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NOTE

# HIDDEN IN PLAIN SIGHT: MORAL RIGHTS, CULTURAL STEWARDSHIP, & "DESTRUCTION" AFTER *KERSON*

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## I. INTRODUCTION

Currently, in one of the main hubs of Vermont Law School,[1] the Chase Community Center, two of the room's walls are affixed with white sound-reducing panels.[2] Although an uninitiated bystander would not know it, painted onto the walls underneath these panels is a mural by one-time Vermont resident and artist, Samuel Kerson,[3] collectively titled "The Underground Railroad, Vermont, and the Fugitive Slave."[4] Kerson and a colleague developed the project to commemorate Vermont's role in the abolition of slavery.[5] In choosing the Chase Community Center, Kerson noted that the "law school's progressive mission" made it a suitable site for the content of his work.[6] The project was supported by The Puffin Foundation, an organization that awards grants to underrepresented artists and arts organizations.[7]

**Figure 7. A portion of Kerson's mural.**

Kerson's mural[8] is brightly colored and depicts a tableau of events related to America's history of slavery, specifically focused on Vermont's role as a stop on

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1 Vermont Law School is now called Vermont Law and Graduate School, but will be referred to in this Note as "Vermont Law School."

2 Richard Chused, *Mural Controversy*, 47 VT. L. REV. 535, 554 (2023).

3 Complaint and Jury Demand at 1, Kerson v. Vt. L. Sch., Inc., No. 5:20-cv-202 (D. Vt. Dec. 2, 2020).

4 *Id.* at 1.

5 Chused, *supra* note 2, at 539.

6 *Id.* at 539.

7 *Id.* at 539 n.15.

8 Valley News, *Judge: Vermont Law School Can Cover Controversial Murals*, VTDIGGER (October 24, 2021), https://vtdigger.org/2021/10/24/judge-

the Underground Railroad.[9] Some scenes depicted are disturbing. For example, one area of the mural shows a white individual—notably, with green skin—whipping enslaved, chained black individuals.[10] Others less so: a black individual leaning against a tree, cutting an apple for two children (not depicted in Figure 1). One of the children sketches a map in the area beyond the figures, likely a representation of the discreet maps drafted of Underground Railroad stops. Throughout, depictions of the United States's nefarious history of slavery are interwoven with imagery honoring important figures from this period,[11] like Frederick Douglass, John Brown, Harriet Tubman, and Harriet Beecher Stowe.[12] From the time of its first public reception, during a Martin Luther King Jr. Day celebration in 1994,[13] the mural received generally positive reviews.[14]

That was until June 30, 2020, when two rising Vermont Law School third-years—Jameson C. Davis and April Urbanowski—distributed a letter to the Law School's community calling for the mural's removal.[15] In the letter, which begins by acknowledging the national distress that emerged following the murder of George Floyd on May 25, 2020 (just one month before the letter was shared), the students recognize that though Kerson's artistic goals may have been laudable, "the best of intentions may lose luster over time as cultural attitudes and understandings change."[16] The letter notes Kerson's efforts to put a spotlight on the dark time in American and Vermont history; however, as the students write,

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vermont-law-school-can-cover-controversial-murals/ [perma.cc/4N4J-75MH]; *see supra* Figure 7.

9 Chused, *supra* note 2, at 541–43; *see supra* Figure 7.

10 *See supra* Figure 7. Kerson's choice to paint the white enslavers green is highlighted in the letter calling for the mural's removal as specifically problematic. This point is discussed further below.

11 Complaint and Jury Demand, *supra* note 3, at 5; *see supra* Figure 7.

12 Chused, *supra* note 2, at 539.

13 *Id.* at 539–40.

14 *Id.* at 539–40 (referring to a Boston Globe article from the time of the celebration). Sometime between 1994 and 2020 a label was added next to the mural describing its creation. Kerson v. Vt. L. Sch., Inc., 79 F.4th 257, 261 (2d Cir. 2023) [hereinafter *Kerson III*].

15 *Id.* at 543.

16 *Id.* at 545.

"unfortunately, not all intentions align with interpretation."[17] In particular, the students note three creative choices by Kerson that they found problematic:

> "[1] [t]he depiction of white colonizers as green, which dissociates the white bodies from the actual atrocities that occurred … [2] [t]he portrayal that "green colonizers" became white liberators, which perpetuates white supremacy, superiority, and the white savior complex … [3] [t]he over exaggerated depiction of Africans, which is eerily similar to Sambos, and other anti-black coon caricatures."[18]

The letter received endorsement from alumni, and a week after it was published, then-dean of Vermont Law School, Thomas McHenry, notified the community that the mural would be painted over, determining that it was inconsistent "with [Vermont Law] School's commitment to fairness, inclusion, diversity, and social justice."[19]

After a failed attempt to gain Kerson's consent to paint over the mural and an inspection by two art installers hired by Kerson to determine whether the mural could be removed without destroying it in the process (the installers found that it could not), Kerson filed a complaint in the United States District Court of Vermont citing a violation of the Visual Artists Rights Act ("VARA").[20] On October 20, 2021, after litigation during which the Law School submitted to the District of Vermont plans to create a set of panels to permanently enclose the murals, Judge Geoffrey Crawford denied Kerson's motion for a preliminary injunction.[21] Sometime after, Vermont Law School constructed the panels,[22] permanently covering Kerson's mural.[23] In response to an appeal filed by Kerson, the Second Circuit affirmed the

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17 *Id.* at 544—45.

