

# NOTES

## REFORMING THE VISUAL ARTISTS RIGHTS ACT TO PROTECT #STREETART IN THE DIGITAL AGE

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## INTRODUCTION

Consider the following: Building Owner commissions Artist to paint a mural on the wall of his building. A decade later, Business buys that building from Building Owner and, unaware of details relative to Artist's wall mural, develops plans to renovate the building for a new use. Upon hearing of Business's attempt to alter its newly acquired property, Artist seeks an injunction to prevent Business from restoring its building in a way that would change or destroy her mural.<sup>1</sup> Would a court prevent Business from altering its building due to Artist's moral rights to her work?<sup>2</sup> If the court follows the Second Circuit's decision in *Castillo v. G & M Realty L.P.*, the answer might be yes.<sup>3</sup>

The law of property, unlike that of contracts, provides individuals with a fixed and narrow range of rights.<sup>4</sup> In the civil law system, the limitation on individuals' property rights is known as *numerus clausus*.<sup>5</sup> Thomas Merrill and Henry Smith assert that property owners'

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1. The hypothetical scenario is based on artist Katherine Craig's attempt to prevent the alteration of a building on which she had painted "The Illuminated Mural" in 2009. See First Amended Complaint at 6-7, *Craig v. Princeton Enters. LLC*, No. 2:16-cv-10027 (E.D. Mich. filed Apr. 1, 2016); Kriston Capps, *An Artist Sues to Save Her Landmark Detroit Mural*, BLOOMBERG (Jan. 5, 2016, 12:19 PM), <https://www.bloomberg.com/news/articles/2016-01-05/detroit-artist-katherine-craig-sues-to-save-illuminated-mural-on-building-citing-visual-artists-rights-act> [https://perma.cc/B8M6-KNU2]. Craig ultimately entered a settlement agreement with the subsequent owner of the property in which that owner pledged to incorporate Craig's mural into its project. Lee DeVito, *Detroit's Controversial 'Illuminated Mural' Has Been Irreparably Damaged, Will Be Replaced by New Mural*, DETROIT METRO TIMES (Aug. 26, 2020, 12:20 PM), <https://www.metrotimes.com/the-scene/archives/2020/08/26/detroits-controversial-illuminated-mural-has-been-irreparably-damaged-during-chroma-construction-will-be-replaced-by-new-sydney-james-mu> [https://perma.cc/3TP8-C6WB].

2. See generally Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106A.

3. See 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

4. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000) [hereinafter Merrill & Smith, *The Numerus Clausus Principle*]; Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) [hereinafter Merrill & Smith, *The Morality of Property*].

5. Merrill & Smith, *The Numerus Clausus Principle*, *supra* note 4, at 4 ("In the common law, the principle that property rights must conform to certain standardized forms has no name. In the civil law, which recognizes the doctrine explicitly, it is called the *numerus clausus*—the number is closed.").

right to exclude others from their property “must be regarded as a moral right.”<sup>6</sup> Further, although the principle of *numerus clausus* is not explicitly recognized in the American common law system, common law courts “treat previously-recognized forms of property as a closed list that can be modified only by the legislature.”<sup>7</sup>

By enacting the Visual Artists Rights Act (VARA) in 1990, Congress expanded artists’ bundle of rights and guaranteed certain protections, including the right “to prevent any destruction of a work of recognized stature,” although the statute does not further define “recognized stature.”<sup>8</sup> In doing so, Congress perhaps unintentionally created an opportunity for street artists to promote their rights over and against those of real property owners.<sup>9</sup> This moral right opportunity made headlines in February of 2020 when the Second Circuit affirmed a \$6.75 million judgment against a property owner, Gerald Wolkoff, after the trial court found he violated VARA by destroying artwork displayed on his property in retaliation against twenty-one plaintiff-artists seeking to preserve their works.<sup>10</sup>

Did Congress predict that a city’s murals would draw tourists to that location,<sup>11</sup> or that street art shared through social media would launch artists’ careers<sup>12</sup> when it failed to elaborate on what constitutes a work of recognized stature?<sup>13</sup> Certainly not. Although

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6. Merrill & Smith, *The Morality of Property*, *supra* note 4, at 1850. The assertion that society must regard property rights as moral rights because “they are in rem rights imposing duties of abstention on all other members of the relevant community” stands in direct opposition to the moral right Congress granted to artists in its enactment of the Visual Artists Rights Act; visual artists who create art on others’ real property may hold their statutory moral right over the moral right of the building owner. *See id.* at 1852-53; 17 U.S.C. § 106A(a), (c).

7. Merrill & Smith, *The Numerus Clausus Principle*, *supra* note 4, at 10-11.

8. 17 U.S.C. § 106A(a)(3)(B).

9. *See Castillo v. G & M Realty L.P.*, 950 F.3d 155, 163-64, 166 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

10. *Id.* at 164, 173 (“Judge Block awarded the maximum amount of statutory damages: \$150,000 for each of the 45 works, for a total of \$6.75 million.”).

11. *See* Claire Gillespie, *These 12 Cities Are Home to the Best Street Art on Earth*, FODOR’S TRAVEL (Apr. 18, 2019), <https://www.fodors.com/news/photos/these-12-cities-are-home-to-the-best-street-art-on-earth> [<https://perma.cc/RK64-RNCL>].

12. *See* Vivienne Decker, *Kelsey Montague’s Street Art Went Viral When Taylor Swift Posed in Front of Her Angel Wing Mural*, FORBES (Jan. 21, 2017, 10:00 AM), <https://www.forbes.com/sites/vivienneecker/2017/01/21/kelsey-montagues-street-art-went-viral-when-taylor-swift-posed-in-front-of-her-angel-wing-mural/?sh=8c0874Fbb> [<https://perma.cc/5MH2-WR7J>].

13. *See* 17 U.S.C. § 106A(a)(3)(B).

street art has existed throughout history, the widespread use of social media in the twenty-first century has created a platform from which visual artists can garner public attention and acclaim.

In enacting VARA, Congress created problems for both visual artists and real property owners. Over the past three decades, artists have rarely brought VARA actions against real property owners due, in part, to the statute's limited scope.<sup>14</sup> Of the suits that are brought, artists seldom win.<sup>15</sup>

It is unclear whether artists who complete commissioned murals do so on a made-for-hire basis.<sup>16</sup> Therefore, street artists who create art for property owners may find no protection under VARA due to the statute's limitations and exceptions. Further, the ambiguous language in VARA, namely the recognized stature provision, potentially impairs the common law rights of property owners whose buildings display artists' graffiti art or murals without putting those individuals or groups on notice.

Artists and moral rights advocates celebrate the *Castillo* decision for its promotion of visual artists' moral rights over their works.<sup>17</sup> However, some property owners argue that the recognized stature provision of VARA "egregiously runs afoul of the Fifth Amendment's due process requirements because Congress neglected to define this novel phrase" and that it "clearly impairs the traditional rights of property owners, which include the right to dispose or destroy one's property."<sup>18</sup>

Ultimately, the statute's ambiguous language presents problems for both the artists it seeks to protect and the real property owners it apparently threatens. Without revision, VARA and recent court decisions surrounding the statute could lead business owners to

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14. Brandon J. Pakkebieer, Note, *Form Over Function: Remediating VARA's Exclusion of Visual Art with Functional Qualities*, 103 IOWA L. REV. 1329, 1337 (2018).

15. See *id.* at 1346.

16. See *infra* notes 90-92 and accompanying text.

17. Sophia Chang, *5Pointz Developer Loses Appeal, Must Pay \$6.75 Million to Whitewashed Artists*, GOTHAMIST (Feb. 21, 2020, 11:20 AM), <https://gothamist.com/arts-entertainment/5pointz-developer-loses-appeal-must-pay-675-million> [<https://perma.cc/9BKE-TBJE>]. In a joint statement issued after the Second Circuit's decision, artist Jonathan Cohen and 5Pointz advocate Marie-Cecile Flageul explained that the court's ruling was "a historical victory for all visual artists in the US, but also for our favored artform graffiti." *Id.*

18. Petition for Writ of Certiorari at 6, *G & M Realty L.P. v. Castillo*, 141 S. Ct. 363 (2020) (No. 20-66).

disallow artists to create works of visual art on their property.<sup>19</sup> Such a refusal would stand in direct contrast to the original purpose of VARA: the acknowledgement of artists' moral rights in order to produce "a climate of artistic worth and honor that encourages the author in the arduous act of creation."<sup>20</sup>

When Congress drafted and enacted VARA, neither large-scale mural projects nor social media were prevalent in the United States. This Note addresses the present-day ramifications of VARA's ambiguity by examining the conflicting rights of visual artists who create street art and those of real property owners. This Note ultimately argues that Congress should amend VARA in order to balance the rights of visual artists and real property owners and notify property owners of VARA's protections.

