places upon them so that they will not be discouraged from purchasing new pieces. Finally, those commissioning public artworks should involve the public, such as by seeking out input regarding art that will be placed in the spaces that community members use and enjoy on a daily basis.[219] Working together, public artists, property owners, and the public can preserve and grow the rich culture of our communities.

---

215. *See, e.g.*, discussion of the 5Pointz murals, *supra* notes 129–144 and accompanying text.

216. This is especially apparent in the waiver provision. *See supra* notes 210–212 and accompanying text.

217. *See supra* notes 197–198 and accompanying text.

218. Many artists are "oblivious to art laws." Jessica L. Darraby, *Personal Reflections on Art Law*, 12 HASTINGS COMM. & ENT. L.J. 298, 300 (1990).

219. Salil K. Gandhi, Note, *The Pendulum of Art Procurement Policy: The Art-in-Architecture Program's Struggle to Balance Artistic Freedom and Public Acceptance*, 31 PUB. CONT. L.J. 535, 547–53, 557 (2002) (analyzing the benefits and drawbacks of community involvement in the commissioning process to avoid community rejection of public artworks after installation, and ultimately advocating for a balance between "artistic freedom and public harmony").

CONCLUSION

VARA does not sufficiently protect public artists' moral rights. A better understanding of public art from an artistic, rather than legal, point of view can help lawmakers and courts identify and implement more sufficient protections. An artistic perspective is necessary when considering VARA reform because it encourages a deeper appreciation of the value of many forms of artistic expression. The broader and more flexible definition of visual art proposed by this Note can help bridge the gap between art and art law by offering legal protection to a wider breadth of works that are invariably recognized as art by art scholars and consumers, but not by legal scholars and judges. These changes cannot and should not occur overnight, and thus the first step to the preservation of America's public artworks is a more widespread recognition of the important role that public art, and therefore the artists who create it, plays in our everyday lives. From statues providing beauty, education, and community gathering in public parks and plazas, to sculptures enhancing otherwise barren corporate lobbies or murals coloring bleak concrete and brick, the public interacts with public art on a daily basis. Reform is necessary to protect and encourage the continued creation of these artworks, because while most can afford to take the vulnerability of public art for granted, the artists who devote their livelihoods to creating it simply cannot.

Emma G. Stewart[*]

* Editor-in-Chief, Volume 97. J.D. (2020), Washington University School of Law; B.A. in English (2017), University of Tulsa. Many thanks to Scott Hodes, Chapman Kelley, and Sue Greenberg for their incredible suggestions and guidance. To all of the editors at the *Washington University Law Review*, thank you for making this Note possible. Special thanks to the brilliant editing team of Jim Coury, Sarah Spring, and Josh Dubin, as well as to my truly amazing Notes Editor and mentor, Caitlin Gray. I would be remiss if I did not also thank Kristina Gliklad, my Managing Editor, for her enduring support and friendship. Finally, my sincerest thanks, as always, are owed to my wonderful parents for their constant motivation and many, many years of patient proofreading; and to Brendan, my fiancé, for encouraging me, believing in me, and inspiring me every single day.

Appendix A: Proposed Definitional Language[220]

17 U.S.C. § 101

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, *including site-specific works, which would receive copyright protection in accordance with section 102 as an original work of authorship fixed in any tangible medium or expression, now known or later developed,* 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 or other identifying mark of the author; or

(2) 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.

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;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii); *or*

~~(B) any work made for hire; or~~

(B) any work not subject to copyright protection under this title.

220. Additions to the current statute are italicized and underlined. Deletions are struck through.

Appendix B: Proposed VARA Language[221]

17 U.S.C. § 106A

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—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—
(A) to claim authorship of that work, and
(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—
(A) to prevent any 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, and
(B) to prevent any destruction of a work of ~~recognized stature~~ *visual art*, and any intentional or grossly negligent destruction of that work is a violation of that right.

(i) If a property owner wishes to destroy a work of visual art, the author's rights under paragraphs (2) and (3) of this section shall apply unless—
(a) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or
(b) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

221. Additions to the current statute are italicized and underlined. Deletions are struck through.

> *(ii) For purposes of subparagraph (a), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to section 113(d)(3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.*[222]

. . . .

222. This language comes from 17 U.S.C. § 113(d) (2018).