18 *Id.* at 539.

19 *Id.* at 546.

20 *See* Complaint and Jury Demand, *supra* note 3, at 1.

21 *See* Kerson v. Vt. L. Sch., Inc., No. 5:20-cv-202, 2021 WL 4142268, at 5 (D. Vt. Mar. 10, 2021) [hereinafter *Kerson I*].

22 *See* Stephanie Becker, *Vermont Law School Can Hide a Controversial Mural Depicting Slavery, Court Rules*, CNN STYLE (Aug. 26, 2023), https://www.cnn.com/style/vermont-law-school-slavery-mural-lawsuit/index.html [perma.cc/R59B-XME7].

23 *See* Chused, *supra* note 2, at 557.

lower court's determination that permanently covering the mural with panels was not a violation of VARA.[24]

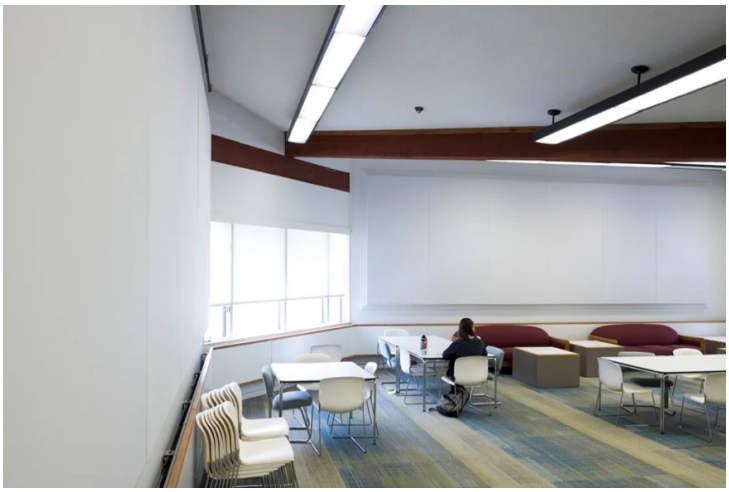

**Figure 8. The Chase Community Center after Vermont Law School covered Kerson's mural with panels.**

This Note does not take issue with the concerns raised by the law students, nor does it place judgment on the immediate reaction to cover Kerson's work due to its uncomfortable imagery, especially in the wake of the murder of George Floyd. Rather, this Note contends that the Second Circuit's August 2023 affirmance—maintaining that a permanent enclosure of an immovable mural is not "destruction" under VARA—reflects an unduly narrow and formalistic interpretation of the statute and disregards its purpose: to protect the personal, expressive, and experiential dimensions of visual art. Moreover, this Note raises the issue in *Kerson* as particularly troubling in the context of charitable educational institutions, like universities, which occupy distinct roles as stewards of culture.[25]

In response, this Note proposes interpretative guidelines that subject public-facing nonprofit art owners, like Vermont Law School, to heightened

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[24] *See Kerson III*, 79 F.4th at 274.

[25] *See* Habiba Hopson, *Who Gets to Decide?: Cancel Culture and Museums*, TOPICAL CREAM (Nov. 11, 2024), https://topicalcream.org/features/who-gets-to-decide-cancel-culture-and-museums/ [perma.cc/9UHG-3QEX] ("Art allows us to visualize the good, the bad, and the ugly, and museums, and teaching institutions, broadly provide a public environment to not only categorize and store these relics, but also to make connections between, argue against, foster dialogue around, and venerate art history.").

scrutiny, in line with the purpose of VARA and commensurate with these institutions' educational missions.[26] Rather than endorsing blunt measures such as permanent enclosure, the framework proposed by this Note encourages contextualization or reversible solutions, such as movable coverings, preserving both art owners' freedom to manage their property and artists' moral rights.

The next Part of this Note surveys the history of moral rights in the United States as well as European precursors to VARA. This Part provides a brief overview of the historical basis for moral rights stemming from nineteenth-century France and a survey of the theories from which moral rights have developed. This Part also reviews important developments leading up to the enactment of VARA, including the United States's decision to become a party to the Berne Convention.[27] Part III of this Note provides a detailed breakdown of VARA's terms. Part IV then summarizes the Second Circuit's Opinion in *Kerson v. Vermont Law School*. Part V proposes guidance to future courts interpreting VARA.