Congress should omit ambiguous and unnecessary language from VARA—namely the recognized stature requirement and the work-made-for-hire exception. Omitting this language would elucidate visual artists' rights under VARA, as artists and property owners will not have to guess whether a work of visual art has achieved recognized stature status or whether an artist completed a work of commissioned art on a for-hire basis. In addition, Congress should implement a formal recording system for street art that artists or their communities wish to protect.<sup>21</sup> This innovation would alleviate risks that many property owners who maintain buildings that display street art unknowingly face. Without proper notice of artists' possible VARA claims, property owners who renovate their buildings could face severe consequences after they alter or destroy an artist's work.<sup>22</sup> Ultimately, a recording system of street art would

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19. See Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 589 (2018).

20. See H.R. REP. NO. 101-514, pt. 1, at 5 (1990) (quoting *The Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Cts., Intell. Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 3 (1989) (statement of the Hon. Ralph Oman, Register of Copyrights)).

21. The U.S. Copyright Office currently allows visual artists to apply for registration of their works. See *Visual Arts*, COPYRIGHT.GOV, <https://www.copyright.gov/registration/visual-arts/> [<https://perma.cc/82F2-6DGY>]. This system is inadequate, as it fails to provide artists with effective means of registration and does not adequately put property owners on notice of VARA or its protections.

22. See Chang, *supra* note 17.

promote artists' moral rights to the general public while placing property owners on notice of those rights.

Part I of this Note provides background on the development of visual artists' moral rights in the United States. Part II discusses the ways in which courts have addressed visual artists' moral rights and introduces the problems that arise from the Second Circuit's interpretations of the Copyright Act and VARA. Part III proposes a solution to clarify VARA's language in order to better promote the moral rights of visual artists who produce street art in the twenty-first century. In addition, Part III posits that a proper recording system of VARA-protected street art would increase public knowledge of artists' moral rights in the United States and prevent property owners from mistakenly altering or destroying art, thereby subjecting themselves to suit. Part IV concludes by addressing polar counterarguments that assert, on the one hand, that VARA does not protect artists enough, and on the other hand, that VARA provides unnecessarily broad protections to artists.

## I. BACKGROUND

In 1990, when Congress passed VARA into law, society labeled graffiti as inherently ephemeral. Indeed, “[w]riting graffiti was an act of rebellion” against traditional art movements, and graffiti writers promoted graffiti’s impermanence as a “canon of the culture.”<sup>23</sup> Recently, however, street artists have incorporated increasingly artistic, large works of art on the facades of buildings.<sup>24</sup> With the proliferation of social media, large-scale murals often attract tourists who, in turn, capture and share photographs of these works online.<sup>25</sup> In response, opportunistic businesses and real estate developers clamor to both buy property in neighborhoods where artists have created murals and commission visual artists to produce more public art on their buildings.<sup>26</sup> In the digital age, visual artists whose murals draw public acclaim on a national scale via the internet could assert that their works have achieved recognized

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23. Chused, *supra* note 19, at 588-89.

24. *Id.* at 589.

25. See, e.g., Decker, *supra* note 12.

26. See Chused, *supra* note 19, at 589.

stature and effectively claim VARA protections over them. Unbeknownst to many, Congress—in acceding to an international convention that elevates artists’ moral rights and ultimately passing VARA—created an opportunity for mural artists to assert their moral rights over and against the rights of business owners.

### A. Social Background

*Black’s Law Dictionary* does not define “graffiti,” “mural,” or “street art.” This Note relies upon mural artist Paul Walsh’s definitions of each.<sup>27</sup> Graffiti writers often act under anonymity with pseudonyms to illegally create graffiti.<sup>28</sup> In contrast, artists paint murals with permission or by commission.<sup>29</sup> Finally, street art became popular between the time that Banksy painted *Mild Mild West* in 1999 and Shepard Fairey designed the *HOPE* poster for Barack Obama’s presidential campaign in 2008.<sup>30</sup> This Section details the ways in which street art incorporates aspects of graffiti and mural art, and it introduces the implications of street art’s having “been swallowed up by capitalism” in recent years.<sup>31</sup>

#### 1. Street Art

Although graffiti writers began producing modern graffiti in Philadelphia in the 1960s, the street art of New York City first drew the attention of the rest of the country.<sup>32</sup> Since the turn of the century, “mainstream cultural institutions,” including notable art museums, have promoted street art as valuable.<sup>33</sup> For the past

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27. Paul X Walsh, “Mural” vs. “Graffiti” vs. “Street Art”: My Definitions, PAUL X WALSH (Feb. 21, 2018), <https://paulwalsh.co.nz/mural-vs-graffiti-vs-street-art-my-definitions/> [<https://perma.cc/Z48Y-TJJP>].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Joe A. Austin, *From the City Walls to ‘Clean Trains’: Graffiti in New York City, 1969-1990*, in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 223, 223 (Jeffrey Ian Ross ed., 2016).

33. Andrea Mubi Brighenti, *Graffiti, Street Art and the Divergent Synthesis of Place Valorisation in Contemporary Urbanism*, in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART, *supra* note 32, at 158, 158.

twenty years, cities within the United States and around the world have encouraged and celebrated street art through festivals, museum collections, and exhibitions.<sup>34</sup> Neighborhoods with street art, like those with “music scenes,” tend to develop into areas in which stores, restaurants, and venues congregate.<sup>35</sup> In turn, business owners in those neighborhoods have realized that incorporating street art into their buildings attracts business and ultimately increases property values.<sup>36</sup> Businesses and property owners commission street artwork for the exterior walls of their buildings to attract tourists and encourage residents to relocate to the neighborhood.<sup>37</sup>

With this increased valuation of street art, attitudes surrounding its fleeting nature have changed.<sup>38</sup> Rather than producing art that will be painted over or removed, street artists now understand that their works contribute to the culture of a neighborhood in a more permanent way.<sup>39</sup> The artistic movement surrounding street art has dramatically shifted—what society once considered “criminal vandalism” is now regarded as “high art”—in a way that Congress could not have predicted when it drafted and enacted VARA three decades ago.<sup>40</sup>

## 2. *Social Media, Street Art, and Advertising*

Today, over 70 percent of Americans use at least one form of social media,<sup>41</sup> and social media advertisement spending will increase by 21.3 percent to nearly \$49 billion in 2021.<sup>42</sup> Further,

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34. *Id.* at 161.

35. *Id.* at 162. Social media contributes to this development. *Id.*

36. Chused, *supra* note 19, at 584. *But see* Jeffrey Ian Ross, *How Major Urban Centers in the United States Respond to Graffiti/Street Art*, in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART, *supra* note 32, at 393, 393 (acknowledging that although some assert that incorporating street art into neighborhoods yields positive results, others argue that street art indicates other forms of criminal activity and “a decline in the use of public transportation systems, a loss of retail sales, and a decrease in property values”).

37. Chused, *supra* note 19, at 584.

38. *See id.* at 589.

39. *See id.*

40. *Id.* at 590.

41. *Social Media Fact Sheet*, PEWRSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/7NGG-ASAP>].

42. Debra Aho Williamson, *US Social Media Advertising in 2021*, EMARKETER (Nov. 24,



businesses will spend up to \$15 billion on “influencer marketing,” a rapidly growing form of social media advertising, by 2022.<sup>43</sup>

In the digital age, businesses compete to find new ways to advertise their products. Companies react to the success of influencer marketing and the notion that “the best street art can go viral on social media” by commissioning artists to produce murals for the primary purpose of advertising.<sup>44</sup> Commissioned street art promotes brands’ products in a way that billboard advertising does not. Unlike billboards, street art advertisements encourage consumers to engage with what they see by photographing the art and posting their pictures to social media.<sup>45</sup> In some instances, street artists embed hashtags or QR codes into commissioned pieces to create an interactive work.<sup>46</sup> Unfortunately, companies often incorporate street art into their advertisements without first securing the artist’s permission to do so.<sup>47</sup>

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2020), <https://www.emarketer.com/content/us-social-media-advertising-in-2021> [<https://perma.cc/JW32-QW4H>].

