

---

---

# NOT A VARA BIG DEAL: HOW MORAL RIGHTS, PROPERTY RIGHTS, AND STREET ART CAN COEXIST

MARY DANIEL\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	928
II. DEVELOPMENT OF UNITED STATES COPYRIGHT LAW .....	931
A. EARLY COPYRIGHT LAW .....	931
B. BERNE CONVENTION AND UNITED STATES RESISTANCE.....	932
C. UNITED STATES RATIFIES BERNE CONVENTION WHILE AVOIDING RECOGNITION OF MORAL RIGHTS .....	934
D. UNITED STATES RECOGNIZES MORAL RIGHTS WITH VARA ENACTMENT.....	936
1. Moral Rights Generally.....	936
2. Moral Rights Under VARA .....	937
E. <i>5POINTZ</i> LITIGATION.....	941
III. ARGUMENTS AGAINST MORAL RIGHTS AND THE APPLICATION OF VARA IN <i>5POINTZ</i> .....	943
A. ARGUMENTS AGAINST THE <i>5POINTZ</i> RULING.....	944
1. Courts Should Interpret VARA as Narrowly as Possible .....	944
2. Street Art Is Not the Type of Work VARA Was Enacted to Protect .....	944
3. <i>5Pointz</i> Encourages Other Artists to Continue Stretching the Scope of VARA .....	946
B. ARGUMENTS THAT VARA HAS NO PLACE IN UNITED STATES COPYRIGHT LAW .....	946
1. VARA Conflicts with Established Law .....	946

---

\*. Executive Senior Editor, *Southern California Law Review*, Volume 94, J.D. Candidate 2021, University of Southern California Gould School of Law; B.A. Communications and Fine Art 2015, Loyola University Maryland. Thank you to Professor Sam Erman for his guidance during the drafting of this Note. Additionally, thank you to my friends and family for their support and feedback. Finally, thank you to all the *Southern California Law Review* editors for their hard work.

2. The Objectives of VARA Can Be Achieved by Existing Law .....	948
IV. VARA’S EXPANSION INTO STREET ART IS APPROPRIATE AND NOT A CAUSE FOR CONCERN THAT VARA WILL EXCEED ITS INTENDED SCOPE.....	949
A. IMPORTANCE OF RECOGNIZING MORAL RIGHTS .....	949
1. Reduces the Gap Between the United States and Other Developed Nations.....	949
2. Incentivizes Creation and Dissemination of Valuable Work....	951
3. Protects Valuable Work that May Not Otherwise Be Protected .....	952
B. STREET ART IS AN APPROPRIATE MEDIUM FOR VARA PROTECTION.....	953
1. Protecting Street Art Serves the Public Interest.....	954
2. Economic Benefits of Protecting Street Art.....	955
3. Street Art Has the Historical Indicators of a Medium Ripe for Increased Copyright Protection .....	957
C. 5POINTZ IS NOT A SIGN OF VARA EXCEEDING ITS INTENDED SCOPE.....	958
1. VARA’s Plain Language Greatly Constrains Its Scope.....	958
2. Courts Have Interpreted VARA Narrowly .....	959
3. <i>Blued Trees</i> as an Example of Ease of Dismissing VARA Claims .....	959
V. RECOMMENDATION.....	961
A. RECOMMENDATION FOR VARA PRESENTLY .....	961
B. RECOMMENDATION FOR VARA IN THE FUTURE.....	962
CONCLUSION .....	962

## I. INTRODUCTION

“Art Murder”—the accusation was sprayed in red paint onto the side of real estate developer Jerry Wolkoff’s Long Island City building.<sup>1</sup> Underneath the denunciation was a patchy layer of white paint, and underneath that layer, decades of graffiti art that once made up 5Pointz, “the world’s premier graffiti mecca.”<sup>2</sup> Aerosol artists from around the world travelled to the Queens neighborhood for a chance to contribute to the de

1. Fernanda DeSouza, *Graffiti Mecca 5 Pointz Sprayed with ‘Art Murder,’* OBSERVER (Feb. 4, 2014, 3:38 PM), <https://observer.com/2014/02/graffiti-mecca-5-pointz-sprayed-with-art-murder> [https://perma.cc/RN28-6S3J].

2. Mackenzie Goldberg, *Graffiti Artists Sue Developer Over the Whitewashing and Demolition of 5 Pointz in Long Island City*, ARCHINECT (Oct. 23, 2017, 1:18 PM), <https://archinect.com/news/article/150034672/graffiti-artists-sue-developer-over-the-whitewashing-and-demolition-of-5-pointz-in-long-island-city> [https://perma.cc/EP8F-W2QG].

facto street art museum.<sup>3</sup> However, the buildings that served as the artists' canvas belonged to Wolkoff, and in 2013, hoping to benefit from the growing housing market in Long Island City, Wolkoff announced plans to raze the former factory buildings to make room for luxury high-rise condominiums.<sup>4</sup> The potential destruction of 5Pointz caused a frenzy in the art community as artists scrambled to prevent the popular site's demolition.<sup>5</sup> Then, all hopes of preserving the artwork ended on the morning of November 19, 2013, when 5Pointz's curator, Jonathan Cohen,<sup>6</sup> awoke to discover that, at the direction of Wolkoff, more than 10,000 artworks covering 200,000 square feet were unceremoniously covered over with white paint in the middle of the night.<sup>7</sup>

Artists responded to the whitewashing by bringing suit under the Visual Artists Rights Act of 1990 ("VARA"), codified at 17 U.S.C. § 106A, claiming that the destruction of the artwork was a violation of the artists' moral rights.<sup>8</sup> Moral rights are a relatively new feature of United States law and a feature that seemed improbable through much of the development of copyright law.<sup>9</sup> However, in a surprising decision, the district court found in favor of the artists. Holding that painting over 5Pointz was unlawful, Judge Block ordered Wolkoff to pay the artists \$6.7 million in damages.<sup>10</sup> The decision marked the first time graffiti art was extended VARA protection.<sup>11</sup> Wolkoff immediately appealed the district court's decision, but in February 2020, the Second Circuit upheld Judge Block's decision in its entirety.<sup>12</sup>

The ruling has been heralded by many as a big win for artists' rights

---

3. Bruce Wallace, *Remembering 5Pointz: A Five-Story Building that Told Plenty More*, NPR (Nov. 21, 2013, 5:01 PM), <https://www.npr.org/2013/11/21/246549375/remembering-5pointz-a-five-story-building-that-told-plenty-more> [<https://perma.cc/RJA6-GCY7>].

4. Cara Buckley & Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, N.Y. TIMES (Nov. 19, 2013), <https://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html> [<https://perma.cc/3YL4-FAU9>].

5. Angelica Cesario, *The 5Pointz Case: A Landmark Decision with an Outsized Impact*, LAWLINE: BLOG (Apr. 25, 2018), <https://blog.lawline.com/the-5pointz-case-a-landmark-decision-with-an-outsized-impact> [<https://perma.cc/BZ8A-D9DG>].

6. Cohen is a New York-based street artist known as Meres One. Jonathan "Meres One" Cohen, MERES ONE ART, <http://www.meresone.com/about> [<https://perma.cc/9Q29-J3BW>].

7. Buckley & Santora, *supra* note 4; see also Sarah Cascone, *It 'Makes No Sense': 5Pointz Developer Vows to Appeal Landmark Ruling That Favored Graffiti Artists*, ARTNET NEWS (Feb. 21, 2018), <https://news.artnet.com/art-world/5pointz-developer-appeal-1228928> [<https://perma.cc/658A-XTL3>] (describing 5Pointz's development and the circumstances leading to its destruction).

8. Goldberg, *supra* note 2.

9. See *infra* Sections II.B–D.

10. Cohen v. G&M Realty L.P. (*5Pointz II*), 320 F. Supp. 3d 421, 447 (E.D.N.Y. 2018), *aff'd, sub nom.* Castillo v. G&M Realty L.P. (*5Pointz III*), 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

11. Alan Feuer, *Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html> [<https://perma.cc/5WWB-QWVM>].

12. Castillo, 950 F.3d at 162.

that signifies courts' growing recognition and respect for artists working in atypical mediums.<sup>13</sup> However, many others have expressed concern that such an expansion of VARA is at odds with property law and signifies a dangerous trend of artists' rights superseding property owners' rights.<sup>14</sup> Moral rights run counter to the United States' traditionally utilitarian approach to copyright law, and the *5Pointz* ruling exemplified the inevitable conflict between moral rights and property rights. Additionally, the street art movement has a reputation as a fringe community, with the term "street art" often used to describe both lawfully and unlawfully created artwork. By extending VARA protection to the unconventional medium, opponents worry that the court lowered VARA's standard and opened the door for other mediums to push the limits of the statute.<sup>15</sup> Fueling this anxiety, there have been other artists seeking the shelter of VARA following the *5Pointz* ruling. For example, the *Blued Trees* movement, started by artist and activist Aviva Rahmani, is an art installation affixed to trees along planned natural gas pipeline pathways.<sup>16</sup> Rahmani has successfully filed the project for copyright registration and hopes to use the moral rights granted by VARA to prevent the removal of the trees.<sup>17</sup> These concerns have led to demands for the *5Pointz* ruling to be overturned or for VARA to be amended, or even repealed, so as to limit its interference with property rights.<sup>18</sup>

This Note argues that VARA's application to street art is appropriate and not something for property owners to fear. While moral rights undoubtedly conflict with property rights, it is important for the United States to recognize moral rights in order to keep up with international standards and encourage creation. Additionally, street art is no longer the fringe movement it once was; artists such as Jean-Michel Basquiat, Keith Haring, and Banksy have helped sway the public opinion of street art away from viewing it as vandalism and towards viewing it as a legitimate artistic

---

13. See, e.g., Feuer, *supra* note 11; Alice B. Lloyd, *What Was the Point of the 5Pointz Millions?*, WASH. EXAM'R (Feb. 15, 2018, 2:30PM), <https://www.washingtonexaminer.com/weekly-standard/what-was-the-point-of-the-5pointz-millions> [<https://perma.cc/SAK7-9DMX>].

14. See, e.g., Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351, 370–71 (2019); Cesario, *supra* note 5.

15. See *infra* Section III.A.3.

16. Aviva Rahmani, *Endangered Species: The Blued Trees Symphony*, AVIVA RAHMANI (2016), <https://www.avivarahmani.com/endangered-species> [<https://perma.cc/Z8TL-LTGL>].

17. See *Aviva Rahmai, Art Activist*, AVIVA RAHMANI, <https://www.avivarahmani.com> [<https://perma.cc/TV7Z-JY24>].

18. See, e.g., Eric E. Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1132–40 (1996); Thornley, *supra* note 14; Justin Davidson, *Artists Won the 5Pointz Case, but the Decision Was Terrible for Art*, N.Y. MAG.: INTELLIGENCER (Feb. 13, 2018), <http://nymag.com/intelligencer/2018/02/artists-won-at-5pointz-but-the-decision-was-terrible-for-art.html> [<https://perma.cc/E637-7GBQ>].

medium worthy of additional copyright protection.<sup>19</sup> Finally, the language of VARA is intentionally limiting and leaves a lot of interpretation to the courts.<sup>20</sup> Generally, courts have been hesitant to apply VARA unless clearly warranted, suggesting that cases such as *Blued Trees* should not be a cause for panic given the court's careful application of VARA.<sup>21</sup>

Part II of this Note explores the development of United States copyright law. Particular emphasis is put on the resistance to the concept of moral rights. Part III discusses the *5Pointz* ruling and analyzes critics' arguments against the holding and against moral rights in general. This Part also explores the potential ramifications of the *5Pointz* ruling. Part IV argues that this recent application is appropriate and not a cause for concern about overreaching. The arguments against VARA are also addressed and concluded to be unpersuasive. The appropriateness of the application of VARA to street art is supported by public opinion and judicial interpretation, while future overreaching is prevented by the statute's limiting language and a careful court. *Blued Trees* is used as an illustration of the ease with which a court can deny VARA protection. Finally, Part V suggests that VARA offers appropriate coverage presently, but future expansion of VARA may be necessary.