## II. MORAL RIGHTS, HISTORICALLY

Copyright protects the rights of creators to profit from their works and to authorize others to do the same.[28] By reserving certain rights associated with works of original authorship—like the right to reproduce a work, prepare derivatives of a work, and perform it publicly[29]—the Copyright Act preserves the economic potential of works for their authors.[30] Copyright protection is automatic from the moment a work is fixed in a tangible form.[31]

Moral rights, on the other hand, reserve the non-economic, personal rights associated with creative work.[32] VARA, although couched within the

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[26] Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994)

[27] Although upon signing the Berne Convention, the United States claimed it was already in compliance with Berne's regulations and did not need to update any of its laws, this determination was unsatisfactory to most creators and, after ample advocacy, VARA was enacted.

[28] *See What is Copyright?*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/what-is-copyright/ [perma.cc/DS8H-B9HA].

[29] *See* 17 U.S.C. § 106(1)–(2), (4).

[30] *See What is Copyright?*, *supra* note 28; *see* U.S. CONST. art. I, § 8.

[31] *See What is Copyright?*, *supra* note 28.

[32] U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 6 (2019) [hereinafter AUTHORS, ATTRIBUTION, AND INTEGRITY].

economically-driven Copyright Act and sharing in its definitions section,[33] was intended to reserve the non-economic rights of artists.[34] Unlike copyright, which can be transferred and extends beyond the death of the author, moral rights cannot be transferred and expire at the author's death.[35]

While this Note specifically analyzes VARA, the moral rights provision of the Copyright Act adopted in 1990, protection of creators' moral rights exists throughout federal and state law.[36] Moral rights protection can be found in substance, though not in name, in First Amendment protections, rights of publicity, trademark law, and, explicitly, in state moral rights provisions.[37]

### A. THE THEORY BEHIND MORAL RIGHTS

Moral rights law has antecedents dating back to nineteenth-century France.[38] Some legal scholars trace its origins to the philosophy of individualism that percolated the French Revolution.[39] In its genesis, moral rights encapsulated the notion that any embodiment of creative expression was a tangible extension of the author's personality, giving that author an inherent right to control the existence and attribution of that expression, irrespective of legal title or economic potential.[40]

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33 17 U.S.C. § 101.

34 *Id.* § 106A.

35 *Id.* § 106(A)(d)(1).

36 AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 24–25. The United States Copyright Office's 2019 report on moral rights noted multiple areas of the law that protect moral rights. In the report, this protection regime is referred to as a "patchwork," and includes areas of the law such as First Amendment, trademark, and state regulations regarding the right of publicity.

37 *Id*. at 4–5, 28; *see also* CAL. CIV. CODE § 987 (1995).

38 Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. UNIV. L. REV. 945, 963 n. 84, 968 (1990).

39 Jean-Francois Bretonniere & Thomas Defaux, *French Copyright Law: A Moral Complex Coexistence of Moral and Patrimonial Prerogatives*, BUILDING AND ENFORCING INTELLECTUAL PROPERTY VALUE 83 (2012).

40 *See id.*

French and German jurists[41] conceptualized the law protecting authors' rights as twofold: first, an author holds alienable property rights to a work, primarily serving to retain economic opportunity for the author (encompassed by copyright law), and second, an author holds innate and inalienable rights to the survival of a work and its association with its author, encompassed by moral rights.[42] Legally, moral rights tend to be divided into two categories: rights of integrity and rights of attribution.[43]

Moral rights originate from the belief that artworks are conduits of their creators' deep emotional drives.[44] Professor Roberta Kwall summarizes this connection between author and creation as follows:

> This intrinsic dimension of creativity explores the creative impulse as emanating from inner drives that exist in the human soul. These drives do not depend upon external reward or recognition but instead are motivated by powerful desires for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author. When a work of authorship is understood as an embodiment of the author's personal meaning and message, the author's desire to maintain the original form and content of her work becomes manifest.[45]

Moral rights law extends rights to authors on the basis of a spiritual connection between themselves and their creative expression and seeks to protect this connection legally.[46] VARA protects the manifestation of the work as an extension of the artist's soul.[47] Artworks—as "outward expression[s] of the artist's

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41 William Strauss, *The Moral Right of the Author*, 4 AM. J. COMPAR. L. 506, 506 (1955).

42 *Id.*

43 Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 99, 132 (1997); *see* 17 U.S.C. § 106A(a).

44 ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW IN THE UNITED STATES xiii (Stan. U. Press 2009).