43. Amine Rahal, *Is Influencer Marketing Worth It in 2020?*, FORBES (Jan. 10, 2020, 6:30 AM), <https://www.forbes.com/sites/theyec/2020/01/10/is-influencer-marketing-worth-it-in-2020/?sh=5b130c9e31c5> [<https://perma.cc/34B8-LVWE>]; *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, BUS. INSIDER (Jan. 6, 2021, 10:19 AM), <https://www.businessinsider.com/influencer-marketing-report?r=US&IR=T> [<https://perma.cc/386Y-LWHQ>] (“[A]s e-commerce and social media converge, influencers will become increasingly vital intermediaries, helping to connect brands with consumers on social media in highly resonant, authentic ways that can deliver immediate returns.”).

44. Greg Ritchie, *Luxury Brands Are Taking over the Street Art Scene*, BLOOMBERG (July 23, 2019, 12:00 AM), <https://www.bloomberg.com/news/features/2019-07-23/luxury-brands-gucci-louboutin-graffiti-ads-take-over-street-art> [<https://perma.cc/Q3QB-9THL>].

45. *Id.*

46. See, e.g., *Art vs. Advertising: How Street Art Impacts Outdoor Branding*, GRP. DELPHI (Aug. 5, 2020), <https://www.groupdelphi.com/blog/industry-trends/street-art-experiential-environments/> [<https://perma.cc/CF37-C5YN>].

47. See Madylan Yarc, *Mural Mural on the Wall: Revisiting Fair Use of Street Art*, 19 UIC REV. INTEL. PROP. L. 267, 268-69 (2020) (discussing a case in which Mercedes Benz posted an image on Instagram depicting its G 500 SUV in front of murals painted by Jeff Soto, Maxx Gramajo, and James Lewis without the artists’ permission). Further, in 2019, Chinese artist Ai Weiwei successfully sued Skandinavisk Motor Co. in Danish court after the company used his work *Soleil Levant* as a backdrop for an advertisement for the Volkswagen Polo. Claire Selvin, *Ai Weiwei Wins Copyright Lawsuit Against Volkswagen Distributor Skandinavisk Motor*, ARTNEWS (July 17, 2019, 4:07 PM), <https://www.artnews.com/art-news/news/ai-weiwei-volkswagen-lawsuit-12995/> [<https://perma.cc/6AN9-M2D5>].

### *B. Legal Background*

Visual artists who create street art in the United States may find protections for their works in federal copyright law.<sup>48</sup> Although most Americans associate copyright protection only with economic security,<sup>49</sup> Congress has affirmed artists' economic and moral rights to their works through copyright legislation.<sup>50</sup> To bring the United States into compliance with the Berne Convention, an international agreement that recognizes artists' moral rights, Congress passed VARA.<sup>51</sup> In doing so, Congress conferred certain moral rights upon visual artists in order to aid them in protecting the integrity of their works.<sup>52</sup> Artists' moral rights are separate and distinct from the economic rights associated with their works.<sup>53</sup> The "bundle of moral rights" afforded to artists includes: (1) the right of disclosure, promoting artists' ability to control whether their work is published; (2) the right of attribution, affirming artists' rights to claim their authorship; (3) the right of integrity, allowing artists to prevent modification of their published works; and (4) the right of withdrawal, permitting artists to remove their works from the public sphere.<sup>54</sup> These rights allow visual artists to prevent others from altering or destroying their art, even after they sell it.<sup>55</sup>

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48. Sara Rosano & Birgit Kurtz, *Tear Down This Wall? The Destruction of Sanctioned Street Art Under U.S. and Italian Law*, 30 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 767, 770 (2020).

49. See Emma G. Stewart, Note, *United States Law's Failure to Appreciate Art: How Public Art Has Been Left Out in the Cold*, 97 *WASH. U. L. REV.* 1233, 1235 (2020).

50. See generally 17 U.S.C. §§ 101-805, 1001-1205.

51. Stewart, *supra* note 49, at 1237.

52. See Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106A(a)(3)(B).

53. See Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1939 (2000) ("Moral rights acknowledge that an artist has, in addition to an economic interest in his reputation, a creative persona that is injected into the work of art at creation and which remains a part of the work despite his physical relinquishment of the object to others.").

54. Stewart, *supra* note 49, at 1236.

55. See 17 U.S.C. § 106A(a)(3)(B); Stewart, *supra* note 49, at 1235.

### 1. *Berne Convention of 1886*

France has legally recognized artists' moral rights since the nineteenth century.<sup>56</sup> Moral rights extend beyond an artist's economic rights to his or her artwork, as they are natural rights with which the artist is born.<sup>57</sup> Artists' moral rights remain with them throughout their lives; these rights are "inalienable" and therefore may never transfer away from them.<sup>58</sup>

In 1886, eight countries signed onto the Berne Convention for the Protection of Literary and Artistic Works.<sup>59</sup> In doing so, these nations created international copyright law.<sup>60</sup> The Convention later recognized artists' moral rights by amendment in 1928.<sup>61</sup> This amendment required signatory nations to affirm not only economic rights, but also additional rights "independent[] of the author's economic rights, and even after the transfer of the said rights" to both claim authorship of an artwork and object to the modification or distortion of that work.<sup>62</sup> In promoting artists' moral rights, the Berne Convention sought to protect artists from reputational harm.<sup>63</sup>

For the next century, until 1988, the United States declined to enter the Berne Convention.<sup>64</sup> The country had maintained a long-standing tradition of respecting an individual's economic right to his or her property.<sup>65</sup> In addition, copyright protections afforded to

56. Elizabeth Schéré, *Where Is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 *FORDHAM INT'L L.J.* 773, 775 (2018).

57. *Id.* (explaining that natural rights protect the person and property rights protect what he owns).

58. *Id.* at 776.

59. *WIPO-Administered Treaties: Contracting Parties > Berne Convention*, WIPO, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) [<https://perma.cc/X6H5-AQRL>] [hereinafter *WIPO-Administered Treaties*]. The initial signatory nations included: Belgium, France, Germany, Italy, Spain, Switzerland, Tunisia, and the United Kingdom. *Id.*

60. Schéré, *supra* note 56, at 777.

61. *Id.*

62. Berne Convention for the Protection of Literary and Artistic Works art. 6 bis, Sept. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3 [hereinafter *Berne Convention*]. The Berne Convention does not expressly forbid the destruction of an artist's work. Robinson, *supra* note 53, at 1940.

63. Rosano & Kurtz, *supra* note 48, at 771-72.

64. *WIPO-Administered Treaties*, *supra* note 59.

65. Robinson, *supra* note 53, at 1940. In a 2016 symposium on artists' moral rights in the United States, Professor Mark Schultz explained that Americans have long sought to protect

individuals in the United States grew from the Constitution's provision that Congress has the power to "promote the Progress of Science and useful Arts."<sup>66</sup> Upon the United States' signing onto the Berne Convention, Congress enacted the Berne Convention Implementation Act of 1988 and ultimately passed VARA.<sup>67</sup>

## 2. *The Visual Artists Rights Act of 1990*

Before the United States acceded to the Berne Convention, artists struggled to secure adequate protections for their works.<sup>68</sup> In nearly every year from 1979 through 1989, Congress introduced legislation that sought to protect artists' moral rights.<sup>69</sup> Several state legislatures, beginning with California, afforded artists moral rights in the absence of congressional action.<sup>70</sup> These state governments sought to model the Berne Convention's language in enacting moral rights legislation; many looked to California's statute because it secured expansive rights for visual artists within the state.<sup>71</sup>

When the United States signed onto the Berne Convention in 1988, the Committee on the Judiciary determined that federal legislation adhered to the Convention's requirements.<sup>72</sup> However, a call for additional protections for artists, manifested in state and local legislation, prompted Congress to consider securing moral

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property rights due to an interest in "securing people's way of making a living ... rather than as a means of securing their status or traditional holdings." Symposium Transcript, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON J. INT'L COM. L. 1, 11 (2016).

66. U.S. CONST. art. I, § 8, cl. 8; see also Robinson, *supra* note 53, at 1940; Schéré, *supra* note 56, at 778 ("From Congress's utilitarian-minded standpoint, the natural approach to moral rights would conflict with the property-based approach to copyright enshrined in Article 1, Section 8 of the Constitution.").