## II. DEVELOPMENT OF UNITED STATES COPYRIGHT LAW

### A. EARLY COPYRIGHT LAW

The proposed copyright clause at the Constitutional Convention of 1787 was one of the few issues presented to receive unanimous approval.<sup>22</sup> While unanimous approval could suggest that the framers recognized the importance of federal control over copyright, early copyright law was sparse.<sup>23</sup> The first federal copyright statute, enacted in 1790, only offered protection to "authors of any map, chart, book or books."<sup>24</sup> Since 1790, copyright law has gone through numerous amendments to encompass new forms of expression and enhance the coverage of existing forms.<sup>25</sup> While the

---

19. See *From the Streets: The Rise of Urban Art*, SOTHEBY'S (Nov. 9, 2017), <https://www.sothebys.com/en/articles/from-the-streets-the-rise-of-urban-art> [<https://perma.cc/Y5NT-UKFG>].

20. See David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985, 1000–20 (2014).

21. See *id.* at 1020 (stating that courts have tended to "interpret[] VARA restrictively and arguably consistently with legislative intent").

22. Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 361 (1992).

23. *Id.* at 362.

24. Copyright Act of 1790, ch. 15 § 1, 1 Stat. 124, 124.

25. See generally PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-*

extension of these protective rights has been arguably slow-moving, copyright has generally been a more expansive than recessive area of law.

Before a new form of expression is granted copyright protection, it must first show it is worth protecting and that protection is desired.<sup>26</sup> Such a showing can be made through creative legal arguments, public demand, and international influence, all of which have helped stretch copyright law's parameters since the beginning of our nation.<sup>27</sup> An early example of these forces at work: musical compositions were not expressly protected by the Copyright Act of 1790. However, by 1794, Benjamin Carr successfully copyrighted his print of the sheet music to "The Kentucky Volunteer."<sup>28</sup> Carr secured a copyright by making the creative legal argument that printed sheet music satisfied the definition of a book—books were copyrightable under federal law.<sup>29</sup> As the market for sheet music grew, more music publishers began to use the same argument to secure their own copyright,<sup>30</sup> signaling to Congress that there was a considerable desire for copyright protection for musical compositions. Eventually, musical compositions were explicitly extended copyright protection through the first major revision to copyright law, the Copyright Act of 1831.<sup>31</sup> Legislative materials for the 1831 revision also consistently cited the importance of increasing copyright protection to keep up with the protection extended to artists in Europe.<sup>32</sup>

#### B. BERNE CONVENTION AND UNITED STATES RESISTANCE

United States copyright law has played "catch up" with Europe since the nation's inception.<sup>33</sup> However, the difference in approaches was never more pronounced than during the Berne Convention.<sup>34</sup> First accepted in 1886, the Berne Convention is an international copyright agreement meant

---

ATLANTIC BATTLE (2014) (explaining the tension historically present during changes in copyright law).

26. See *infra* Section IV.B.

27. See BENEDICT ATKINSON & BRIAN FITZGERALD, A SHORT HISTORY OF COPYRIGHT 4, 7 (2014); Meredith L. McGill, *Copyright*, in 2 A HISTORY OF THE BOOK IN AMERICA: AN EXTENSIVE REPUBLIC: PRINT, CULTURE, AND SOCIETY IN THE NEW NATION, 1790–1840, at 198, 201, 204 (Robert A. Gross & Mary Kelley eds., 2010).

28. FEDERAL COPYRIGHT RECORDS 1790–1800, at 15 (James Gilreath ed., Elizabeth Carter Wills comp., 1987).

29. 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:19 n.21 (2020).

30. See NICHOLAS E. TAWA, SWEET SONGS FOR GENTLE AMERICANS 3–4 (1980).

31. See J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMMS. & TECH. L. REV. 407, 411 (2004).

32. See H.R. REP. NO. 21-3, at 2 (1830).

33. See John A. Rothchild, *How the United States Stopped Being a Pirate Nation and Learned to Love International Copyright*, 39 PACE L. REV. 361, 366–69 (2018).

34. Susan Stanton, *Development of the Berne International Copyright Convention and Implications of United States Adherence*, 13 HOUS. J. INT'L L. 149, 150–52 (1990).

to modernize and unify copyright law.<sup>35</sup> The agreement obligates all member nations to meet minimum standards in protecting artists' rights and reduces the formalities required of artists seeking protection in other member nations.<sup>36</sup> The Berne Convention marked the first attempt to develop an international copyright code and symbolized a growing universal attitude that artistic works needed greater protection.<sup>37</sup> At the final of three conferences held to draft the Convention, the United States attended only as an observer, and it was not until 1988 that the United States joined the Berne Union.<sup>38</sup>

One of the main reasons for the United States' reluctance to join was that the Berne Convention was based on different policy than United States copyright law.<sup>39</sup> The Berne Convention considered the interests of both the creators *and* the copyright holders while United States copyright law focused solely on the copyright holders' interests. These interests are based on the dichotomy between an artist's moral rights and his or her economic rights. United States law considered a transfer of economic rights to be a transfer of all rights, while the Berne Convention sought to allow artists to retain moral rights even after a transfer of economic rights.<sup>40</sup> Moral rights are meant to protect the inextricable relationship between an artist and his or her work.<sup>41</sup> Such rights had never been recognized in United States copyright law, and opponents expressed concern that recognizing moral rights would lead to drastic increases in litigation, or was simply philosophically infeasible given the nation's existing law.<sup>42</sup> However, many European nations and original Berne Convention signees were more familiar and comfortable with the idea of moral rights and economic rights coexisting.<sup>43</sup>

Over a hundred years passed before the United States ratified the Convention. In that time, public interest in joining the Berne Convention swelled several times.<sup>44</sup> However, it was not until 1955, when the United

---

35. See Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 16–17 (1986).

36. See *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) [perma.cc/6T5Y-WTJQ].

37. Stanton, *supra* note 34, at 155.

38. *Id.* at 149.

39. See Karyn Temple Claggett, *Session II: The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms*, 40 COLUM. J.L. & ARTS 345, 348 (2017).

40. Cambra E. Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 853 (2004).

41. See Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355–56 (2006).

42. Stanton, *supra* note 34, at 170.

43. See *id.* at 167; *infra* Section II.D.1.

44. See H.R. REP. NO. 94-1476, at 47 (1976); Paul J. Sherman, *The Universal Copyright*

States became party to the Universal Copyright Convention, an alternative international copyright agreement free of moral rights, that it became clear United States copyright law needed major revising.<sup>45</sup>

The Universal Copyright Convention was made up predominately of smaller developing nations, while the more developed nations with greater copyright export were signed on to the Berne Convention.<sup>46</sup> The United States was in the midst of its post–World War II economic expansion, yet its copyright law was more akin to that of a much less developed nation.<sup>47</sup> A national desire to keep up with the other major powers, coupled with an increase in copyright exports, led to two decades of research, drafting, and revision culminating in the Copyright Act of 1976.<sup>48</sup> This overhaul of United States copyright law provided a much-needed increase in the protection of artists and set the stage for the United States’ ratification of the Berne Convention.

#### C. UNITED STATES RATIFIES BERNE CONVENTION WHILE AVOIDING RECOGNITION OF MORAL RIGHTS

The Copyright Act of 1976 made ratification of the Berne Convention possible by amending several of the key differences between United States and Berne Union copyright law.<sup>49</sup> Most notably, the Act established a copyright term of the author’s life plus fifty years<sup>50</sup>—a required term of the Berne Convention.<sup>51</sup> Having made the minimum necessary changes, the United States ratified the Berne Convention with the Berne Convention Implementation Act of 1988 (“BCIA”).<sup>52</sup>

However, BCIA is often regarded as a watered-down ratification.<sup>53</sup> Congress’s minimalist method is most apparent in its approach to moral

---

*Convention: Its Effect on United States Law*, 55 COLUM. L. REV. 1137, 1147 (1955).

45. H.R. REP. NO. 94-1476, at 47.

46. See Sherman, *supra* note 44, at 1144.

47. See Samuel Jacobs, Note, *The Effect of the 1886 Berne Convention on the U.S. Copyright System’s Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMMS. & TECH. L. REV. 169, 170–71 (2016).

48. H.R. REP. NO. 94-1476, at 47–48, 135–36.

49. Rothchild, *supra* note 33, at 445–46.

50. The Sonny Bono Copyright Term Extension Act extended the term of copyright protection for most works to life plus seventy years. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302).

51. H.R. REP. NO. 94-1476, at 135–36.

52. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O’ROURKE, *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 37–38 (5th ed. 2020).

53. COHEN ET AL., *supra* note 52, at 38; Jacobs, *supra* note 47, at 171.

rights.<sup>54</sup> The Berne Union had recognized moral rights since 1928,<sup>55</sup> but moral rights were incompatible with the United States' utilitarian theory of copyright law.<sup>56</sup> The United States avoided recognizing moral rights by stating in BCIA that the Berne Convention was not self-executing and that the United States' laws currently in place provided adequate protection for creators.<sup>57</sup>

Among the moral rights of the Berne Convention was the right of integrity, which allows artists "to object to any distortion, mutilation or other modification of . . . the said work."<sup>58</sup> Without such protection, artists in the United States were rendered helpless as their work was altered or even destroyed. Illustrating such a risk, Richard Serra's site-specific sculpture, *Tilted Arc*, was dismantled against Serra's wishes after members of the public objected to the sculpture's display.<sup>59</sup> In 1979, Serra, a noted American artist, was commissioned, through the Art in Architecture Program, to create a sculpture for Foley Federal Plaza in Manhattan. The resulting work, *Tilted Arc*, was a slightly angled, 120-foot long, 12-foot tall unfinished plate of COR-TEN steel that bisected the busy plaza.<sup>60</sup> The polemical work sparked immediate public debate with some feeling it was revolutionary whereas others feeling it was disruptive.<sup>61</sup> The debate ultimately led to a public hearing where a panel voted four to one in favor of removing the sculpture.<sup>62</sup> Serra filed suit to prevent the removal, and thereby the destruction, of his work, but the suit was dismissed.<sup>63</sup> Serra had given up the economic rights to his work, and without recognition of moral rights, there was little to be done.<sup>64</sup> Ultimately, *Tilted Arc* was dismantled and removed in 1989, and has never been publicly displayed since.<sup>65</sup>

---

54. Jacobs, *supra* note 47, at 171.

55. Moral rights were incorporated into the Berne Convention following the 1928 Rome Conference. Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 384 (1995).

56. Jacobs, *supra* note 47, at 174.

57. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853, 2853; Rebecca Stuart, Comment, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 649-50 (2007).

58. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention] (as revised at Stockholm on July 14, 1967).

59. Richard Serra, GAGOSIAN, <https://gagosian.com/artists/richard-serra> [perma.cc/35MP-5FJE].

60. MICHAEL KAMMEN, VISUAL SHOCK: A HISTORY OF ART CONTROVERSIES IN AMERICAN CULTURE 239 (2006).

61. *Id.* at 240.