45 *Id.*

46 *Id.*

47 *Id*. xiii-xvi (using the term "spiritual" to describe a relationship that is "characterized by a dual sense of self-connectedness to the work, and self-imposed distance with respect to the work").

own feeling"—are manifestations and extensions of the artist's personality.[48] As discussed below, this concept challenges core principles of United States property law and is, in part, why it took so long to enact explicit federal moral rights protection in the United States.[49]

### B. THE BERNE CONVENTION

The greatest push to enact VARA was the United States's 1989 decision to enter the Berne Convention for the Protection of Literary and Artistic Works.[50] The Berne Convention proposes guidelines for the protection of creative works and the rights of their authors in member nations.[51] The Berne Convention introduced many concepts of authorship that have become core features of the United States's system of copyright.[52] These concepts have crafted a broad and strong system of copyright protection for authors in the United States.[53] The following Section focuses on the Berne Convention's reservation of moral rights.

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[48] George W. Beiswanger, *The Esthetic Object and the Work of Art*, 48 PHIL. REV. 587, 595, 600 (1939) ("In either case, the material work of art is but the instrument, the means by which the actual *work* of art is rounded out or initiated. The work of art, in short, is something larger than the products of art-technology; it is something rather which takes place in the experience of the artist and in the experience of the spectator … 'the actual work of art is what the product does with and in experience.'").

[49] *See* Mary Daniel, *Not a VARA Big Deal: How Moral Rights, Property Rights, and Street Art Can Coexist*, 94 S. CAL. L. REV. 927, 929–30 (2021) (expanding on the U.S.'s delay in considering moral rights associated with copyrights).

[50] *See* Simon J. Frankel, *VARA's First Five Years*, 19 HASTINGS COMMC'NS & ENT. L. J. 1, 8–9 (1996) (exploring the chain of events that led the way to Congress's enactment of VARA).

[51] *See* Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*. Sep. 9, 1886, *as revised at Paris* on July 24, 1971, *amended on* September 28, 1979, S. Treaty Doc. No. 99-27 (1986).

[52] *See* Samuel Jacobs, *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. TELECOM. & TECH. L. REV. 169, 182–84 (2016) (noting the Berne Convention's practical role in shaping copyright, specifically authorship, in the U.S.).

[53] *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51. For example, the Berne Convention set forth the notion of protection from the moment a work is "fixed" in physical form, releasing authors from

Article *6bis* of the Berne Convention sets forth moral rights for authors of all creative works, not just visual art.[54] The revised Paris 1971 version of Article *6bis* breaks down consideration of moral rights into three sections.[55] The first section sets forth the substantive provisions of the law: authors have a right to claim authorship over their works and to object to any distortion, mutilation, modification, or "derogatory action" to their works that would be prejudicial to their reputation.[56] This right also exists in the inverse, conferring upon the author the right to remain anonymous.[57]

The second section sets forth the duration of moral rights and describes who may exercise an author's moral rights.[58] Although this section explains that authors' rights after death shall be maintained "at least until the expiry of economic rights"—in the United States, at the time of its ascension to Berne, fifty years—this section leaves open the option for each individual country to curtail moral rights at an author's death (as is the case with VARA protection).[59] Furthermore, this section grants moral rights not only to the author but to the "persons or institutions authorized by the legislation of the country where protection is claimed."[60] The final section of Article *6bis* leaves the specific determination of damages up to each individual country.[61]

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the requirement that they must register their work before receiving protection.

54 *See generally* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51; *see also* Paul Geller, *Comments on Possible US Compliance with 6bis of the Berne Convention*, 10 COLUM.-VLA J. L. & ARTS 665, 665 (1986); Pollara v. Seymour, 344 F.3d 265, 269–70 (2d Cir. 2003) (discussing that VARA only protects fine art).

55 *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51, art. *6bis*.

56 Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51, art. *6bis*.

57 Damich, *supra* note 38, at 949–50 (discussing that the right of attribution gives the author the ability to control the association of their name with their work).

58 *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51, art. *6bis*.

59 *Id.*

60 *Id.*; *see also* AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 144 (calling on Congress to clarify how shared moral rights function under VARA).

61 *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51, art. *6bis*.