67. Schéré, *supra* note 56, at 778.

68. See Robinson, *supra* note 53, at 1941.

69. *Id.* at 1941 n.36.

70. *Id.* at 1941 n.37. Other states including Massachusetts, Pennsylvania, Louisiana, and New Mexico passed legislation following California's lead. *Id.* at 1943. The statutes in each of these states required the protected art to be of "recognized quality." *Id.*

71. *Id.* at 1942 ("The [California Art Preservation] Act departs from Berne in several ways, most notably for present purposes in protecting works from complete destruction.").

72. *Id.* at 1944.

rights for artists.<sup>73</sup> As a result, Congress passed VARA and established federal copyright protection for visual artists' moral rights.<sup>74</sup>

*a. VARA Protections*

VARA protects a visual artist's right to attribution as well as his or her right to integrity.<sup>75</sup> VARA secures artists' abilities to claim authorship of their works and prevent the use of their names in association with a piece of visual art that they did not create.<sup>76</sup> In addition, VARA affords visual artists the right to prevent others from distorting or modifying their artwork in a way that would harm their reputations.<sup>77</sup> Most notably, visual artists whose artwork is "of recognized stature" have the right to prevent "any destruction" of that work.<sup>78</sup> Although these artists may waive their moral rights to their artwork, they may not transfer them.<sup>79</sup>

*b. VARA Limitations*

VARA covers murals because they fit within the definition of "visual art."<sup>80</sup> However, in order to balance the rights of artists with those of real property owners, Congress created exceptions to VARA for murals and other works incorporated into buildings.<sup>81</sup> A property owner whose building features a mural that can be removed must make a good faith effort to notify the work's artist of plans to alter or remove the artwork.<sup>82</sup> Further, if a work cannot be removed without causing damage to it, an artist who consents to the potential

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73. *Id.*

74. Stewart, *supra* note 49, at 1237.

75. See Jennifer Elisa Chapman, *Renunciation, Fake Art, & the Visual Artists Rights Act: A Contextual Conundrum*, 18 VA. SPORTS & ENT. L.J. 1, 5 (2018).

76. Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106A(a)(1)-(2).

77. *Id.* § 106A(a)(3)(A).

78. *Id.* § 106A(a)(3)(B).

79. *Id.* § 106A(e). To waive his or her rights to a work, an artist must, in writing, identify the work and detail the use of it. *Id.*

80. *Id.* § 101.

81. *Id.* § 113(d)(1).

82. *Id.* § 113(d)(2).

modification of the work due to removal surrenders the integrity right associated with that work.<sup>83</sup>

In developing the language of VARA, Congress sought to narrowly define exactly which artworks the Act protected.<sup>84</sup> VARA provides limited protections to visual artists by defining a “work of visual art” as “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer,”<sup>85</sup> and protects only works created after its enactment.<sup>86</sup> Further, the definition excludes works such as posters, maps, and technical drawings.<sup>87</sup> Finally, VARA does not protect visual artwork made for hire,<sup>88</sup> nor does it allow artists to prevent destruction of works that have not achieved recognized stature status.<sup>89</sup>

A “work made for hire” has been “prepared by an employee within the scope of his or her employment” or “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.”<sup>90</sup> Congress did not further define “employee” in VARA or in the Copyright Act.<sup>91</sup> Without a statutory definition of employee, circuit courts have struggled to determine whether an artist hired by business owners to produce a work may successfully claim VARA protection.<sup>92</sup>

Although VARA protects all visual artists’ rights of integrity and attribution, it limits the protection of artists’ rights to only prevent destruction of works of “recognized stature.”<sup>93</sup> Neither VARA nor

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83. *Id.* § 113(d)(1).

84. H.R. REP. NO. 101-514, pt. 4, at 11 (1990) (“As Representative [Edward] Markey testified, ‘I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered.’”).

85. 17 U.S.C. § 101.

86. *Id.* § 106A(d)(1)-(2).

87. *Id.* § 101.

88. *Id.*

89. *Id.* § 113(d)(1).

90. *Id.* § 101.

91. See Stewart, *supra* note 49, at 1245.

92. *Id.*; see also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (requiring a multifactor balancing test to determine whether a work was produced by a hired employee or was created by an independent contractor).

93. 17 U.S.C. § 106A(a)(3)(B).

the Copyright Act further define the term.<sup>94</sup> Without a statutory definition, courts are left to determine whether works of visual art meet this amorphous requirement.<sup>95</sup>

Notably, VARA explicitly limits protection of artworks placed on building exteriors. In creating this building exception, section 113 of the Copyright Act appears to balance the moral rights of artists with those of property owners.<sup>96</sup> If an artist acknowledges that the installation of his or her work “may subject the work to destruction, distortion, mutilation, or other modification” due to its removal in a written instrument, VARA will not provide protection to that work.<sup>97</sup> Alternatively, when an artist affixes his or her work of visual art onto a building, and the building owner subsequently wishes to remove that work but does not have the artist’s written consent to do so, the building owner must “ma[k]e a diligent, good faith attempt” to provide written notice to the artist detailing his or her intention to remove the work.<sup>98</sup> Once the building owner notifies the artist, the building owner must wait ninety days for the artist “either to remove the work or to pay for its removal” before he or she may remove it without the artist’s permission.<sup>99</sup> If the building owner meets these requirements under the Copyright Act, he or she may remove the artist’s work without facing legal liability.

In effect, visual artists who attach their works to buildings garner limited protection under VARA. An artist who provides written affirmation of his or her understanding that the removal of a work from the exterior of a building could damage the art never secures

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94. See *Cohen v. G & M Realty L.P. (Cohen II)*, 320 F. Supp. 3d 421, 437 (E.D.N.Y. 2018) (explaining that the term “is not defined in VARA”), *aff’d sub nom. Castillo v. G & M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

95. See *id.* at 437-38; *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999) (“In spite of its significance, th[e] phrase [recognized stature] is not defined in VARA, leaving its intended meaning and application open to argument and judicial resolution.”).

96. See 17 U.S.C. § 113(d); see also 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) (“[The] ‘Building Exception’ in section 113(d) ... expressly balances the conflict between the moral rights of artists ... and the property rights of building owners who have allowed the artwork to be created on their buildings.”).

97. 17 U.S.C. § 113(d)(1)(B).

98. *Id.* § 113(d)(2)(A).

99. *Id.* § 113(d)(2)(B).

VARA protection over that work.<sup>100</sup> Finally, a building owner who does not receive such written affirmation from a visual artist who has placed an artwork on the building need only make a good faith attempt to notify the artist and wait ninety days before removing the work.<sup>101</sup>

### *c. Remedies Under VARA*

Remedies available to visual artists under VARA mirror those of the Copyright Act.<sup>102</sup> Courts may award artists who successfully sue under VARA injunctive relief, impounding, actual and statutory damages, and attorney's fees.<sup>103</sup> Courts can award statutory damages "in a sum of not less than \$750 or more than \$30,000 as the court considers just."<sup>104</sup> Further, if a court finds that a defendant acted "willfully" in infringing upon an artist's rights, then that court may award statutory damages up to \$150,000.<sup>105</sup>

## II. VARA'S AMBIGUITY INJURES BOTH STREET ARTISTS AND PROPERTY OWNERS

In light of the international community's long-standing recognition of artists' moral rights, the United States signed onto the Berne Convention and passed VARA.<sup>106</sup> However, that affirmation of artists' moral rights stood in direct opposition to traditional property owners' rights in the United States.<sup>107</sup> Congress struggled to balance this tension in its drafting and enactment of VARA.<sup>108</sup>

Despite its attempt to balance the rights of visual artists with those of property owners, Congress failed to adequately protect the interests of both groups. Ultimately, Congress minimally complied with the Berne Convention when it narrowly defined visual artists'

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100. *Id.* § 113(d)(1).

101. *Id.* § 113(d)(2).

102. *See id.* §§ 502, 504-505.

103. *Id.* §§ 502-505.

104. *Id.* § 504(c)(1).

105. *Id.* § 504(c)(2).

106. *See supra* Part I.B.

107. *See supra* Part I.B.

108. *See supra* Part I.B.



moral rights over their works of art.<sup>109</sup> Congress limited the types of visual artwork that VARA protects, expressly excepted from VARA protection works made for hire, and explained that only visual artworks of recognized stature could avoid complete destruction.<sup>110</sup> As a result, visual artists who create artworks that society has not traditionally considered art—such as street artists in a developing mural art scene—face significant challenges in their attempts to protect their works.