62. *Id.* at 242.

63. *Id.*

64. Serra claimed that the moving of *Tilted Arc* was a violation of his First Amendment right to free speech. *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1055 (S.D.N.Y. 1987).

65. See HARRIET F. SENIE, THE *TILTED ARC* CONTROVERSY: DANGEROUS PRECEDENT? 35 (2002).

D. UNITED STATES RECOGNIZES MORAL RIGHTS WITH VARA  
ENACTMENT

1. Moral Rights Generally

The concept of moral rights is based on the theory that the relationship between an artist and his or her artwork is so significant that it warrants protection.<sup>66</sup> This theory was originally proposed by Kant in his essay, *Wrongfulness of the Unauthorized Publication*, in which he emphasized the inherent connection between certain creations and their creators.<sup>67</sup> Kant suggested that:

The author and someone who owns a copy can both, with equal right, say of the same book, "it is my book," but in different senses. The former takes the book as writing or speech, the second merely as the mute instrument of delivering speech to him or to the public, i.e., as a copy. This right of the author is, however, not a right to the thing, namely to the copy (for the owner can burn it before the author's eyes), but an innate right in his own person . . . .<sup>68</sup>

Kant's theory was first given legal weight in France where an artist maintained his moral rights even after giving up his economic rights to the work.<sup>69</sup> As early as 1504, French courts began to issue opinions that supported the policy of moral rights.<sup>70</sup> By 1791, the French National Assembly codified a law granting an attribution and integrity right for playwrights.<sup>71</sup>

During the Rome Revision in 1928, the Berne Convention recognized moral rights with the enactment of Article 6bis.<sup>72</sup> Under 6bis, members of the Berne Convention must, at a minimum, recognize the right of attribution and the right of integrity.<sup>73</sup> However, the Article does not require member

66. Rigamonti, *supra* note 41, at 355–56.

67. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370 (1998); Kim Treiger-Bar-Am, *Kant on Copyright: Rights on Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1066–67 (2008).

68. IMMANUEL KANT, *On the Wrongfulness of the Unauthorized Publication of Books*, in PRACTICAL PHILOSOPHY 23, 35 (Mary J. Gregor ed. & trans. 1996) (1793).

69. André Françon & Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. & ARTS 381, 385–86 (1985); Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 608 (2001).

70. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 18, 19 (1993).

71. See Susan P. Liemer, *On the Origins of le Droit Moral: How Non-Economic Rights Came to Be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65, 108–09 (2011).

72. Sherman, *supra* note 55, at 384.

73. Berne Convention, *supra* note 58; Tanja Makovec Petrik, *Moral Rights of Composers: The Protection of Attribution and Integrity Available to Musicians in the European Union and United States*,

nations to have explicit moral rights statutes, so long as the nation has laws in place that effectively protect artists' rights of attribution and integrity.<sup>74</sup> This language leaves the level of moral rights protection to the discretion of each member nation and allowed the United States to join the Berne Convention without expressly acknowledging moral rights.<sup>75</sup>

In general, most member nations provide more moral right protection than mandated by Article 6bis. Some nations recognize additional moral rights such as the royalty right, the right of disclosure, and the right of withdrawal.<sup>76</sup> In France, an artist is permitted to transfer moral rights to heirs, thereby allowing moral rights to survive past the life of the artist.<sup>77</sup> Some nations apply moral rights to broad categories of works, while other nations limit the application to a select group of artworks.<sup>78</sup> The United States recognized moral rights in 1990 with the enactment of VARA, but the protection afforded by VARA is minimal compared to much of the developed world.

## 2. Moral Rights Under VARA

VARA was enacted the year after the removal of *Tilted Arc*<sup>79</sup> and provided the cause of action Serra needed for a chance at saving his sculpture. VARA explicitly recognizes artists' rights of attribution and integrity.<sup>80</sup> The recognition of such rights creates a cause of action for certain occurrences of misattribution, mutilation, or destruction of a limited category of works of art.<sup>81</sup>

Much like *Titled Arc*, the enactment of VARA was polarizing. Judge Cardamone of the Second Circuit embraced the concept of moral rights in *Carter v. Helmsley-Spear, Inc.*, opining that such rights “spring from a belief

---

22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 359, 364–66 (2012).

74. Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 14 COLUM.-VLA J.L. & ARTS 229, 232 (1994); Frédérique Fontaine & Pauline Celeyron, *Beyond the Cliché: Are Authors' Moral Rights Under French Law as Inflexible as They are Said to Be?*, 12 J. INTELL. PROP. L. & PRAC. 775, 775–76 (2017).

75. Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More Than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMPAR. L. REV. 415, 428 (2003).

76. Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 107 KY. L.J. 547, 554–55 (2018); Katreina Eden, Note, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 124–26 (2005); Rigamonti, *supra* note 41, at 359.

77. Loi 57-298 du 11 mars 1957 sur la propriété littéraire et artistique [Law 57-298 of March 11, 1957 on Literary and Artistic Property], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 14, 1957, p. 2723; Gunlicks, *supra* note 69, at 653.

78. See Rigamonti, *supra* note 41, at 407.

79. See Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified in scattered sections of 17 U.S.C.).

80. 17 U.S.C. § 106A.

81. Jacobs, *supra* note 47, at 175; see 17 U.S.C. § 106A.

that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved."<sup>82</sup> However, there are many opponents of the concept of moral rights. Judge Posner reasoned that moral rights were unnecessary because such rights were already available through preexisting laws such as fraud, trademark infringement, and contract.<sup>83</sup> Others felt art did not merit exemption from the normal rules of property law.<sup>84</sup>

However, VARA was drafted to have an intentionally limited scope.<sup>85</sup> Under VARA, an artist's moral rights last only for the lifetime of the artist. At the time of the artist's death, moral rights expire, and thus the owner of the economic rights holds all the rights pertaining to the artwork.<sup>86</sup> Furthermore, VARA allows an artist to waive his or her moral rights through a VARA waiver.<sup>87</sup> In contrast, some nations allow the artist's next of kin to inherit the artist's moral rights or consider moral rights inalienable.<sup>88</sup> Additionally, VARA recognizes only two moral rights required by the Berne Convention: the right of attribution and the right of integrity.

VARA claims are further limited to exclusively "work[s] of visual art,"<sup>89</sup> such as a painting, drawing, print, or sculpture.<sup>90</sup> And the work must be either a single copy or part of a limited edition of 200 or fewer copies, all consecutively numbered and signed by the artist.<sup>91</sup> The requirement of 200 or fewer copies in existence is meant to narrow the scope of VARA to exclusively works that "embody the artist's 'personality' far more closely than subsequent mass-produced images."<sup>92</sup>

Whether a work qualifies as a "work of visual art" is determined by a court, based on the court's common sense and artistic community

---

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

83. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 276–78 (2003).

84. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009).

85. H.R. REP. NO. 101-514, at 9 (1990) ("Those hearings revealed a consensus that the bill's scope should be limited to certain carefully defined types of works and artists . . .").

86. *See* 17 U.S.C. § 106A(d).

87. *Id.* § 106A(e).

88. *E.g.*, Loi 57-298 du 11 mars 1957 sur la propriété littéraire et artistique [Law 57-298 of March 11, 1957 on Literary and Artistic Property], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 14, 1957, p. 2723; Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, Bundesgesetzblatt [BGBL] [Federal Law Gazette] last amended Sept. 1, 2017, BGBL 3346, at § 76 (Ger.).

89. 17 U.S.C. § 106A.

90. *Id.* § 101.

91. *Id.*

92. *The Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Cts., Intell. Prop., & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 84 (1989).

standards.<sup>93</sup> Generally, courts have been hesitant to apply liberal interpretations of what satisfies the definition of “work of visual art.” The Seventh Circuit considered a district court ruling that a garden was a “painting” or a “sculpture.”<sup>94</sup> The issue was not raised on appeal, but the court did express concern with the lower court’s determination because it appeared at odds with the intentionally limiting language of the statute.<sup>95</sup>

The right of attribution is one of the two moral rights recognized by VARA, and it concerns the right of an artist to be credited with the artist’s creation.<sup>96</sup> Under VARA, an artist has the right to claim ownership, the right to prevent the use of the artist’s name on a work the artist did not create, and the right to prevent the use of the artist’s name on any work that has been distorted such that it is “prejudicial to [the artist’s] honor or reputation.”<sup>97</sup> The right of attribution typically does not interfere with property owner rights and is therefore not opponents’ primary objection to VARA.

The conflict between moral rights and property rights is mainly caused by the other moral right recognized by VARA: the right of integrity. This right allows artists to object or prevent certain modifications to their artwork.<sup>98</sup> This right creates a conflict between moral and property rights by allowing an outside party to control how a property owner may use his property. Generally, property owners in the United States have been free to use their property as they wish, including destroying or altering that property. Under VARA, an artist may prevent any intentional distortion that would be “prejudicial to his or her honor or reputation.”<sup>99</sup> Additionally, an artist may prevent the intentional or grossly negligent destruction of his or her work.<sup>100</sup> However, an artist’s right to prevent his or her work’s destruction is further limited to only artworks of “recognized stature.”<sup>101</sup>

The recognized stature requirement has proven to be one the most difficult elements to establish in an unlawful destruction claim.<sup>102</sup> The House Judiciary Committee expressed concern with this language and suggested it be altered to “honor and reputation,” as is the standard of the Berne

---

93. *Id.* at 11.

94. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 300–01 (7th Cir. 2011).

95. *Id.* at 301 (“If a living garden like Wildflower Works really counts as both a painting and a sculpture, then these terms do no limiting work at all.”).

96. See Elizabeth M. Bock, Note, *Using Public Disclosure as the Vesting Point for Moral Rights Under the Visual Artists Rights Act*, 110 MICH. L. REV. 153, 156 (2011).

97. 17 U.S.C. § 106A(a)(2).

98. See *id.* § 106A(a)(3)(A).

99. *Id.*

100. *Id.* § 106A(a)(3)(B).

101. *Id.*

102. See Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTELL. PROP. 204, 212 (2013).

Convention.<sup>103</sup> The committee feared that the recognized stature provision would be unfairly prejudicial to works of lesser known or appreciated artists.<sup>104</sup> However, recognized stature remained the standard under VARA and with no definition provided, what works qualify is left to judicial interpretation.<sup>105</sup>

Relevant case law has developed a two-prong test that considers recognized stature achieved when the work is viewed as meritorious and its stature is recognized by art critics or the artistic community.<sup>106</sup> Proving the recognized stature of a work usually requires expert testimony<sup>107</sup> or documents showing community recognition of the work's stature.<sup>108</sup> Furthermore, the determination is based solely on the work in question—the recognized stature of the artist personally or other works by the artist are insufficient.<sup>109</sup>

VARA includes further limitations when a work of art is incorporated into a building, such as the artwork at issue in the *5Pointz* litigation.<sup>110</sup> Under these circumstances, a real property owner has many options to avoid a VARA claim. Moral rights are waivable, and thus a VARA waiver can be sought by the property owner. Additionally, even when an artist does not waive his or her moral rights, a property owner may still lawfully destroy the artwork so long as the owner makes a good faith effort to notify the artist of the work's impending destruction.<sup>111</sup> The owner's good faith effort is presumed when the owner provides written notice to the artist's last known address ninety days prior to the artworks destruction.<sup>112</sup> It then becomes the artist's burden to either remove the work herself or pay for its removal within ninety days.<sup>113</sup> If the artist fails to do so, the property owner may lawfully destroy the work.