Once the United States acceded to the Berne Convention in November 1988, the Convention entered into force on March 1, 1989.[62] Notably, the existence of moral rights in the Berne Convention was a significant sticking point in the United States's ratification of the treaty.[63] Eventually, however, the United States would become party to the Berne Convention, formally bringing moral rights into the United States's copyright law, albeit only for works of visual art.[64]

### C. ART IN THE UNITED STATES BEFORE VARA

Although the United States declared that it already had adequate coverage of the moral rights enumerated in the Berne Convention prior to 1988, instances of unsanctioned art destruction before Berne demonstrate both the historic need for explicit moral rights protection in the United States and offer examples of potential dangers when art owners are left as the sole decision-makers regarding the existence of a work.[65]

One particularly well-documented instance of art destruction before the enactment of VARA occurred in Allegheny, Pennsylvania and concerned a mobile constructed by iconic abstract sculptor Alexander Calder. In 1959, Calder's mobile, white and black with a halo of gliding arm-like fans characteristic of the sculptor's work, was installed in the rotunda of the then-new Greater Pittsburgh Airport.[66] However, soon after installation, it fell into the hands of the airport's maintenance workers.[67] Due to space limitations in the rotunda where Calder's mobile hung, the maintenance workers weighted some of the mobile's arms and welded

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62 H.R. 4262, 100th Cong. (1987); *see also* Frankel, *supra* note 50, at 8.

63 *Andrea Wright, Breakout Session: Getting Moral Rights Right*, 2 J. COPYRIGHT EDUC. & LIBRARIANSHIP 1, 1 (2017); AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 22 (describing the extensive debates at the time over whether moral rights already existed within U.S. law and whether they were compatible with the U.S. legal framework).

64 *Id*.

65 Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 478 (1990).

66 Philip B. Hallen, *Local Dispatch / Airport Art is Not Always a Pretty Picture: The Story of Calder's 'Pittsburgh,'* PITTSBURGH POST-GAZETTE (Jan. 4, 2008), https://www.post-gazette.com/news/portfolio/2008/01/04/Local-dispatch-Airport-art-is-not-always-a-pretty-picture-The-story-of-Calder-s-Pittsburgh/stories/200801040158 [perma.cc/NFQ3-7TRY].

67 *Id.*

others.[68] The mobile was also attached to an electric motor, which spun all of its limbs in unison rather than allowing each to float individually, as Calder intended.[69] Perhaps most egregiously, the workers repainted the mobile orange and green—Allegheny County's official colors.[70] Despite Calder's frustration at the blatant disregard for his work, he had no available legal recourse.[71]

Another oft-cited instance of unsanctioned art destruction concerns Richard Serra's *Tilted Arc*, a massive steel curved structure that cut through New York City's Federal Plaza.[72] Constructed in 1981 following a commission by the General Services Administration, the sculpture was quickly met with frustration by workers who traversed Federal Plaza each day, whose commutes had become longer due to maneuvering around the sculpture.[73] Following a successful petition by these workers, on March 15, 1989, the sculpture was cut into three parts by the GSA and removed, stored in pieces, in a warehouse.[74] Like Alexander Calder, Richard Serra was disturbed by this blatant and permanent disregard of his creative expression, yet did not have sufficient legal recourse, as the GSA had lawful title to the work.[75] Had VARA been enacted at the time, these artists—among the most influential of the modern era—might have had a legal avenue to prevent the destruction of their works or seek recourse afterward.

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68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*; Alan E. Katz, *What the Visual Rights Act Does and Doesn't Protect*, ART BUSINESS NEWS (June 3, 2015), https://artbusinessnews.com/2015/06/know-your-rights/ [https://perma.cc/4UYF-NVT3]. In 1979, approximately three years after the sculptor's death, Calder's mobile was moved to a new location and restored, where it still hangs today. *Pittsburgh by Alexander Calder*, PGH MURALS (Dec. 4, 2015), https://pghmurals.blogspot.com/2015/12/pittsburgh-by-alexander-calder.html [https://perma.cc/5FVL-ZVN3].

72 Jennifer Mundy, *Lost Art: Richard Serra*, TATE, https://www.tate.org.uk/art/artists/richard-serra-1923/lost-art-richard-serra [perma.cc/D34N-LVBM].

73 *Id.*

74 *Id.*

75 Richard Serra, *The Tilted Arc Controversy*, 19 CARDOZO ARTS & ENT. L.J. 39, 40 (2001). While the United States had already adopted the Berne Convention by 1989, its principles were not yet adopted into United States law.

## III. THE VISUAL ARTISTS RIGHTS ACT

In 1989, following debate and hesitation, the 101st Congress implemented moral rights into United States copyright law.[76] VARA, codified at 17 U.S.C. § 106A, is separated out into two distinct areas in which authors hold non-economic rights in their works: rights of attribution and rights of integrity.[77] This Note focuses on the right of integrity. While the right of attribution arises in litigation on occasion, it is not at issue in *Kerson v. Vermont Law School,* nor is it central to the judicial guidance this Note recommends.[78] Similarly, while the duration[79] of VARA and related transfer and waiver rights[80] pose interesting questions regarding the timeline of protection imposed by VARA, neither of these rights are at issue in Kerson's appeal and are therefore out of the scope of this Note.

Throughout the following Sections, I compare VARA to a state moral rights statute, the California Artist Preservation Act ("CAPA").[81] CAPA provides a useful counterpoint to understand VARA's scope of protection

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[76] Ginsburg, *supra* note 65, at 478.