In addition, without statutory definitions of “employee,” “scope of employment,” or “recognized stature,” courts must look beyond the plain meaning of the terms when assessing whether VARA protects a street artist’s work.<sup>111</sup> The lack of clarity in the Copyright Act and VARA could result in costly litigation for street artists and property owners alike.

Finally, both the Copyright Act and VARA permit successful plaintiff-artists to recover attorney’s fees.<sup>112</sup> This allowance, especially following both the \$6.75 million judgment for the plaintiff-artists in *Cohen v. G & M Realty L.P. (Cohen II)* and the parties’ stipulated agreement granting plaintiffs’ counsel an additional \$2 million in attorneys’ fees, could lead to strike suits—lawsuits brought on tenuous claims in an attempt to force defendants to settle outside of court—against property owners whose buildings display street art.<sup>113</sup>

The Second Circuit’s decisions in *Carter v. Helmsley-Spear, Inc. (Carter II)* and *Castillo v. G & M Realty L.P.* elucidate these problems. Without clear guidance from the Copyright Act and VARA,

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109. Stewart, *supra* note 49, at 1237-38.

110. See *supra* Part I.B.2.b.

111. *E.g.*, *Carter v. Helmsley-Spear, Inc. (Carter I)*, 861 F. Supp. 303, 316 (S.D.N.Y. 1994) (quoting *Aymes v. Bonelli*, 980 F.2d 857, 860 (2d Cir. 1992)) (“The Copyright Act does not define the terms ‘employee’ or ‘employment’ and, therefore, ‘the application of these terms is left to the courts.’”), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

112. See *supra* Part I.B.2.c.

113. See 320 F. Supp. 3d 421, 439-40 (E.D.N.Y. 2018), *aff’d sub nom.* *Castillo v. G & M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020); Eileen Kinsella, *The Developer Who Painted over the 5Pointz Graffiti Mecca Must Pay an Additional \$2 Million to Cover the Artists’ Legal Fees*, ARTNET (Nov. 30, 2020), <https://news.artnet.com/art-world/5pointz-additional-2m-attorney-fees-1927310> [https://perma.cc/DA2N-PA42].

both courts struggled to craft rules that complied with the statutes and furthered Congress's intent.

*A. VARA Inadequately Protects Works Made for Hire*

VARA, in incorporating the work-made-for-hire exception in the Copyright Act, fails to define "employee" or "employment."<sup>114</sup> This exception directly contradicts the statute's purpose—to shield artists' moral rights—as courts can find that VARA denies protection to visual artists who create commissioned works of art.<sup>115</sup> Street artists' integrity rights are more vulnerable than those of other visual artists because their works are on public display; this is true regardless of whether a property owner allows a street artist to create a mural on his or her property or if that owner commissions the work.<sup>116</sup>

In *Carter v. Helmsley-Spear, Inc.*, three sculptors sought to prevent a commercial building owner's alteration of works of art that the sculptors had installed in the building's lobby.<sup>117</sup> The three sculptors entered into an agreement with the managing agency of the property "to design, create and install sculpture and other permanent installations' in the lobby."<sup>118</sup> Pursuant to the agreement, the sculptors were each paid \$1,000 per week through the completion of the project, and they maintained complete control over the design and installation of the artwork.<sup>119</sup>

The District Court for the Southern District of New York held that VARA protected the artists' works.<sup>120</sup> In determining whether the artists had created a work made for hire, the court analyzed pertinent facts using a multifactor test that the Supreme Court had

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114. See *supra* notes 90-92 and accompanying text.

115. See Stewart, *supra* note 49, at 1246 n.107 (quoting JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 328 (4th ed. 2002)) ("[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.").

116. See *id.* at 1242.

117. 861 F. Supp. 303, 311 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

118. *Id.* at 312.

119. *Id.* at 312-13.

120. *Id.* at 329.

previously established in *Community for Creative Non-Violence v. Reid*.<sup>121</sup>

However, on appeal, the Second Circuit ultimately found that the sculptors' artwork constituted a work made for hire under the Copyright Act.<sup>122</sup> Therefore, VARA did not protect it.<sup>123</sup> The Second Circuit's decision followed its own application of the *Reid* multi-factor test.<sup>124</sup> In analyzing the facts of the case, the court determined that, despite the artists' control over the design and implementation of the installation, the artists had created their works as employees because they had secured employment benefits in addition to their weekly salary.<sup>125</sup> Today, a building owner who commissions an artist to produce a work of visual art for display on the exterior wall of his or her building could point to *Carter* if the artist attempts to assert his or her moral rights under VARA.

### *B. VARA Fails to Define Recognized Stature*

Because VARA does not define the term "recognized stature," courts must determine whether a work fits into this category and is thereby protected from destruction.<sup>126</sup> The fact that VARA is a seldom-litigated statute and does not require artists to register or record their public artworks makes it highly unlikely that property owners know of their obligations to the visual artists who create

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121. *Id.* at 317-22. In its determination that the artists' work was not made for hire, the court relied upon eight distinct factors. *Id.*

122. *Carter v. Helmsley-Spear, Inc. (Carter II)*, 71 F.3d 77, 88 (2d Cir. 1995).

123. *Id.*

124. *Id.* at 85-88. The Second Circuit cited a Supreme Court decision in which the Court elaborated on the following thirteen factors:

the hiring party's right to control the manner and means by which the product is accomplished ... the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Id.* at 85 (alteration in original) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)).

125. *Id.* at 87-88.

126. *See supra* notes 93-95 and accompanying text.

street art. If a property owner does know of VARA's protections, he or she must guess as to whether VARA prohibits destruction of any given work, as the statute does not clarify when or how visual art achieves recognized stature status.<sup>127</sup>

Four years after VARA's enactment, the *Carter* district court crafted a test to determine whether a work is of recognized stature.<sup>128</sup> Two decades later, the district court in *Cohen v. G & M Realty L.P. (Cohen I)* addressed for the first time whether VARA protects street art.<sup>129</sup> After several years of litigation, the court ultimately found that VARA protects such art in *Cohen II*.<sup>130</sup> In a landmark decision, that court became the first to place visual artists' moral rights over those of property owners.<sup>131</sup>

In *Carter*, the District Court for the Southern District of New York described the recognized stature requirement as a "gate-keeping mechanism" and explained that visual artists could prevent the destruction of "only ... those works of art that art experts, the art community, or society in general views as possessing stature."<sup>132</sup> In interpreting Congress's intent, the district court held that plaintiffs hoping to prevent the destruction of their visual artwork must show that either "art experts, other members of the artistic community, or ... some cross-section of society" identify the work as "meritorious."<sup>133</sup> The court concluded that these plaintiffs would likely need expert witnesses to testify to whether a visual artwork had recognized stature.<sup>134</sup>

On appeal, the Second Circuit neither affirmed nor rejected the lower court's standard for assessing whether a work had recognized

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127. See Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106A(a)(3)(B).

128. 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

129. 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013) ("This marks the first occasion that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law.").

130. 320 F. Supp. 3d 421, 439-40 (E.D.N.Y. 2018), *aff'd sub nom. Castillo v. G & M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

131. Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal?*, 67 CLEV. ST. L. REV. 351, 352 (2019).

132. 861 F. Supp. at 325.

133. *Id.*

134. *Id.*

stature.<sup>135</sup> Instead, it merely reviewed Congress's discussions surrounding VARA and concluded that Congress intended for courts to "use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of" visual art.<sup>136</sup> This decision provided little foundation to which lower courts could look, and it ultimately prompted the Second Circuit to expand VARA protection to street art in *Castillo v. G & M Realty L.P.*

In the events leading up to the Second Circuit's decision in *Castillo*, Gerald Wolkoff, the former owner of an abandoned complex known as 5Pointz, allowed Jonathan Cohen and other graffiti artists to paint on his buildings' exterior for two decades—from the early 1990s through 2013.<sup>137</sup> Both the "crime infested" neighborhood surrounding the complex and the buildings' state of disrepair prompted Cohen to approach Wolkoff and speak about improving the complex grounds.<sup>138</sup> In their meeting, Cohen offered to serve as the curator of works painted on Wolkoff's buildings.<sup>139</sup> After that meeting, Cohen and other artists cleaned the outdoor space, installed exterior lighting, and rented studio space inside the warehouse on Wolkoff's property.<sup>140</sup> Cohen, working without pay, oversaw the site and led others in an effort to develop the space to the point that it "became a major attraction drawing thousands of daily visitors."<sup>141</sup>

In 2013, Cohen learned that Wolkoff had applied to renovate the buildings on his property to build luxury condominiums.<sup>142</sup> Attempting to save 5Pointz, Cohen first asserted that the property had cultural significance in an application to New York City's Landmark

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135. See *Carter II*, 71 F.3d 77, 84 (2d Cir. 1995).