An artist who can show a VARA violation is entitled to actual damages and profits or statutory damages.<sup>114</sup> Statutory damages are typically between \$750 and \$30,000 per work, however, in cases of willful infringement the

---

103. H.R. REP. NO. 101-514, at 15 (1990).

104. *Id.*

105. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994).

106. *Id.*

107. *Scott v. Dixon*, 309 F. Supp. 2d 395, 397 (E.D.N.Y. 2004).

108. *See Martin v. City of Indianapolis*, 982 F. Supp. 625, 631 (S.D. Ind. 1997) (noting that newspaper and magazine articles and numerous letters were offered as evidence of the artwork's recognized stature).

109. *Dixon*, 309 F. Supp. 2d at 400.

110. 17 U.S.C. § 113(d)(2).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* § 504(b)–(c).

ceiling is raised up to \$150,000 per work.<sup>115</sup>

#### E. 5POINTZ LITIGATION

At the forefront of VARA's recent publicity has been the *5Pointz* litigation.<sup>116</sup> Wolkoff bought the property, which was originally a water meter factory, in the early 1970s and expressed plans early on to eventually develop the site.<sup>117</sup> However, at that time, there was not a high demand for property in Long Island City, so rather than developing the building, Wolkoff began renting it out to artists as studio space.<sup>118</sup> With Wolkoff's permission, artist-tenants began painting on the building's exterior walls.<sup>119</sup> In 2002, Cohen began curating 5Pointz, so that the site operated as a de facto museum.<sup>120</sup> At Cohen's direction, artists from around the world contributed to 5Pointz with some artworks shown as temporary installations while other works were created with the intent of long-term display.<sup>121</sup> However, in 2013, Wolkoff announced his intention to finally develop the property, which required the demolition of the buildings displaying the aerosol art.<sup>122</sup>

The art community feared the loss of the cultural site and sought to prevent its destruction by using the protection of VARA to seek a preliminary injunction prohibiting demolition.<sup>123</sup> In 2013, the district court denied that preliminary injunction.<sup>124</sup> Judge Block explained that the denial was issued after balancing the tension between the artists' moral rights and the owner's property rights.<sup>125</sup> Not wanting to greatly impede on the basic notions of property law, Judge Block denied the injunction largely because

---

115. *Id.* § 504(c).

116. *See generally* Castillo v. G&M Realty L.P. (*5Pointz III*), 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020); Cohen v. G&M Realty L.P. (*5Pointz II*), 320 F. Supp. 3d 421 (E.D.N.Y. 2018), *aff'd, sub nom.* *5Pointz III*, 950 F.3d 155; Cohen v. G&M Realty L.P. (*5Pointz I*), 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

117. John Bicknell, Note, *Is Graffiti Worthy of Protection? Changes Within the Recognized Stature Requirement of the Visual Artists Rights Act*, 17 TUL. J. TECH. INTELL. PROP. 337, 343 (2014); Davidson, *supra* note 18.

118. Margaret McCormick, *Gangs of New York: The Battle for 5 Pointz*, FAILED ARCHITECTURE, <https://failedarchitecture.com/gangs-of-new-york> [<https://perma.cc/8N4L-L3GP>].

119. *See* Thornley, *supra* note 14, at 355; Davidson, *supra* note 18.

120. *See* Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 585 (2018).

121. *5Pointz II*, 320 F. Supp. 3d at 438–39.

122. *Id.* at 434.

123. Cohen v. G&M Realty L.P. (*5Pointz I*), 988 F. Supp. 2d 212, 214–15 (E.D.N.Y. 2013); DeSouza, *supra* note 1.

124. *5Pointz I*, 988 F. Supp. 2d at 225; Laura B. Richardson, *The Making of the Moral Rights Case: The Factual and Legal Background of the 5Pointz Trial*, CTR. FOR ART L. (Nov. 5, 2017), <https://itsartlaw.org/2017/11/05/the-making-of-the-moral-rights-case-the-factual-and-legal-background-of-the-5pointz-cases> [<https://perma.cc/KL7W-3ZXG>].

125. *5Pointz II*, 320 F. Supp. 3d at 427.

of the transient nature of the artworks.<sup>126</sup> Furthermore, the court reasoned VARA could not be used to protect an entire site like 5Pointz because the statute was limited to specific, individual works of art.<sup>127</sup> Despite denying the preliminary injunction, the opinion noted that the “recognized stature” determination of a number of the aerosol artworks presented “sufficiently serious questions going to the merits to make them fair ground for litigation.”<sup>128</sup> The court intended to make such a determination after more information was made available through trial. Less than a week after denying the preliminary injunction, before the court had the chance to make a determination on the works’ recognized stature and without giving the artists the required notice, Wolkoff ordered a team of painters to cover the artwork in white paint.<sup>129</sup>

The whitewashing effectively destroyed the artworks months prior to the planned razing. More 5Pointz artists sought to bring claims against Wolkoff, and thus the *5Pointz* litigation continued although the issue before the court was now whether the whitewashing constituted unlawful destruction of a work of recognized stature. Ultimately, thirty-six of the whitewashed aerosol paintings were determined by an advisory jury<sup>130</sup> to qualify for VARA protection.<sup>131</sup> Judge Block adopted the jury’s recommendation and found an additional nine works also achieved recognized stature.<sup>132</sup> The court found Wolkoff to have acted willfully in the destruction of all forty-five works of art and awarded the artists a total of \$6.7 million in statutory damages.<sup>133</sup>

The district court’s ruling can be contributed to a number of factors. Firstly, the plaintiffs simply had more credible witnesses; two certified art appraisers and a New York University art professor testified to the recognized stature of the whitewashed artworks of 5Pointz.<sup>134</sup> The defense’s witnesses suggested that the artworks had not reached the level of recognized stature, but the court disagreed, opining, “[The witness] used an unduly restrictive interpretation of recognized stature that was more akin to a masterpiece standard.”<sup>135</sup> Additionally, Wolkoff behaved terribly throughout

---

126. *5Pointz I*, 988 F. Supp. 2d at 227 (stating that a “factor which precludes either preliminary or permanent injunctive relief was the transient nature of the plaintiffs’ works”).

127. *Id.* at 255–56.

128. *Id.* at 226.

129. *5Pointz II*, 320 F. Supp. 3d at 427.

130. Plaintiffs waived their jury rights with defendants’ permission just prior to closing arguments. *Id.* at 431.

131. *Id.*

132. *Id.* at 428.

133. *Id.* at 447.

134. *Id.* at 431.

135. *Id.* at 439.

the litigation stating he “would make the same decision today” and, during a particularly problematic portion of his testimony, was threatened to be held in contempt.<sup>136</sup> Wolkoff’s behavior during trial and flippant attitude towards the whitewashing assured that the court had no difficulty awarding plaintiffs the maximum damages.<sup>137</sup>

Wolkoff promptly appealed the district court’s decision.<sup>138</sup> The Second Circuit heard oral arguments in August 2019<sup>139</sup> and issued an opinion in February 2020, affirming the district court’s decision.<sup>140</sup> The Second Circuit agreed with the district court’s conclusion that the forty-five works were of recognized stature and had been willfully damaged or destroyed.<sup>141</sup> In July 2020, Wolkoff filed a petition for a writ of certiorari with the Supreme Court, reframing his argument to target the constitutionality of VARA.<sup>142</sup> However, the Supreme Court declined to hear the case in September 2020.<sup>143</sup>

### III. ARGUMENTS AGAINST MORAL RIGHTS AND THE APPLICATION OF VARA IN *5POINTZ*

Wolkoff is not alone in his opinion that the *5Pointz* ruling was erroneous. Following the ruling, many critics warned of the implications of such a judgment. Some critics argue that by applying VARA to street art the court expanded a law, which was meant to be extremely limited, to an unconventional medium and thereby opened the door for other artworks to continue pushing the bounds of VARA. Other critics take the more extreme position that VARA has no place in the United States legal system and should be repealed.<sup>144</sup> This Part will explore the rationale behind each of these views separately.

---

136. *Id.* at 432 (“He was argumentative and prone to tangents and non-responsive answers. Eliciting coherent testimony was a chore and was only achieved after the Court threatened to hold him in contempt.”).

137. *Id.* at 447 (“The Court has discussed at length the problematic conduct of Wolkoff during the whitewashing and on the witness stand.”).

138. Notice of Appeal at 1–2, *Cohen v. G&M Realty L.P. (5Pointz I)*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013) (No. 1:13-cv-05612).

139. Pete Brush, *Aerosol Artists Rights Need Limits, Developer Tells 2nd Circ.*, LAW360 (Aug. 30, 2019, 5:44 PM), <https://www.law360.com/articles/1194371> [<https://perma.cc/TYT9-CD3K>].

140. *Castillo v. G&M Realty L.P. (5Pointz III)*, 950 F.3d 155, 162 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

141. *Id.* at 169–70.

142. Petition for a Writ of Certiorari, *G&M Realty L.P. v. Castillo*, No. 20-66 (U.S.), *cert. denied*, 141 S. Ct. 363 (2020) [hereinafter Petition for a Writ of Certiorari].

143. Eileen Kinsella, *The Developer Who Painted over the 5Pointz Graffiti Mecca Must Pay an Additional \$2 Million to Cover the Artists’ Legal Fees*, ARTNET NEWS (Nov. 30, 2020), <https://news.artnet.com/art-world/5pointz-additional-2m-attorney-fees-1927310> [<https://perma.cc/VU6X-Q4K7>].

144. Bensen, *supra* note 18, at 1149.

A. ARGUMENTS AGAINST THE *5POINTZ* RULING

## 1. Courts Should Interpret VARA as Narrowly as Possible

A common sentiment among objectors to VARA's application in *5Pointz* is that it is counter to congressional intent. As discussed in Part II, there was significant congressional apprehension surrounding moral rights. The choice to adopt the higher standard of "recognized stature," limiting moral rights to one of a kind or limited edition works and allowing VARA waivers all support the idea that Congress wanted to limit VARA's reach. Representative Markey confirmed this intent, testifying "we have gone to extreme lengths to very narrowly define the works of art that will be covered."<sup>145</sup> Objectors to *5Pointz* argue that courts should abide by this intent and keep VARA limited to only the most exceptional circumstances.<sup>146</sup> In their view, *5Pointz* is not one of the exceptional circumstances to which VARA should be limited in part because of street art's reputation and the future implications of allowing street art to satisfy the recognized-stature standard.

## 2. Street Art Is Not the Type of Work VARA Was Enacted to Protect

Wolkoff maintained throughout the *5Pointz* litigation that street art should not be extended VARA protection because of its temporary nature.<sup>147</sup> The property owner argued that street art is inherently ephemeral because it only survives until the building is destroyed or another artist covers the earlier work.<sup>148</sup> Courts have recognized that VARA has a minimal duration requirement because it only applies to "sufficiently permanent" works.<sup>149</sup> Wolkoff argued that street art could not satisfy this requirement and therefore should not be protected by VARA. Furthermore, alteration or destruction cannot be "prejudicial to [a street artist's] honor or reputation" because alteration or destruction are an innate part of the medium.<sup>150</sup> During Banksy's 2013 *Better Out Than In* residency in New York City, the artist revealed a new graffiti work each day during the month of October.<sup>151</sup>

---

145. H.R. REP. NO. 101-514, at 6921 (1990).

146. See LANDES & POSNER, *supra* note 83, at 280.

147. Cohen v. G&M Realty L.P. (*5Pointz I*), 988 F. Supp. 2d 212, 223 (E.D.N.Y. 2013); Cohen v. G&M Realty L.P. (*5Pointz II*), 320 F. Supp. 3d 421, 435 (E.D.N.Y. 2018), *aff'd, sub nom.* Castillo v. G&M Realty L.P. (*5Pointz III*), 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020); *5Pointz III*, 950 F.3d at 167.