[77] 17 U.S.C. § 106A (1990).

[78] *See* 17 U.S.C. § 106A(a)(1)–(2). The right of attribution grants the author the right to claim authorship over her work, to prevent the use of her name as the author of work she did not create and prevent the use of her name as the author of a work in the event of a distortion, mutilation, or modification which would be prejudicial to her reputation.

[79] *Compare* 17 U.S.C. § 106A(d)(1)–(3) *with* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51, art. *6bis*(2). In a notable departure from Berne, VARA's protections expire upon the death of the author. *Id.* In the case of a joint work, the rights conferred by VARA last as long as the life of the last surviving author. *Id.*

[80] *See* 17 U.S.C. § 106A(e)(1). The statute does not allow for the transfer of moral rights but allows authors to waive moral rights in express statements such as waivers made in written instruments signed by the author. *Id.* A transfer of a copy of a work does not constitute such a waiver and does not constitute a transfer of moral rights associated with the work. A point of concern and scholarship, though not at issue here, is the last sentence of this clause which states that the choice of one artist to waive moral rights to a joint work, waives those rights for all artists involved.

[81] *See* CAL. CIV. CODE § 987 (1995).

A. SCOPE OF PROTECTION.

Congress intended VARA to exist outside of the economic rights protected by Section 106 of the Copyright Act.[82] Rather than protect an artist's economic gain from his or her work, VARA was crafted to foster a climate of artistic worth to encourage artists to scale the arduous act of creation, for public benefit.[83] In this vein, VARA grants rights that derive from the artist's relationship to his work: attribution and integrity.[84] The right of integrity is twofold.

First, authors of creative works may invoke the right of integrity to "prevent the use of [the author's name] as the author of the work … in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to [the artist's] honor or reputation."[85] This right is granted regardless of how the work came to be distorted, mutilated, or modified.[86] For example, a detrimental modification resulting from the passage of time or the inherent nature of the medium, while not a cause of action under the "intentional acts" section of the statute (below), would give an artist grounds to request the removal of her name from association with the distorted work.[87] However, modification resulting

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82 *See* 17 U.S.C. § 106 (1976). Exclusive rights in copyrighted works include the right to reproduce copyrighted works in copies or phonorecords, prepare derivative works based upon the copyrighted work, distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; to perform the copyrighted work publicly; to display the copyrighted work publicly; and to perform a sound recording by means of digital audio transmission. *Id.*

83 AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 76 (citing H.R. REP. NO. 101-514, at 5–6 (1990) ("Congress intended the right of integrity to further the public interest in preserving and protecting works of visual art and thereby preserving the integrity of our shared culture")).

84 Damich, *supra* note 38, at 994.

85 17 U.S.C. § 106A(a)(2).

86 *See* Mass. Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38, 56 (1st Cir. 2010) (in which the Museum did not include Büchel's name next to his unfinished work, as a preemptive measure, given the wide berth of this clause).

87 17 U.S.C. § 106A(c)(1); *see also* Laurel Caruso & Kate Lucas, *Navigating VARA and Tricky Contracts: The Legal Battle Over Mary Miss's "Greenwood Pond: Double Site,"* GROSSMAN LLP (July 6, 2024), https://www.grossmanllp.com/Navigating-VARA-and-Tricky-Contracts-Mary-Miss [https://perma.cc/4HNS-LB69] (where the distortion of a work arises from natural causes, like erosion or rain—as was the case for an

from conservation or presentation decisions (like choice of lighting or placement of a work) is not cognizable under VARA unless the product of gross negligence.[88]

Second, the right of integrity allows an author to prevent intentional acts of distortion, mutilation, or modification to her work that would be prejudicial to her reputation.[89] Professor Jane Ginsburg suggests that this clause sets a relatively wide net for actionable modification under VARA.[90] Should an artist object to a modification that has already occurred—regardless of whether the institution or individual who modified the work believed such modification was harmless—the artist may have a cause of action.[91] This right protects all authors of visual works, regardless of notoriety.[92]

Authors of "works of recognized stature," however, receive enhanced protection. For these works, VARA prevents any intentional or grossly negligent *destruction*.[93] It is perhaps counterintuitive that relatively unknown works receive protection against modification but not full destruction. One could argue that only works of relative notoriety—works of "recognized stature"—should receive protection against the "lesser" injury of a modification, while all works, regardless

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installation by the artist Mary Miss at the Des Moines Art Center—the artist likely has no cause of action under VARA).

88 17 U.S.C. § 106A(a)(c)(2) (1990); *see also* Kerson v. Vermont L. Sch. Inc., No. 5:20-cv-202, 2021 WL 11691249, at *5 (D. Vt. Oct. 20, 2021) [hereinafter *Kerson II*] (referring to this carve-out as the "presentation exception").