136. *Id.* (quoting H.R. REP. NO. 101-514, pt. 4, at 11 (1990)). In that Report, Congress noted that "the term 'painting' includes murals." H.R. REP. NO. 101-514 at 11.

137. *Cohen II*, 320 F. Supp. 3d 421, 432 (E.D.N.Y. 2018), *aff'd sub nom.* *Castillo v. G & M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 433. In addition to daily visits from tourists and school trip attendees, "[m]ovie, television, and music video producers" filmed footage at 5Pointz. *Id.* Notably, the 2013 motion picture *Now You See Me* filmed scenes at the site, and R&B singer Usher performed there. *Id.*

142. *Id.* at 434.

Preservation Commission.<sup>143</sup> After the Commission denied his application, he began pooling funds to buy the property.<sup>144</sup> Despite his efforts, Cohen failed to purchase 5Pointz from Wolkoff.<sup>145</sup>

Cohen ultimately petitioned the District Court for the Eastern District of New York for a preliminary injunction to prevent the demolition of 5Pointz.<sup>146</sup> The court issued an order denying Cohen's application for a preliminary injunction, and, in a separate opinion (*Cohen I*), found that it "had no authority under VARA to preserve 5Pointz as a tourist site."<sup>147</sup> The court ultimately determined that it would address whether any of the artworks painted onto the 5Pointz complex achieved recognized stature at trial.<sup>148</sup> Within the eight-day period between the court's denial of a preliminary injunction and its issuance of an accompanying opinion, the court learned that Wolkoff, "'under cover of darkness' had 'painted over all of the works of visual art at 5Pointz.'"<sup>149</sup>

Five years later, after a three-week trial, the same judge who denied plaintiffs' initial request for a preliminary injunction concluded that forty-five of the forty-nine works Wolkoff had painted over satisfied the recognized stature requirement and thereby secured VARA protection.<sup>150</sup> The court held that Wolkoff acted willfully in his destruction of these protected works and awarded maximum statutory damages under VARA for each of the forty-five works—for a total sum of \$6.75 million.<sup>151</sup>

At trial, all twenty-one plaintiff-artists testified, detailing their "professional achievements" as street artists.<sup>152</sup> In addition, the court heard testimony of five experts who aided the court in assessing the appraisal value, recognized stature status, and removability

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Cohen I*, 988 F. Supp. 2d 212, 226 (E.D.N.Y. 2013).

148. *Id.*

149. *Id.* at 214 n.2.

150. *Cohen II*, 320 F. Supp. 3d at 440.

151. *Id.* at 447.

152. *Id.* at 431 ("Folios for each were admitted [to demonstrate] ... an impressive array of fellowships, residences, public and private commissions, teaching positions, media coverage, and social media presence.").

of each of the destroyed works.<sup>153</sup> Finally, two fact witnesses built the record in discussing the site’s “artistic importance” and “cultural[] significan[ce],” while two more witnesses further discussed the appraisal value of the artworks and whether the artists’ works had recognized stature.<sup>154</sup> The Second Circuit affirmed the district court’s judgment on appeal in *Castillo v. G & M Realty L.P.*—thereby awarding the largest judgment to street artists in history.<sup>155</sup>

### III. A PROPOSED REFORM OF VARA

Without clear guidance from Congress, the *Carter* and *Cohen* courts struggled to interpret VARA and further muddled the balance between artists’ and property owners’ moral rights. Moreover, street artists who watched the *Cohen* court award the plaintiffs nearly \$7 million will likely flood the courts with their own VARA claims. To ameliorate VARA’s ambiguity and prevent costly litigation, Congress should modernize the statute, and it should create a better recording system for street art. In light of society’s developed appreciation for murals, VARA should protect visual artists’ works of street art. Further, Congress should create a national registry of street art in order to provide individual property owners with the means to communicate their plans to renovate their buildings to any artist who has incorporated an artwork onto those structures.

#### *A. Eliminating Ambiguous Language*

In order to clearly and adequately protect street artists’ moral rights, Congress should omit VARA’s work-made-for-hire exception and its recognized stature requirement. These omissions would better elucidate the protections afforded to street artists and decrease the likelihood of expensive, drawn-out litigation over undefined, unnecessary terms.

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153. *Id.* at 431-32.

154. *Id.* at 432.

155. *Castillo v. G & M Realty L.P.*, 950 F.3d 155, 173 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

First, Congress should eliminate the work-made-for-hire exception incorporated in VARA. This exception directly contradicts VARA's attempt to affirm artists' moral rights, as it could eliminate protection over visual artworks that others commission.<sup>156</sup> When drafting VARA, Congress had no understanding of the ways in which individuals and companies would come to commission visual art in the twenty-first century, nor did Congress know of society's burgeoning interest in murals and other forms of public art.<sup>157</sup> Eliminating this requirement would protect street artists who have created or will create commissioned murals for businesses and curb litigation in which parties contest whether artists who produced such works did so as employees of the commissioning party. Omitting this exception to VARA is necessary to better promote the moral rights of artists in a way that Congress could not have anticipated when it drafted and enacted VARA in 1990.

Next, Congress should amend the scope of VARA's protection in light of the definition of "visual art" in the Copyright Act.<sup>158</sup> The Copyright Act defines visual art in both positive (what art *is*) and negative (what art *is not*) terms.<sup>159</sup> However, VARA's recognized stature requirement forces artists to show much more than the fact that they have created a work of visual art in order to protect their work from the ultimate threat to their moral rights—destruction of their artworks.<sup>160</sup> This requirement overburdens artists for little to no additional protection to property owners, as it works in tandem with the building exception described above.<sup>161</sup> Moreover, "visual art" excludes graffiti writers' simple tags—marks of spray paint

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156. See Stewart, *supra* note 49, at 1246.

157. See *supra* Part I.A.1; Stewart, *supra* note 49, at 1246 n.108. In 1989, the U.S. Copyright Office explained that "most works described in the bill [*e.g.*, works of visual art in single or limited editions] are not usually created for hire." U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 64 (2019), <https://www.copyright.gov/policy/moralrights/full-report.pdf> [<https://perma.cc/57L2-FVPV>]. This assertion does not contemplate the current reality in which businesses and governments commission street artists to create murals on exterior walls of buildings.

158. See 17 U.S.C. § 101 (defining visual art as "a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer" but not "poster[s], map[s], [or] technical drawing[s]"); *supra* notes 84-87 and accompanying text.

159. 17 U.S.C. § 101.

160. See *id.* § 106A(a)(3)(B).

161. See *id.* § 113(d); *supra* notes 96-99 and accompanying text.



indicating a signature—therefore, only legal street art would secure VARA protection.<sup>162</sup>

On its own, the building exception properly balances the rights of property owners with those of street artists, as it addresses works incorporated into a building—such as a mural painted onto a wall.<sup>163</sup> Omitting the recognized stature requirement would not do away with this exception. Instead, visual artists could prevent destruction of their works incorporated into buildings after 1990 only if: (1) they had not provided written consent to an installation that could subject their works to destruction or modification upon their removal; and (2) building owners had not made a “good faith attempt without success” to provide written notice of their intent to remove artworks or, if they had provided such notice, the artists had failed to remove the work within ninety days of receiving that notice.<sup>164</sup>

In addition to providing little added protection for property owners, the recognized stature requirement increases the likelihood of expensive and complicated litigation. The court in *Cohen I* initially denied VARA protection to artists’ works at 5Pointz after the judge found that the works had not achieved recognized stature.<sup>165</sup> Five years later, after a lengthy trial, the same judge revised his initial findings and ultimately awarded the plaintiff-artists statutory damages for the destruction of their works.<sup>166</sup>

The 5Pointz litigation, in which plaintiff-artists who created works located at a renowned tourist attraction initially failed to secure VARA protection, exemplifies the lack of clarity in VARA’s recognized stature requirement and the difficulty artists face in launching successful VARA claims.<sup>167</sup> The suit should prompt Congress to reform the recognized stature provision of VARA for several reasons.