148. LANDES & POSNER, *supra* note 83, at 280.

149. *5Pointz III*, 950 F.3d at 168.

150. LANDES & POSNER, *supra* note 83, at 280.

151. Roberta Smith, *Mystery Man, Painting the Town*, N.Y. TIMES (Oct. 30, 2013), <https://www.nytimes.com/2013/10/31/arts/design/banksy-makes-new-york-his-gallery-for-a-month.html> [https://perma.cc/SC8K-HXRA].

Despite being arguably the best-known street artist in the world, Banksy's works are not immune to street art's short life expectancy, and today the only works that remain of the thirty-one he created during the residency are covered with plexiglass to prevent their destruction.<sup>152</sup> Opponents argue that street artists chose to accept the risk of alteration or destruction when they elect to present their work in a medium that leaves it exposed to the public. Thus, the artists should not be entitled to legal recourse when that risk is realized.

In addition to its ephemerality, street art also has a much less sophisticated reputation than that of traditional fine arts. Street art is a blanket term that can refer to both lawful and unlawful publicly displayed work. The street art movement in the United States began in the 1970s when artists and vandals began illegally spray-painting subway cars.<sup>153</sup> During this time, street art was categorized as an "urban problem" that needed to be eradicated.<sup>154</sup> Since the 1970s, street art has evolved into a more respected medium, evidenced by the popularity of murals and the rise of well-known street artists.<sup>155</sup> However, street art has not fully discarded its reputation, and thus the extension of VARA protection appears to be a substantial reduction of the recognized stature standard.

A reduction of the recognized-stature standard could lead to an increase in VARA litigation and greater conflict between moral and economic rights. The recognized-stature requirement, which serves a gate-keeping role, is not expressly defined by VARA.<sup>156</sup> The opposing parties of the *5Pointz* litigation took clear stances on the appropriate standard for recognized stature.<sup>157</sup> The court ultimately adopted the plaintiffs' more expansive view, and in doing so, opponents fear the court opened the door for other atypical modes of expression to continue stretching the bounds of VARA.

---

152. Monica Herrera, *Banksy: Hammer Boy—NYC Street Art*, ARTIHOLICS (July 4, 2020), <https://artiholics.com/2020/07/04/banksy-hammer-boy-nyc-street-art> [<https://perma.cc/9E79-BSYB>]; Editorial Board, Opinion, *Banksy's New York Welcome*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/opinion/banksys-new-york-welcome.html> [<https://perma.cc/N24N-J6W9>].

153. JOE AUSTIN, TAKING THE TRAIN: HOW GRAFFITI ART BECAME AN URBAN CRISIS IN NEW YORK CITY 38–74 (2001).

154. *Id.* at 76.

155. *See infra* Section IV.B.1.

156. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994).

157. *See supra* Section III.A.

### 3. *5Pointz* Encourages Other Artists to Continue Stretching the Scope of VARA

In the wake of *5Pointz*, other street artists have sought similar protection from VARA. A group of muralists in the small town of Normal, Illinois have filed a VARA suit to prevent the demolition of their work.<sup>158</sup> Similarly, muralist Kyle Holbrook filed suit against the city of Pittsburgh for the destruction of several of his works.<sup>159</sup> Opponents argue that these artists have been emboldened by the *5Pointz* ruling, which established that street art is not necessarily excluded from VARA protection.

Opponents warn that *5Pointz* could encourage abuse of VARA. *Blued Trees* is an example of artwork seeking to test the power of VARA.<sup>160</sup> Created by activist and artist Aviva Rahmani, *Blued Trees* features portions of a symphony painted in blue sine waves on trees located in planned natural gas pipeline pathways.<sup>161</sup> Rahmani has successfully filed the project for copyright registration<sup>162</sup> and hopes to use the moral rights granted by VARA to prevent the removal of the trees and thereby the pipeline's construction.<sup>163</sup> While Rahmani has yet to assert any claims under VARA, *Blued Trees* illustrates how VARA could be weaponized to control another's property.

## B. ARGUMENTS THAT VARA HAS NO PLACE IN UNITED STATES COPYRIGHT LAW

### 1. VARA Conflicts with Established Law

As described herein,<sup>164</sup> many European nations, most notably France, recognize more extensive moral rights than the United States. France adopted a dualistic approach to copyright law that recognizes that artists possess two distinct rights in their work: moral and economic.<sup>165</sup> In contrast, United States law historically recognized solely the economic rights of

---

158. Katharine Haydock, *Fighting Back Against the "New Normal"—Artists Assert VARA Rights to Protect Street Art*, HUGHES HUBBARD & REED (July 15, 2019), <https://www.hhrartlaw.com/2019/07/fighting-back-against-the-new-normal-artists-assert-vara-rights-to-protect-street-art> [<https://perma.cc/5T2R-XMNY>].

159. Mike Nepple, *Can an Artist Deem His Own Art Worthy of Protection?*, THOMPSON COBURN LLP (Mar. 28, 2019), <https://www.thompsoncoburn.com/insights/blogs/in-focus/post/2019-03-28/can-an-artist-deem-his-own-art-worthy-of-protection> [<https://perma.cc/4EB8-ZHR2>].

160. Jaya Bajaj, Note, *Art, Copyright, and Activism: Could the Intersection of Environmental Art and Copyright Law Provide a New Avenue for Activists to Protest Various Forms of Exploitation?*, 15 NW. J. TECH. & INTELL. PROP. 53, 56–58 (2017).

161. *Id.*

162. *Id.*

163. *Id.* at 63.

164. See *supra* Section II.D.1.

165. Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (And French Moral Rights)*, 9 IND. INT'L & COMPAR. L. REV. 423, 426 (1999).

artworks and thus only sought to protect the property owner as the party holding the economic rights.<sup>166</sup> Justice Reed described United States copyright law as built on an “economic philosophy,” and many felt that moral rights, whose purpose is to protect noneconomic interests, were too incompatible with this philosophy to ever have a place in the United States legal system.<sup>167</sup> The tension between moral and economic rights kept the United States from recognizing moral rights for sixty years after their recognition by the Berne Convention.

Given the United States’ lack of familiarity with the philosophy supporting moral rights, it is unsurprising that the enactment of VARA was met with reluctance. Firstly, on its face the law does not appear to have an economic justification.<sup>168</sup> Under the statute, an artist’s nonpecuniary interest in preventing an alteration to his or her work may take precedent over the work’s owner’s pecuniary interest in altering the work.<sup>169</sup> Such a result appears at odds with the “economic philosophy” of copyright law. This argument is similar to the argument that VARA is contrary to the constitutionally stated purpose of copyright law.<sup>170</sup> The Copyright Clause of the United States Constitution pronounces that the goal of copyright law is “[t]o promote the Progress of Science and useful Arts.”<sup>171</sup> A common interpretation of the Copyright Clause equates promotion with dissemination, and therefore VARA, which appears to focus on protecting artists rather than disseminating copyrighted material, does not serve this purpose of “promot[ing]” according to adversaries.<sup>172</sup>

Furthermore, an individual’s ability to control his or her property is a core concept of the United States legal system. VARA allows an individual with no economic rights to control how the economic rights holder uses his or her property. Such a detour from established law could upset settled economic expectations of property owners.<sup>173</sup> As a capitalist economy, the importance of a predictable and strong system of property rights is paramount for a functioning economy.<sup>174</sup> VARA puts a burden on the

---

166. Benjamin S. Hayes, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1014–15 (2000).

167. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

168. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 102 (1997).

169. *See id.* at 109.

170. Craig W. Dallan, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. 307, 326–27 (2006); Sinclair Marber, Note, *They Can’t Take That Away from Me: An Indemnification Solution to Unmerited VARA Claims*, 41 COLUM. J.L. & ARTS 319, 321–22 (2018).

171. U.S. CONST. art. I, § 8, cl. 8.

172. Bensen, *supra* note 18, at 1133–34.

173. *See* Petition for a Writ of Certiorari, *supra* note 142, at i.

174. Armen A. Alchian, *Property Rights*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/>

property owner<sup>175</sup> and may create a murkiness as to what conduct risks liability. VARA's lack of clarity was the crux of Wolkoff's argument in his petition to the Supreme Court.<sup>176</sup> Wolkoff argued that VARA's cloudiness violated the Due Process Clause of the Fifth Amendment, which requires "that laws which regulate . . . must give fair notice of conduct that is forbidden or required."<sup>177</sup> Although the Supreme Court declined to hear Wolkoff's case, critics maintain that VARA should be repealed.

## 2. The Objectives of VARA Can Be Achieved by Existing Law

The United States avoided recognizing moral rights for more than sixty years after the Berne Union; even after joining the union in 1988, the United States did not recognize moral rights for another two years. Congress determined that a patchwork of existing laws provided artists with the same protection they would be afforded by the express recognition of moral rights.<sup>178</sup> The patchwork consisted of federal and state law related to a range of different areas of law.<sup>179</sup> VARA opponents question the logic of creating a new law that is incompatible with foundational elements of the nation's legal system when existing law can serve the same function.<sup>180</sup>

Additionally, opponents point out that VARA does not even protect many works that arguably should be preserved. Andy Warhol's original *Marilyn Diptych* would have no protection under VARA because Andy Warhol died in 1987 and moral rights only last during the artist's lifetime.<sup>181</sup> *Rabbit*, the sculpture by Jeff Koons that sold for \$91.1 million in May 2019 would not be protected under VARA—VARA is not retroactive and thus could not reach the 1986 sculpture. Neither *The Statue of Liberty*, *American Gothic*, *Whistler's Mother*, nor the works of Norman Rockwell, Edmonia

---

Enc/PropertyRights.html [https://perma.cc/LT9C-SZ7F] ("Any restraint on private property rights shifts the balance of power from impersonal attributes toward personal attributes and toward behavior that political authorities approve.").

175. Thornley, *supra* note 14, at 364 ("Nothing more should be required of the property owner, yet VARA's 'recognized stature' provision does just that, requiring the property owner to obtain a written, moral-rights waiver from the artist.").

176. Petition for a Writ of Certiorari, *supra* note 142, at 22–30.

177. *Id.* at 22 (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

178. S. EXEC. REP. NO. 105-25, at 10 (1998) ("This deference to national law may allow the United States to rely upon a patchwork of existing state laws and the federal trademark law as the legal basis for satisfying the Treaty obligation, without enacting new federal legislation.").

179. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 7 (2019) ("This patchwork included federal laws such as the Lanham Act and certain provision of the Copyright Act, as well as state laws relating to privacy and publicity, contracts, fraud and misrepresentation, unfair competition, and defamation.").

180. LANDES & POSNER, *supra* note 83, at 280 ("But such cases are too rare to justify the creation and maintenance of a complex body of law (with undesirable side-effects) designed to prevent them from arising.").

181. 17 U.S.C. § 106A(d)(1).

Lewis, Jackson Pollock, Georgia O’Keefe, and Jean-Michel Basquiat are protected by VARA. If VARA is unable to protect the most valuable works of our nation, then opponents see no strong justification for its necessity.