89 17 U.S.C. § 106A(a)(3) (1990). VARA does not set forth examples of when an act of distortion would be prejudicial to an author's honor but, rather, seems to leave that metric up to the author to determine.

90 Ginsburg, *supra* note 65, at 483 ("failure to disclose alterations and the artist's objections to them implicitly associates her with a mangled or miscast version of her work, and thus could [result in] prejudice [to] her honor or reputation as an artist").

91 *Id*. at 482–83 (recommending a disclosure requirement—which, at the time of writing this Note, has yet to be implemented—that would require the modifying institution to note that an artist objected to a given modification or to the context in which the artist's work was set). Such a disclosure requirement, according to Ginsburg, would serve the "artist and public alike" by protecting the artist from full association with a representation that artist at least in part disowns, and ensuring that the public is not misled. *Id.*

92 *See Pollara*, 344 F.3d at 268 (distinguishing the limited scope of the destruction clause from the broad protection of the modification or mutilation clause).

93 17 U.S.C. § 106A(a)(3). The term "works of recognized stature" is not defined in the statute.

of notability, should be protected from the more significant injury of destruction. It is possible that this enhanced protection developed from economic concerns, despite Congress's stated intention that VARA's protection be distinct from the protection of the economic potential of works, as covered by the rest of the Copyright Act.[94]

Given that VARA does not provide a definition of "recognized stature,"[95] CAPA offers a useful counterpoint.[96] CAPA explicitly describes preservation for the public good as the basis for the statute's protection of "recognized" works.[97] Moreover, by adopting a qualitative criterion—"recognized stature" in VARA and "recognized quality" in CAPA—the statutes shift the focus of protection away from the artist's personal reputation and toward preservation based on a work's significance to society. This is a marked difference from the Berne Convention's protection without such qualifiers.[98] Even more so than CAPA, VARA's choice of language—"stature" rather than the aesthetics-minded "quality"—encourages that precedence be given to the social and cultural importance of a work individual aesthetic preferences. Courts have previously held that adopting a valuative term such as "recognized stature" or "recognized quality" functions as a gate-keeping mechanism afforded only to those works that art experts, the art community, or

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[94] *Id*. § 106A(a) (stating that the moral rights that follow are "independent of the exclusive rights provided [in the rest of the Copyright Act]"); *see also* Hansmann & Santilli, *supra* note 43, at 105 (suggesting that, despite VARA's first clause stating otherwise, the "recognized stature" clause may have been constructed to protect the profitability of notable works, given that an artist whose work is known is more likely to be relying on economic gain from that work and hence should receive a higher degree of protection).

[95] *See* Castillo v. G&M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020) (in which the court was tasked with determining what "recognized stature" is and its specific contours); *see also* AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 144 (recommending Congress provide clarification regarding how courts should interpret the "recognized stature" requirement).

[96] *See* CAL. CIV. CODE § 987 (defining qualifying art as art of "recognized quality").

[97] *See id.* § 987(1). CAPA explicitly considers the public interest in preserving the integrity of cultural and artistic creations. *Id.*

[98] *Compare* 17 U.S.C. § 106A *and* CAL. CIV. CODE § 987 (1995) *with* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 51.

society in general view as possessing stature.[99] Requiring a determination of stature reinforces the preservative intent of VARA.[100]

Furthermore, according to its definition of protected work, VARA only protects works in limited editions—works that are likely created explicitly for viewership.[101] VARA draws its definitions from Section 101 of the Copyright Act.[102] This section defines a "work of visual art" as a painting, drawing, print, or sculpture existing in a single copy, in a limited edition of 200 copies or fewer, or a still photographic image "produced for *exhibition purposes only*," also in a limited edition.[103] Zeroing in on works that exist only in single physical copies reinforces the likelihood that VARA was, at least in part, constructed to preserve works of art intended for ruminative reflection in places of public exhibition, most commonly charitable organizations with educational missions like museums, libraries, and universities.

### B. LIMITATIONS ON PROTECTION

Despite using the term "author" (a term most associated with written works), VARA only contemplates visual artists.[104] While the use of the term "author" was likely to mirror the language of the Berne Convention, unlike Berne,

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99 Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994) (finding that the recognized stature requirement is a gate-keeping mechanism, affording protection only to works of art that the art community or society views as possessing stature); *see also* AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 78-81 (recommending Congress develop guidelines to analyze this criterion).

100 Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994) (using the recognized stature requirement to affect the "preservative goal" of VARA). Preservation, by definition, centers on the importance of a work to society and culture. George Hale, *New Theory Suggests We're All Wired to Preserve Culture*, VITAL RECORD (June 6, 2025), https://vitalrecord.tamu.edu/new-theory-suggests-were-all-wired-to-preserve-culture/ [https://perma.cc/8XED-8Z3G].