In its ruling, the district court seemed to offer contradictory conclusions regarding this requirement. The court highlighted the

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162. See 17 U.S.C. § 101.

163. See *id.* § 113(d); *supra* Part I.B.2.c.

164. 17 U.S.C. § 113(d).

165. 988 F. Supp. 2d 212, 226 (E.D.N.Y. 2013).

166. *Cohen II*, 320 F. Supp. 3d 421, 428-29 (E.D.N.Y. 2018), *aff’d sub nom.* Castillo v. G & M Realty L.P., 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, 141 S. Ct. 363 (2020).

167. See *id.*

lengths the 5Pointz artists went to ultimately prove that their works had achieved recognized stature and later explained that artists do not necessarily need to call on expert witnesses to satisfy this requirement.<sup>168</sup> Further, in providing a rationale for its decision that three works had not achieved recognized stature, the court explained that these works had not “attracted significant third-party attention or social media buzz.”<sup>169</sup> This explanation could encourage other courts to evaluate a work of art based on its social media presence.<sup>170</sup> Such an evaluation would effectively allow all works in the public view to achieve recognized stature status at an unknown point in the future, as the confluence of street art, social media, and advertising develops.<sup>171</sup>

Eliminating the work-made-for-hire exception and the recognized stature requirement would appropriately realize Congress’s original intent to protect artists’ moral rights. In 1990, Congress could not have anticipated the ways in which property owners would commission public art, nor could it have predicted the melding of social media, street art, and advertising. Omitting this language from the statute would better protect street artists’ moral rights in the twenty-first century.

### *B. Developing a National Recording System of Street Art*

Upon hearing of Wolkoff’s plans to destroy 5Pointz, Cohen’s first instinct was to approach New York City’s Landmarks Preservation Commission in an attempt to designate the site as a landmark.<sup>172</sup> His failure to preserve the art at 5Pointz highlights the need for a comprehensive registry of street art that VARA possibly protects.<sup>173</sup>

A robust digital database that provides a current record of street art would promote the interests of street artists and put property owners on notice of artists’ potentially protected works. Such a

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168. *Id.* at 431-32, 437-39.

169. *Id.* at 440.

170. *See id.*

171. *See supra* Part I.A.2.

172. *See supra* note 143 and accompanying text.

173. This system should record *only* legal street art that artists produce with permission or by commission. Illegal graffiti does not fall within the scope of this proposal, as it is not visual art. *See supra* note 162 and accompanying text.

registry would not provide additional protection to works covered by VARA; instead, it would create a developed record to which property owners could look when assessing whether to purchase new properties or initiate renovations on the buildings they own. In addition, this system would improve communication between artists and property owners, as artists could associate their names and contact information after posting their artwork to the digital registry.

This registry could promote similar goals to those of the organization Cohen approached; the New York City Landmarks Preservation Commission works to record and protect the city's "culturally significant buildings and sites by granting them landmark or historic district status."<sup>174</sup> The proposed registry would not have the power to affirm or deny whether VARA protects an artist's work, but it could place the work of public visual art on a list that community members could easily access and to which they could contribute.<sup>175</sup>

In creating a digital registry of street art, Congress could look to the structure of the National Historic Preservation Act (NHPA) of 1966.<sup>176</sup> The NHPA provides federal and local governments with tools to ensure preservation of the nation's heritage.<sup>177</sup> It codifies necessary federal protection of historic properties and encourages local participation in preserving and registering these sites.<sup>178</sup> With the passing of this Act, Congress first created the National Register of Historic Places—a comprehensive list of significant districts and landmarks throughout the country—and the State Historic Preservation Programs.<sup>179</sup>

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174. *About LPC*, NYC LANDMARKS PRES. COMM'N, <https://www1.nyc.gov/site/lpc/about/about-lpc.page> [<https://perma.cc/5GPZ-JJQ6>].

175. In 2000, Christopher J. Robinson proposed the "establishment of a national registry of highly significant art ... chosen ... by a panel of experts." Robinson, *supra* note 53, at 1972 (footnotes omitted). Anyone who destroyed a registered artwork would face prosecution or civil liability. *Id.* That was nearly a decade before smartphone technology provided individuals with the ability to take a picture of their surroundings and upload that image to an online platform within seconds. Therefore, this Note seeks to simplify—and modernize—Robinson's suggestion by encouraging broad public participation in a digital registry to both develop a comprehensive record of street art and better inform property owners and the public about VARA and its protections. *See id.*

176. *See* National Historic Preservation Act, 54 U.S.C. §§ 300101-307108.

177. Timothy L. Binetti, Note, *Culture Club or The Clash?: Historic Preservation, Aesthetic Uniformity and Artistic Freedom*, 13 DEPAUL-LCA J. ART & ENT. L. 313, 314-15 (2003).

178. *Id.*

179. *See* 54 U.S.C. §§ 302101-302108, 302301-302304.

Using the NHPA framework as a guide, Congress should create a National Register of Public Visual Art and encourage public participation in recording and preserving street art throughout the United States. Individuals and private organizations could participate alongside local governments in identifying VARA-protected works of visual art.<sup>180</sup> In conjunction with local efforts, the Register could maintain a digital record of public art produced within the United States.<sup>181</sup>

This Register should borrow language from the criteria that the National Park Service uses to select National Historic Landmarks. The National Park Service recognizes a site as a National Historic Landmark if it “posses[es] a high degree of integrity of location, design, setting, materials, workmanship, feeling and association,” and also meets at least one additional factor.<sup>182</sup> Notably, a site qualifies as a National Landmark if it also “outstandingly represent[s] the broad national patterns of United States history ... from which an understanding and appreciation of those patterns may be gained,”<sup>183</sup> or it is “composed of integral parts [that] ... collectively compose an entity of exceptional ... artistic significance, or outstandingly commemorate or illustrate a way of life or culture.”<sup>184</sup>

Here, the National Register of Public Visual Art could include visual artists’ public artworks that are placed onto a physical location and either (1) provide representation of an art movement in United States history<sup>185</sup> or (2) commemorate modern American culture.<sup>186</sup> This Register would not require individual artists to prove that their works have achieved recognized stature. Instead, it could assess both stand-alone murals painted onto a property owner’s building and large-scale street art projects such as 5Pointz to determine whether such public art exemplifies an art movement.<sup>187</sup> Alternatively, the Register could determine whether artists’

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180. *See id.* § 302303(b)(1)-(2).

181. *See id.*

182. National Historic Landmark Criteria, 36 C.F.R. § 65.4(a) (2021).

183. *Id.* § 65.4(a)(1).

184. *Id.* § 65.4(a)(5).

185. *See id.* § 65.4(a)(1); *supra* Part I.A.1.

186. *See* 36 C.F.R. § 65.4(a)(5); *supra* Part I.A.2.

187. *See supra* Part I.A.1; note 143 and accompanying text.

public works highlight society's heightened interest in murals and social media in the twenty-first century. In doing so, the Register could consider both the artwork itself and the setting in which the artist created it. If a work contributes to its surrounding location's popularity or draws patrons to the site to capture and share photographs of the work on the internet, it could qualify as commemorating the American culture of the digital age.

This recording system would give property owners whose buildings display street art better notice of the potential ramifications of altering or destroying an artist's public work. In creating a national agency that relies upon public input and individual artists' applications just as the NHPA dictates, this system would provide a necessary supplement to the current records made available by the United States Copyright Office.<sup>188</sup>

#### IV. STRIKING A BALANCE BETWEEN EXPANDING AND CURTAILING ARTISTS' MORAL RIGHTS PROTECTIONS

While some assert that VARA does not do enough to protect artists' moral rights, others argue that the statute inappropriately infringes upon property owners' interests. Congress's attempt to balance the rights of these two groups in its introduction and enactment of VARA failed to adequately address the interests of both. As a result, these groups have become further polarized in promoting their rights. Ultimately, Congress should better alert the public of its commitment to protecting visual artists' moral rights, especially since this affirmation may sometimes curtail those same rights of property owners. This Part addresses possible counterarguments to this Note's proposed solution to Congress's failure to adequately promote visual artists' moral rights and sufficiently balance these rights against those of property owners.