Prior to VARA, artists were always free to protect their moral rights through contract. An artist could include a moral rights provision in a sale contract that gave the artist approval rights over any future modifications of the work.<sup>182</sup> If a sale contract does not include such a provision, opponents argue moral rights are not a compelling enough reason to override the ordinary rules of contract law and insert terms the parties did not originally agree upon.<sup>183</sup> Additionally, before VARA’s enactment, moral rights provisions were not a common feature of art sale contracts.<sup>184</sup> Opponents argue that this suggests artists did not consider moral rights beneficial enough to justify the cost to the artist—an artist would likely need to reduce the sale price in order to include the term.<sup>185</sup> Much like the objections to VARA based on its conflict with property law, opponents do not see the logical justification for upholding a law that conflicts with established legal principle when there are alternative means of achieving those same objectives.

#### IV. VARA’S EXPANSION INTO STREET ART IS APPROPRIATE AND NOT A CAUSE FOR CONCERN THAT VARA WILL EXCEED ITS INTENDED SCOPE

VARA undoubtedly conflicts with property rights and the *5Pointz* ruling demonstrated that those conflicts can lead to results that appear at odds with some of the most fundamental principles of our legal system. However, this Note argues that both VARA and its recent application in *5Pointz* are appropriate. This Part will discuss the arguments in support of VARA and *5Pointz*. This Part will also respond to opponents’ arguments and conclude that none offer a persuasive justification for VARA’s repeal.

##### A. IMPORTANCE OF RECOGNIZING MORAL RIGHTS

###### 1. Reduces the Gap Between the United States and Other Developed Nations

Today, the world is more global than ever before, and as a result there is a greater need for international consistency in copyright law. Any dissemination of copyrighted material is likely to become part of the

---

182. LANDES & POSNER, *supra* note 83, at 277.

183. Thornley, *supra* note 14, at 364.

184. LANDES & POSNER, *supra* note 83, at 277.

185. *Id.* at 278.

international market regardless of the creator's intent to keep the product domestic.<sup>186</sup> International collaboration ensures adequate protection and a predictable market.<sup>187</sup> It is especially important for the United States, as one of the world's largest exporters of copyrighted material,<sup>188</sup> to not only set the standards but to also acquiesce to the standards demanded by the global community. Cooperation in global affairs can help bolster foreign relations. Additionally, if increased uniformity in copyright law leads to a better market for copyrightable material,<sup>189</sup> it follows that a top exporter of copyrightable material would want to contribute to unifying international copyright law.

In 2017, the foreign sales and exports for selected United States copyright industries<sup>190</sup> totaled over \$191 billion.<sup>191</sup> As the global market becomes more accessible, it is likely artists will have more location flexibility when deciding where to create their works. Through much of the growth of the United States copyright industry, the United States had the benefit of being a desirable market for artists largely thanks to the success of Hollywood's entertainment industry. Domestic and international artists wanted to create in the United States because it offered the most opportunities for success.<sup>192</sup> However, by offering these same networking and publicity opportunities anywhere in the world, the internet has made the physical location of an artist less important than ever before.

Looking toward the future, the United States should want to encourage this lucrative industry to remain in the United States. Under the Berne Convention, the United States is required to enforce the moral rights of foreign artists hailing from nations that acknowledge such rights.<sup>193</sup> Thus, prior to the enactment of VARA, United States courts were recognizing the moral rights of foreign artists while denying those same rights to American

---

186. Graeme B. Dinwoodie, *New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 479 (2000).

187. *Id.*

188. *Global Innovation Index 2019: The United States of America*, WORLD INTELL. PROP. ORG. [WIPO] 1 (2019), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_gii\\_2019/us.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2019/us.pdf) [<https://perma.cc/JG7D-3CY9>].

189. Dinwoodie, *supra* note 186, at 479.

190. The selected copyright industries are recorded music; motion pictures; television and video; software publishing; and non-software publications including newspapers, books and periodicals. STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2018 REPORT 3 n.4 (2018), <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf> [<https://perma.cc/ATD9-8VD6>].

191. *Id.* at 14.

192. Gerben Bakker, *The Economic History of the International Film Industry*, EH.NET (Feb. 10, 2008), <https://eh.net/encyclopedia/the-economic-history-of-the-international-film-industry> [<https://perma.cc/5J7Z-SC6K>] (commenting that "even more than money creative inputs wanted to maximize fame and professional recognition").

193. See Berne Convention, *supra* note 58.

artists.<sup>194</sup> Copyright industries are unique in that artists function as the factory: without artists there is no product. If the United States wants to keep these factories running in the United States, it is important to provide artists with rights comparable to other nations. VARA, although narrow, did finally recognize American artists' moral rights and in doing so slightly reduced the gap between copyright protection in the United States and other Berne Union members; thereby encouraging authors to create and disseminate their work in the United States.

Moral rights are recognized in nearly all civil law systems and, while less so, also in many common law systems.<sup>195</sup> The enactment of moral right statutes can help convey a nation's respect to artists and the artistic process.<sup>196</sup> In fact, this is one of the main reasons for VARA's enactment according to its legislative materials,<sup>197</sup> and one of the main reasons opponents argue that VARA does not provide economic benefits. However, given the benefits of increasing the international uniformity of copyright law and the importance of presenting the United States as an artist-friendly nation, perhaps VARA's enactment is better described as a good "PR move" than an undermining of established legal principles. The United States appeared sensitive to artists' rights and cooperative in international concerns all while benefiting a lucrative industry. Such a recategorization further suggests that VARA is not necessarily counter to the foundational "economic philosophy" of copyright law.

## 2. Incentivizes Creation and Dissemination of Valuable Work

The Supreme Court has found on numerous occasions that statutes that promote the dissemination of copyrighted work satisfy the Constitutional purpose of copyright law.<sup>198</sup> Moral rights help to encourage American authors not only to keep creating, but also to keep disseminating their work. When rights distinct from economic rights are recognized, artists are more likely to sell the economic rights to their work because their moral rights provide a persisting sense of control over their work, which they would

---

194. Gunlicks, *supra* note 69, at 663.

195. See, e.g., Copyright Act, R.S.C. 1985, c C-42, S14.1, 14.2, 17.1, 17.2 (Can.); Legge 22 aprile 1941, n.633, G.U. July 16, 1941, n.166 (It.); 中华人民共和国著作权法 [Copyright Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991), art. 20 (China).

196. See Gunlicks, *supra* note 69, at 668.

197. H.R. REP. NO. 101-514, at 6 (1990) (stating the purpose of the act was to "preserve the integrity of our artworks as expressions of the creativity of the artist").

198. E.g., *Golan v. Holder*, 565 U.S. 302, 326 (2012) ("Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science."); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

otherwise lack.<sup>199</sup>

Opponents take great issue with VARA's conflicts with established law.<sup>200</sup> However, balancing competing interests is an innate part of copyright law. The Copyright Clause of the Constitution recognized this inherent conflict, stating the purpose of copyright is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>201</sup> This language identifies two distinct groups—copyright owners and copyright users—whose interests are meant to be served by copyright legislation. Copyright law frequently requires courts to balance these competing interests given the facts and implications of a specific case.<sup>202</sup> When determining whether to issue the preliminary injunction sought by the 5Pointz artists in 2013, Judge Block balanced the competing interests of the artists and the property owner and concluded a preliminary injunction was not appropriate.<sup>203</sup> While conflicting interests are inevitable under VARA, the courts should be trusted to balance these interests before applying VARA.

### 3. Protects Valuable Work that May Not Otherwise Be Protected

Opponents frequently argue that VARA's explicit recognition of moral rights is unnecessary because a patchwork of existing law provides artists with the same protection.<sup>204</sup> Contract law is advocated as a better approach for addressing moral rights concerns because contract law is more compatible with a capitalist economy because it allows the market to dictate the value of moral rights. Artists can always negotiate for a moral rights provision but may need to agree to a lower sale price in exchange for such a benefit. The lack of moral rights provisions in pre-VARA art sales contracts has been argued to be evidence of artists not valuing moral rights.<sup>205</sup> However, the scarcity of moral rights provisions is more likely due to an inequality of bargaining power. The majority of artists do not have the

---

199. Cf. LANDES & POSNER, *supra* note 83, at 276 ("Artistic innovation in the past half-century has been greater in the United States than in Europe, despite Europe's having moral rights laws during this period and the United States largely not.").

200. *Supra* Section III.B.

201. U.S. CONST. art I, § 8, cl. 8.

202. E.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) ("Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests."); *Steward v. Abend*, 495 U.S. 207, 209 (1990) ("[I]t is not the role of this Court to alter the delicate balance Congress has labored to achieve.").

203. *Cohen v. G&M Realty L.P. (5Pointz II)*, 320 F. Supp. 3d 427 (E.D.N.Y. 2018), *aff'd, sub nom. Castillo v. G&M Realty L.P. (5Pointz III)*, 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

204. *Supra* Section III.B.2.

205. See LANDES & POSNER, *supra* note 83, at 277–78.

financial stability to risk the loss of a sale or major price reduction and thus do not attempt to negotiate atypical provisions like moral rights.<sup>206</sup> Furthermore, the majority of art sales are done through verbal rather than written contracts, so to protect their moral rights through contract, artists would have to incur the additional cost of a written contract. VARA ensures that more artists can enjoy the protection of moral rights without having to make a financial sacrifice.

Opponents have also argued that VARA is ineffective because it is inapplicable to many valuable artworks.<sup>207</sup> While it is true VARA cannot reach certain celebrated artworks, that should not detract from the value of the works it is able to reach. Satisfying the recognized stature standard requires evidence of the work's high artistic merit, but it is not a "masterpiece standard."<sup>208</sup> Furthermore, as pointed out by VARA opponents, moral rights can be protected by contract law. The artist or owner of a highly valued artwork outside of VARA's scope nonetheless has the bargaining power to negotiate a moral-rights or an approval-rights provision, unlike a lesser-known artist. For artists who are entitled to VARA protection, VARA can be used as a bargaining chip for the artist who could waive his or her moral rights in exchange for a higher sale price. By expressly recognizing moral rights, VARA gives an additional tool for artists that are often not in a strong negotiating position and can help preserve works that may grow to be as valuable and cherished as an O'Keefe or Basquiat work.

#### B. STREET ART IS AN APPROPRIATE MEDIUM FOR VARA PROTECTION

While the congressional hesitation to recognize moral rights is clear, the fact that VARA was nevertheless enacted ought to be given more weight. Congress knew recognizing moral rights would lead to conflicts with established law. VARA was carefully drafted, so as to limit the inevitable conflicts.<sup>209</sup> Congressional records frequently describe such limitations built into the narrow law.<sup>210</sup> Given the cautious drafting of VARA, if Congress felt further limits or exclusions were necessary, then the statute would reflect that belief.<sup>211</sup> Therefore, if a medium appears to warrant the protection of the

---

206. See *Occupational Employment and Wage Statistics, May 2020*, U.S. BUREAU OF LAB. STAT. (May 2020), <https://www.bls.gov/oes/current/oes271013.htm> [<https://perma.cc/DHM9-YMHP>] (reporting that the average annual wage of fine artists in 2020 was \$65,020).

207. See *supra* Section III.B.2.

208. *5Pointz II*, 320 F. Supp. 3d at 439.

209. See *supra* Section II.D.2 (discussing VARA's limitations further).

210. H.R. REP. NO. 101-514, at 9 (1990) ("Those hearings revealed a consensus that the bill's scope should be limited to certain carefully defined types of works and artists, and that if claims arising in other contexts are to be considered, they must be considered separately.")