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188. See *supra* note 21 and accompanying text; 17 U.S.C. § 113(d)(3).

*A. Congress Should Expand VARA Protections to Include All Public Art*

Some assert that the definition of visual art in section 101 of the Copyright Act does not adequately protect artists who create works of public art.<sup>189</sup> These advocates promote an even broader definition of art that VARA protects, and they wish to change the courts' inquiry from whether something fits into categories of visual art within section 101 of the Copyright Act (such as a "painting" or "sculpture") to whether an artwork can actually secure a copyright.<sup>190</sup>

Although those concerned with expanding the definition of protectable visual art would agree with eliminating the work-made-for-hire exception and recognized stature requirement within VARA, they would likely argue that this expansion of the statute does not go far enough to protect other forms of public art.<sup>191</sup>

However, a further expansion of VARA would threaten the rights of property owners in a way that Congress has not contemplated or intended. In its enactment of VARA, Congress sought to narrowly define the categories of protected art.<sup>192</sup> Further, VARA's drafters explained that the narrow scope and limited protections afforded to certain visual artists ultimately enabled the statute's enactment.<sup>193</sup>

This Note seeks to provide a clearer picture of street artists' moral rights to both the artists themselves and the property owners whose buildings display street art. In light of both the monetization of murals and the recent *Castillo* decision, reforming VARA to better acknowledge and promote street artists' moral rights is imperative. However, this Note does not advocate for an even broader expansion of VARA to protect applied art—a "two- and three-dimensional

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189. See Stewart, *supra* note 49, at 1257.

190. *Id.* at 1258. Any "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" may secure a copyright. 17 U.S.C. § 102(a).

191. See Stewart, *supra* note 49, at 1258; see also Chused, *supra* note 19, at 633 ("The short term of moral right protection for works of visual art incorporated in or on buildings in the United States also makes little sense.").

192. See *supra* note 84 and accompanying text.

193. Timothy Marks, *The Saga of 5Pointz: VARA's Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. L.A. ENT. L. REV. 281, 287 (2015).

ornamentation or decoration that is affixed to otherwise utilitarian objects”—as Congress explicitly excluded such art from VARA protection, and societal understanding of and reaction to applied art has not dramatically changed in the past three decades.<sup>194</sup> Some argue that the lack of protection over applied art undermines society’s valuation of this art form.<sup>195</sup> However, curtailing property owners’ rights to promote the moral rights of visual artists who create applied art is unnecessary. This Note proposes only necessary amendments to the statute in order to modernize VARA’s reach; it does not work to unreasonably curtail property owners’ rights.

### *B. Congress Should Curtail VARA Protections of Public Art Placed on Private Property*

Alternatively, advocates who assert the long-established right of exclusion in property law argue that any broadening of VARA protection inappropriately compromises the rights of property owners. These individuals assert that VARA elevates artists’ moral rights over those of property owners and will ultimately stifle property owners’ allowances or commissions of street art for public viewing.<sup>196</sup> When Wolkoff and his co-defendants petitioned the Supreme Court for review of the Second Circuit’s affirmation of statutory damages in *Castillo*, they claimed that the “recognized stature” requirement “egregiously runs afoul of the Fifth Amendment’s due process requirements.”<sup>197</sup> Considering this assertion, it is clear that those in support of Wolkoff’s petition would reject this Note’s expansion of VARA protections.<sup>198</sup>

The Supreme Court will not rule on whether the Second Circuit’s decision affirmed an unconstitutional taking, as it denied Wolkoff’s

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194. *Carter II*, 71 F.3d 77, 84-85 (2d Cir. 1995) (quoting *Carter I*, 861 F. Supp. 303, 315 (S.D.N.Y. 1994)).

195. See Stewart, *supra* note 49, at 1247 (citing 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)).

196. See Marks, *supra* note 193, at 309.

197. Petition for Writ of Certiorari at 6, *G & M Realty L.P. v. Castillo*, 141 S. Ct. 363 (2020) (No. 20-66).

198. See *id.*; Thornley, *supra* note 131, at 371 (“VARA illegitimately places subjectively determined moral rights above far-more objective property and contract rights.”).

petition for certiorari in October 2020.<sup>199</sup> However, in an analogous case, *Penn Central Transportation Co. v. New York City*, the Court found that restrictions that preserve historic buildings did not constitute an unconstitutional taking.<sup>200</sup> In that decision, the Court explained that it had previously “upheld land-use regulations that destroyed or adversely affected recognized real property interests” when those restrictions had advanced “health, safety, morals, or general welfare.”<sup>201</sup> Although VARA does impair the rights of property owners, applying the rationale of *Penn Central* to Congress’s protection of visual artists’ moral rights supports a conclusion that VARA does not unconstitutionally regulate property owners.<sup>202</sup>

Further, eliminating this ambiguous language from the statute would reduce guesswork without inappropriately restraining the rights of property owners. The building exception to VARA adequately protects property owners, even if Congress were to accept this Note’s proposed omissions to the statute.<sup>203</sup> As such, VARA places minimal burdens on property owners whose buildings display street art that can be removed without destroying it; property owners must only make a good faith effort to notify an artist of any plans to alter or remove street art from their buildings.<sup>204</sup> If Congress eliminates the work-made-for-hire exception and the recognized stature requirement, street art will secure adequate protection, individuals and groups will better understand which artworks VARA protects, and property owners will be on notice of the artworks they may not alter or destroy without the artist’s permission.<sup>205</sup>

Critically, visual artists may waive their moral rights over their works at any time. They may provide written release of their moral rights over a work in a contract with a property owner whose building displays their art.<sup>206</sup> The opportunity for such a waiver

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199. See *G & M Realty L.P. v. Castillo*, 141 S. Ct. 363 (2020).

200. 438 U.S. 104, 138 (1978).

201. *Id.* at 125 (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)).

202. See *id.*

203. See 17 U.S.C. § 113(d).

204. See *id.*

205. See *supra* Part III.A. This is especially true if Congress were to implement a comprehensive recording system of public visual art to which property owners could look when making determinations about buying or altering property. See *supra* Part III.B.

206. See 17 U.S.C. § 106A(a)(1)-(2).



allows for property owners and visual artists to contract around potential disputes. It also provides bargaining power to property owners who wish to remove an artwork but suspect that the removal would destroy or distort it (thereby preventing the property owner from asserting the building exception to VARA). If a visual artist and building owner agree, in writing, that the artist's installation of a mural on the property owner's building "may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal," the visual artist loses moral rights over that mural.<sup>207</sup>

Finally, creating a national registry of visual art will assist property owners in making informed decisions when purchasing property or attempting to renovate the buildings they own. This registry would increase public awareness of street artists' moral rights and amplify the important effort Congress made to balance artists' and property owners' rights in enacting VARA. It would promote a fundamental shift away from a traditional understanding of individual property rights and encourage society to better embrace artists' moral rights.

## CONCLUSION

Congress should more effectively balance the interests of street artists and property owners in light of the American public's developing appreciation for street art.

Recall the introductory hypothetical: A property owner plans to renovate a building that displays street art, and the work's artist seeks to challenge that renovation. How could this Note's proposal resolve the controversy at issue? Artist could have contacted the appropriate local group in order to record her mural in the National Registry of Public Visual Art at the time Building Owner commissioned the work. Alternatively, any individual member of the public could do so. Upon examining the property and seeing that a mural covered its side, Business could look to the Registry to determine pertinent information—including the name of Artist and the date she created and registered it—and make a more informed decision

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207. *See id.* § 113(d)(1)(B).

about purchasing the property. If Business chose to purchase the building and wished to remove the mural from its wall, Business would proceed through the steps contained in the building exception to VARA. Ultimately, if the mural could be removed from the building without destroying or modifying it, Business would only need to make a good faith effort to communicate this plan to Artist and then wait ninety days for Artist to remove the work or pay for its removal. Alternatively, if such a removal would alter or destroy the work, Artist may object to Business's proposal, and she could prevent Business from taking further action. At that point, Business would need to seek a written waiver of Artist's moral rights.

Business may resent the outcome of this hypothetical. However, it would now be on notice of VARA's protections and could anticipate potential conflicts in the future. Business would have the tools to make informed decisions about purchasing property and allowing or commissioning public art on its building. These modifications to VARA would better inform artists and property owners of the statute's protections and create a solution to what is currently a trap for the unwary artist and property owner alike.

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