211. *Castillo v. G&M Realty L.P. (5Pointz III)*, 950 F.3d 155, 167 (2d Cir.) ("In light of [Congress's] specificity, we see no justification for adopting an additional requirement not included by

narrow statute, then VARA should be permitted to offer its protection.

Copyright law has historically been a malleable body of law.<sup>212</sup> Statutes often contain language that can easily be stretched to encompass new forms of authorship ripe for copyright protection, while also creating enough of a hurdle to easily exclude forms deemed unfit for such protection.<sup>213</sup> This Section will argue that street art is ripe for VARA protection. Historically, as mediums have become valuable—particularly economically valuable—copyright law has expanded to ensure that these mediums are protected. Street art has become valuable and thus it's natural for copyright statutes, such as VARA, to utilize their flexibility to reach the medium.

Opponents of VARA's application to street art argue that street art is simply not an appropriate medium for VARA protection.<sup>214</sup> However, street art is not the fringe movement it once was; it has evolved into a valuable medium both culturally and economically. Given street art's value, the VARA application is better viewed as a "natural progression" than a lowering of VARA's standard.

#### 1. Protecting Street Art Serves the Public Interest

Graffiti has undergone a major transformation in public perception since its "urban problem" label in the 1970s. By the 1980s, some graffiti began to earn the more distinguished title of "street art" as it crossed over into the mainstream.<sup>215</sup> This categorical swing from problem to art started with recognition by individuals within the art community. Martha Cooper and Henry Chalfant began photographing New York City graffiti in the early 1970s, and in 1984 they released the best-selling book *Subway Art*.<sup>216</sup> The book helped legitimize graffiti as a mode of artistic expression and helped disseminate the concept of graffiti worldwide.<sup>217</sup>

---

Congress . . ."), *cert. denied*, 141 S. Ct. 363 (2020).

212. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) ("Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.").

213. See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 357–58 (1989) ("A copyright law cannot make sensible provision for the growth of technology unless it incorporates both the flexibility to make adjustments and the general principles to guide courts in the directions those adjustments should take.").

214. See *supra* Section III.B.2.

215. MARGO THOMPSON, *AMERICAN GRAFFITI* 65–70 (2009).

216. MARTHA COOPER & HENRY CHALFANT, *SUBWAY ART* 4 (1984).

217. Adam Mansbach, 'Subway Art' Review: A Lush New Edition of the NYC Graffiti Bible, WASH. POST (Jan. 15, 2016), [https://www.washingtonpost.com/entertainment/books/subway-art-review-a-lush-new-edition-of-the-nyc-graffiti-bible/2016/01/14/7266f746-b335-11e5-a842-0feb51d1d124\\_story.html](https://www.washingtonpost.com/entertainment/books/subway-art-review-a-lush-new-edition-of-the-nyc-graffiti-bible/2016/01/14/7266f746-b335-11e5-a842-0feb51d1d124_story.html) [<https://perma.cc/8SN8-ELPR>].

In the years since *Subway Art*, graffiti continued to evolve, and its popularity grew as the medium became a common launching pad for some of the most recognizable contemporary artists. For instance, Jean-Michel Basquiat began his career illegally painting graffiti around Lower Manhattan in the late 1970s.<sup>218</sup> By the early 1980s, he had become an art world sensation with his work showing at prodigious galleries worldwide.<sup>219</sup> In October 2020, the NBA's Brooklyn Nets announced that their uniform rotation for the 2020–2021 NBA season would include a Basquiat-inspired uniform.<sup>220</sup> A professional sports team wearing a street-art-inspired uniform on national television is strong evidence that the general public has grown to accept street art as a legitimate artistic medium.

## 2. Economic Benefits of Protecting Street Art

As street art has grown into a cultural phenomenon, its economic value has also seen a major increase.<sup>221</sup> In 2018, four of the five top contemporary artists—based on number of lots sold during the 2017–2018 auction period—began their careers as street artists.<sup>222</sup> Sotheby's, one of the world's oldest and most respected auction houses, regularly sells works by Banksy, including his painting, *Devolved Parliament*, which sold for over \$12 million in October of 2019.<sup>223</sup> Given their high market value, many of Banksy's public works must be protected by barriers or guards to prevent their theft.<sup>224</sup>

On appeal, the Second Circuit clearly stated there is “nothing in VARA that excludes temporary artwork from attaining recognized stature.”<sup>225</sup> Street art satisfies the statute's minimal durational requirement so long as it exists “for at least several minutes.”<sup>226</sup> In fact, street art's ephemerality can increase

---

218. Laurie A. Rodrigues, “SAMO© as an Escape Clause”: *Jean-Michel Basquiat's Engagement with a Commodified American Africanism*, 45 J. AM. STUD. 227, 227 (2010).

219. *Id.*

220. *Brooklyn Nets City Edition*, NBA, <https://www.nba.com/nets/shop/city-edition> [<https://perma.cc/QFN9-YSTC>].

221. Naomi Rea, *Street Art Is a Global Commercial Juggernaut With a Diverse Audience. Why Don't Museums Know What to Do With It?*, ARTNET (Aug. 7, 2019), <https://news.artnet.com/art-world/street-art-museums-1617037> [<https://perma.cc/692W-DDE8>].

222. *The Contemporary Art Market Report 2018: Artist Prices*, ARTPRICE (2018), <https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2018/artists-prices> [<https://perma.cc/ZVX8-3EJA>].

223. Scott Reyburn, *Banksy Painting 'Devolved Parliament' Sells for \$12 Million*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/arts/design/banksy-devolved-parliament-auction.html> [<https://perma.cc/496Z-SK9F>].

224. *E.g.*, *Banksy Art Garage Owner Hires Security Guards to Protect Mural*, ITV (Dec. 20, 2018, 5:15 PM), <https://www.itv.com/news/wales/2018-12-20/banksy-art-garage-owner-hires-security-guards-to-protect-mural> [<https://perma.cc/3FL4-4D7A>].

225. *Castillo v. G&M Realty L.P. (5Pointz III)*, 950 F.3d 155, 167 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

226. *Id.* at 168 (quoting *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127–28 (2d Cir.

a work's value. Signed Banksy prints are typically sold for between \$30,000 and \$319,000.<sup>227</sup> While his prints are valuable, art experts maintain that most buyers "are more interested in acquiring the graffiti pieces that first appeared as guerilla tags on buildings, rather than works on canvas."<sup>228</sup> Since street art is an ephemeral medium, these works are made more valuable by the fact that they survived despite the inherent risks of street art. Similarly, in 2018, Banksy's canvas work *Girl with Balloon* sold for \$1.4 million at a Sotheby's auction house.<sup>229</sup> Moments after the sale, the work was shredded by a hidden mechanism in its frame.<sup>230</sup> Despite the seeming destruction of the work, many experts believe the piece has only increased in value.<sup>231</sup> Like Banksy's public works, *Girl with Balloon* was made more valuable by the threat of its destruction.

The economic progress of street art has been enjoyed by more than just the artists, evidence has emerged showing that street art can increase neighborhood property values.<sup>232</sup> One building, in the Manhattan neighborhood of Chelsea, saw a 15% increase in its property value following the reveal of two Eduardo Kobra<sup>233</sup> murals on the building's exterior.<sup>234</sup> And Banksy's illicit artworks have, in some instances, doubled the value of the buildings on which they appear.<sup>235</sup> This is not meant to argue that street art increases property value in all circumstances; rather, it is meant to emphasize that street art is no longer solely associated with crime or neglect and in many circumstances may be a sign of economic prosperity or community involvement.<sup>236</sup>

---

2008)).

227. Benjamin Sutton, *Banksy Market Accelerates Following Shredding Stunt*, ARTSY (Nov. 20, 2018, 3:54 PM), <https://www.artsy.net/article/artsy-editorial-banksy-market-accelerates-shredding-stunt> [<https://perma.cc/4SDX-DE78>].

228. Nate Freeman, *Is That Banksy Worth More Now That It's Shredded? We Asked the Experts*, ARTSY (Oct. 10, 2018, 12:18 PM), <https://www.artsy.net/article/artsy-editorial-banksy-worth-shredded-asked-experts> [<https://perma.cc/Y559-6PYV>].

229. 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/we-just-got-banksy-ed-girl-with-balloon-sells-for-1-4m-before-self-destructing> [<https://perma.cc/85YN-KDEA>].

230. *Id.*

231. Freeman, *supra* note 228.

232. Elena Martinique, *What Is the Effect of Street Art on Real Estate Prices?*, WIDEWALLS (May 30, 2016), <https://www.widewalls.ch/street-art-real-estate> [<https://perma.cc/66R8-Q2ZR>].

233. Kobra is a Brazilian street artist known for his colorful portraits.

234. Martinique, *supra* note 232.

235. *E.g.*, *Banksy Graffiti Doubles Derelict Pub's Value*, TELEGRAPH (Dec. 2, 2008, 12:39 AM), <https://www.telegraph.co.uk/finance/property/house-prices/3541901/Banksy-graffiti-doubles-derelict-pubs-value.html> [<https://perma.cc/JU6A-BTXP>].

236. *Cf.* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465> [<https://perma.cc/896R-AQ64>].

### 3. Street Art Has the Historical Indicators of a Medium Ripe for Increased Copyright Protection

The defendants in the *5Pointz* litigation argued that, given its intentionally limiting language, VARA should be interpreted as narrowly as possible, thereby categorically denying protection to temporary works.<sup>237</sup> However, such a tactic is at odds with the need for flexible copyright statutes. Statutes that are too rigid are unable to adapt to technological advancements or cultural movements<sup>238</sup> whereas flexible copyright statutes are better able to handle future developments.<sup>239</sup> The historical pattern of copyright development suggests that cultural and economic factors tend to indicate when a medium warrants additional copyright protection.

The external circumstances of the expansion of copyright law to motion pictures share a lot of similarities with VARA's recent application to street art. Motion pictures broke into the public mainstream in 1895 with the public screening of a collection of the Lumière brother's short films.<sup>240</sup> However, motion pictures were not expressly granted copyright protection in the United States until 1912 through the Townsend Amendment.<sup>241</sup> Protection for motion pictures became necessary as the medium began to generate greater profits. The congressional report for the amendatory act stated that the enactment was crucial because "the production of motion-picture photoplays . . . has become a business of vast proportions."<sup>242</sup> Furthermore, by this time, motion pictures were a cultural phenomenon; large portions of the public regularly visited kinoscope parlors to watch film vignettes.<sup>243</sup> Congress interpreted the economic and cultural growth of motion pictures to signal a need for more government regulation of the medium. These historical indicators should be trusted to only appear for mediums that are ripe for such increases. Because the indicators of cultural and economic value are present in street art, VARA should be allowed to naturally progress and encompass the medium.

---

237. *E.g.*, *Cohen v. G&M Realty L.P. (5Pointz II)*, 320 F. Supp. 3d 421, 435 (E.D.N.Y. 2018), *aff'd*, *sub nom.* *Castillo v. G&M Realty L.P. (5Pointz III)*, 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

238. Litman, *supra* note 213, at 333.

239. *Id.* ("In order to answer the questions that the future will present, a statute needs flexible language embodying principles.")

240. DAVID J. SHEPHERD, *THE BIBLE ON SILENT FILM* 11 (2013).

241. Townsend Am. Act, Pub. L. No. 6303, 37 Stat. 488 (1912).

242. H.R. REP. NO. 62-756, at 1 (1912).

243. CHARLES MUSSER, *BEFORE THE NICKELODEON: EDWIN S. PORTER AND THE EDISON MANUFACTURING COMPANY* 42 (1991).

C. *5POINTZ* IS NOT A SIGN OF VARA EXCEEDING ITS INTENDED SCOPE

The *5Pointz* ruling attracted a lot of attention in the media, and, as a result, VARA has been made known to a lot more people. Artists may certainly be emboldened to bring VARA claims in the wake of *5Pointz*, but the ruling did not suggest that any of those claims would succeed. This Section will argue that VARA will not overreach because it has been limited both in plain language and judicial application. If the court can continue to only expand VARA when the indicators of natural progression are present, then VARA should only interfere with property rights when circumstances clearly warrant a lapse in the typical rules of property and contract.

1. VARA's Plain Language Greatly Constrains Its Scope

With such obvious conflicts with existing law Congress had to approach VARA's drafting delicately to minimize such conflicts.<sup>244</sup> The result of such limiting was a statute that as stated by Representative Markey, goes "to extreme lengths to very narrowly define the works of art that will be covered."<sup>245</sup> In addition to VARA's "work of visual art" requirement, limited duration, prohibition of transfer, allowance of waiver, and recognized-stature standard, the statute also includes three exceptions. Firstly, changes to a work due to the passage of time or other natural phenomena cannot be challenged under VARA.<sup>246</sup> Similarly, VARA is not applicable to reproductions.<sup>247</sup> Finally, any modification of a work that occurs due to conservation or public presentation will not be a VARA violation unless found grossly negligent.<sup>248</sup> In aggregation, VARA's requirements and exceptions greatly limit its applicability.

VARA anticipated conflicts like *5Pointz* and provided building owners with numerous ways to avoid liability.<sup>249</sup> Under VARA, artists' moral rights are waivable. With basic research or by hiring a competent attorney, a property owner would be alerted to VARA and be made aware that the rights can be contracted away through a VARA waiver.<sup>250</sup> Additionally, even if an artist refuses to waive his or her moral rights, or a VARA waiver is otherwise not obtained, a property owner may alter or destroy the artwork so long as the owner provides the statutorily required ninety-day notice.<sup>251</sup> The burden

244. *Infra* Section II.D.2.

245. H.R. REP. NO. 101-514, at 11 (1990).

246. 17 U.S.C. § 106A(c)(1).

247. *Id.* § 106A(c)(3).

248. *Id.* § 106A(c)(2).

249. *See id.* § 113(d).

250. *Id.*

251. *Id.*

then becomes the artist's to remove the artwork at his or her own cost.<sup>252</sup> VARA's fundamentally narrow scope and consideration of property owners' interests works to limit moral rights violations to clearly warranted circumstances.

## 2. Courts Have Interpreted VARA Narrowly

The construction of VARA leaves a lot of discretion to courts by omitting several elemental definitions.<sup>253</sup> Courts are aware of Congress's intent for VARA to have a limited application,<sup>254</sup> and thus far the judicial interpretation has been cautious. To illustrate, consider an unlawful destruction claim. Beyond the work qualifying as visual art and being copyrightable, an unlawful destruction claim requires the additional elements of the work being one of "recognized stature" that was destroyed or about to be destroyed.<sup>255</sup> Courts have set a high bar for satisfying these elements. "Recognized stature" requires expert testimony or documents and is determined based solely on the work at hand, the artist's stature as an individual or the stature of the artist's other works are not considered.<sup>256</sup> Additionally, to satisfy the destruction requirement, a work must have been, or is about to be, destroyed so greatly it could never be repaired. In *Flack v. Friends of Queen Catherine*, a sculptor brought suit under VARA for the destruction of her thirty-five foot statue.<sup>257</sup> Flack's argument was rejected by a court that found the statue had not been adequately destroyed, despite being left to deteriorate outdoors in a "garbage dump" because the statue was technically still repairable.<sup>258</sup>

The extent of limitations, exceptions and need for court interpretation built into VARA ensures that a court can easily dismiss a VARA claim that seeks to extend the statute too far. If the court's, thus far, careful application is indicative of the future, then VARA will continue its delicate progression at an appropriate rate.

## 3. *Blued Trees* as an Example of Ease of Dismissing VARA Claims

The *Blued Trees* movement began in 2015, and related movements have emerged elsewhere in the country since its inception. The project was

---

252. *Id.*

253. *See, e.g.*, Pollara v. Seymour, 344 F.3d 265, 269 (2d Cir. 2003).

254. *See, e.g.*, Castillo v. G&M Realty L.P. (*5Pointz III*), 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

255. 17 U.S.C. § 106A(3).

256. Scott v. Dixon, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

257. Flack v. Friends of Queen Catherine Inc., 139 F. Supp. 2d 526, 530–31 (S.D.N.Y. 2001).

258. *Id.*

conceived by “ecological artist” Aviva Rahmani,<sup>259</sup> and the site-specific piece can be found on trees in the path of the Algonquin natural gas pipeline.<sup>260</sup> Like the aerosol artists of 5Pointz, Rahmani’s work has been installed with the consent of the property owners.<sup>261</sup> The project hopes to prevent the destruction of the land by asserting that it is protected by VARA. While a VARA claim has yet to be brought by Rahmani, such a claim would ask a court to rule that moral rights may serve as shield to eminent domain.<sup>262</sup> The implications of such a ruling would be extensive, and there would likely be a huge increase in VARA claims as parties seek to prevent takings with art installations. However, VARA is constructed so that a court could easily dismiss any VARA claim that seeks to stretch the statute too far. To illustrate, consider how a court could withhold VARA protection from *Blued Trees*.

The *Blued Trees* claim could firstly fail because it is a site-specific work of art.<sup>263</sup> VARA never mentions if site-specific art is protected, which has led to a circuit split. In *Phillips v. Pembroke Real Estate*, the First Circuit Court of Appeals held that “VARA does not apply to site-specific art at all.”<sup>264</sup> The Seventh Circuit also considered site-specific art’s place under VARA and determined that “site-specific art is not categorically excluded from VARA.”<sup>265</sup> However, the Seventh Circuit also opined that site-specific art is not necessarily destroyed when moved: rather, it may be better categorized as modified.<sup>266</sup> Under the First Circuit ruling, *Blued Trees* would likely fail simply because it is site specific. Under the Seventh Circuit, it would not fail necessarily, but one could argue that the trees could be moved to another location, and thus the artwork would be modified rather than destroyed. Rahmani would then need to show that such a modification would be prejudicial to her honor. If such a modification would cause injury to Rahmani’s reputation as an artist, then she may be able to prevent the modification. However, there is very little case law specifically considering this question as pertaining to modification, so a court, not bound by precedent, would be able to easily exclude *Blued Trees*.

---

259. Audrea Lim, *How Land Art Lived and Died to Stop a Fracked-Gas Pipeline—And How It Lives Again*, VILLAGE VOICE (June 29, 2016), <https://www.villagevoice.com/2016/06/29/how-land-art-lived-and-died-to-stop-a-fracked-gas-pipeline-and-how-it-lives-again> [<https://perma.cc/5BLS-B3G6>].

260. Bajaj, *supra* note 160, at 57.

261. Shay Collins, *Aviva Rahmani’s Blued Trees and the Fight Against Pipelines*, CORNELL DAILY SUN (Dec. 3, 2015), <https://cornellsun.com/2015/12/03/aviva-rahmanis-blued-trees-and-the-fight-against-pipelines> [<https://perma.cc/43VK-JGWA>].

262. Bajaj, *supra* note 160, at 67–68.

263. Rahmani, *supra* note 16.

264. *Phillips v. Pembroke Real Est., Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

265. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 307 (7th Cir. 2011).

266. *Id.*

Alternatively, a court may allow Rahamani to bring an unlawful destruction claim but find it fails because *Blued Tress* is not of recognized stature. Generally, courts have broad discretion when determining if an artwork reaches recognized stature. It requires a showing that the work is viewed as meritorious and that its stature is recognized by art critics or the artistic community.<sup>267</sup> 5Pointz was an internationally known site that attracted artists and tourists from around the world and was featured in films and music videos.<sup>268</sup> The court's categorization of 5Pointz's artwork by no means set a low bar for the recognized stature requirement. Therefore, a court could deny Rahamani's request for VARA protection for *Blued Trees* because it is not sufficiently recognized. Additionally, the property owner can always provide the requisite notice prior to the work's destruction, and then Rahamani would have the burden to pay for its removal if she wished to preserve the work. VARA was constructed to allow the judiciary to control the statute's reach, and if a court does not feel *Blued Trees*, or any other work, should be protected by VARA, then the work can easily be excluded.

## V. RECOMMENDATION

### A. RECOMMENDATION FOR VARA PRESENTLY

Although the Supreme Court declined to hear Wolkoff's argument on VARA's constitutionality, VARA violations will likely continue to be met with criticism. However, street art has demonstrated its value both culturally and economically. Given its benefits, the United States should want to encourage street artists, particularly artists whose work is lawfully created as was the work at 5Pointz.

As for VARA itself, some parties have called for its repeal while others called for its amendment to provide more protection to property owners. However, at present, this Note does not advocate for any changes to be made to VARA. The conflict between moral rights and economic rights is inevitable, and the more extensive VARA becomes, the more such conflicts will arise. On the other hand, moral rights are important both for encouraging the creation of art and for the nation's international reputation. Additional limitations or a full repeal of VARA would not only negatively impact the United States' reputation on an international stage but may also lead to artists opting to create in a nation with more artist protection. Therefore, for now, no legislative changes need to be made to VARA and its application should be left to the courts to make a determination based on the particular

---

267. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–35 (S.D.N.Y. 1994).

268. *Cohen v. G&M Realty L.P. (5Pointz II)*, 320 F. Supp. 3d, 421 (E.D.N.Y. 2018), *aff'd, sub nom. Castillo v. G&M Realty L.P. (5Pointz III)*, 950 F.3d 155 (2d Cir.), *cert. denied*, 141 S. Ct. 363 (2020).

circumstances and potential implications.

#### B. RECOMMENDATION FOR VARA IN THE FUTURE

In the future, VARA should likely expand to provide more coverage. An expansion will be necessary as international copyright laws continue to advance and as new modes of expression develop. Whether such an expansion should come from the judiciary or Congress can only be speculated as varying circumstances may warrant different approaches.

However, VARA will only be successful if its expansion is gradual. Any major expansion or limitation of the tenuous statute will cause backlash from either the artists or the property owners. Therefore, premature expansions or sudden limitations should be avoided if these two communities want to be kept feasibly happy. Moral rights and property rights can coexist, so long as VARA is monitored to ensure it provides protection when warranted but does not reach far enough to call established legal principles into question.

To fully enjoy the benefits of VARA, some trust must be given to the public, Congress, and the courts. The public can be trusted to signify, through media consumption and economic purchases, when a medium merits VARA protection. Congress can be trusted to have fully evaluated the conflicts created by VARA prior to its enactment and to have drafted a carefully limiting law. And the courts can be trusted to consider applications and implications before applying VARA. If these parties can each be trusted to help VARA develop at a natural pace, then VARA can reach its ideal potential—only interfering with property rights when clearly warranted by cultural and economic forces.

#### CONCLUSION

The tension between moral rights and property rights has been recognized since the concept of moral rights was first introduced. The *5Pointz* ruling realized many of VARA opponents' anxieties regarding the United States' recognition of moral rights. However, as progressive as the *5Pointz* ruling may appear, the decision was a careful application of an already limited statute. VARA is a beneficial statute that works to preserve important works of art that may not otherwise be preserved. If VARA continues to be applied carefully and appropriately, then property owners, artists, and the public can reap its benefits.