101 *See* Ginsburg, *supra* note 65, at 480–81.

102 *See* 17 U.S.C. § 101 (1976).

103 *See id.*

104 *Id.* § 106A(a).

VARA does not protect creators other than those of visual works.[105] Rather, like CAPA, VARA protects visual artists alone.[106]

By referring to the creator as "artist," CAPA invokes the conventional association between an artist and a discrete physical object.[107] VARA, on the other hand, refers to the creator of the protected work as an "author," invoking the concept of the "auteur" or a genius responsible for a work's distinctive character and soul.[108] In other words, "artist" and "author" suggest different things.[109] An artist is usually associated with an object, whether it be a painting, sculpture, or film. An author, on the other hand, is the creator of an idea. Using the term "author" encompasses not only the tangible work but also its expressive, experiential, and even spiritual dimensions.[110] By using the term "author," Congress refers to a broad scope of creation and, therefore, protection under VARA.[111] This word choice is in line with the theoretical basis for moral rights, which protects creative works due to the belief that they are intangible and amorphous extensions of their authors' personalities.[112] However, courts have been hesitant to protect the scope of creation that "authorship" suggests. Instead, since its enactment, courts have limited VARA protection to a narrow range of

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105 *Compare id. with* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 65, art. *6bis*(2); *see also* Ginsburg, *supra* note 65, at 480 (explaining that this narrowing of moral rights came from hesitation that the law was too broad or could conflict with the scope of United States copyright law, specifically with publication rights).

106 17 U.S.C. § 106A(a) (limiting offered protections to "author[s] of a work of visual art" alone).

107 CAL. CIV. CODE § 987(b)(1).

108 17 U.S.C. § 106A(a)(2); *see also* Peter Schepelern, *The Making of an Auteur*, *in* VISUAL AUTHORSHIP: CREATIVITY AND INTENTIONALITY IN MEDIA 103, 103 (Torben Kragh Grodal, Bente Larsen, & Iben Thorving Laursen eds., 2005). (discussing the concept of the "auteur" or "artist-in-control").

109 *See* Damich, *supra* note 38, at 964 (suggesting that "author" may have been used because it was already defined in Title 17, despite its incongruence with the scope of VARA).

110 *See* CONSTANTINE SANTAS, RESPONDING TO FILM: A TEXT GUIDE FOR STUDENTS OF CINEMA ART 18 (2001) (describing the auteur, or author, as someone who "controls all aspects of" their creative endeavors).

111 *See* Martin A. Roder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 562 (1940).

112 *See id.*

permanent, literal acts of destruction to the physical aspects of the author's work, most often manifesting in the literal painting over a work.[113]

## IV. THE SECOND CIRCUIT'S DECISION IN *KERSON V. VERMONT LAW SCHOOL*

In its Opinion, the Second Circuit discusses both whether Vermont Law School's actions constitute destruction under VARA and, if not destruction, whether the Law School's measures to conceal the mural are cognizable modifications. The Opinion also addresses the public presentation exception (which carves out moving a work to a less desirable location or staging it in a way the artist finds unfavorable from a legally relevant modification).[114] However, the discussion below focuses primarily on the Second Circuit's analysis of destruction, as its shortcomings are the focus of this Note and the impetus for the judicial recommendations discussed below.

Only works of recognized stature are protected against destruction.[115] As such, courts must first establish stature before deciding whether destruction occurred. However, the Second Circuit avoids wading into the muddy waters of "recognized stature."[116] Instead, it follows the lower court in assuming the mural qualifies as a work of recognized stature.[117] Omitting this analysis sets the court up for a limited consideration of what constitutes destruction of the murals, as the court avoids defining the bounds of Kerson's work and, therefore, avoids considering the full scope of acts that may "destroy" it.

The Second Circuit's destruction analysis is brief and uses a dictionary definition, as is typical of contemporary statutory interpretation,[118] of "destroy" to guide its discussion.[119] Citing Black's Law Dictionary, as the Copyright Act does

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113 *See* Castillo v. G&M Realty L.P., 950 F.3d 155, 165–66 (2d Cir. 2020) (outlining forms of cognizable destruction).

114 *See Kerson III*, 79 F.4th at 284; *see also* 17 U.S.C. § 106A(c)(2).

115 *See* 17 U.S.C. § 106A(a)(3)(B).

116 Such analysis would result in addressing head-on the public's interest in the work.

117 *See Kerson III*, 79 F.4th at 262 (reviewing de novo where the district court assumed the works were ones of recognized stature).

118 Austin Peters, *Are They All Textualists Now?*, 118 NW. UNIV. L. REV. 1201, 1231 (2024) (noting that textual interpretation through use of dictionaries is the preeminent interpretative tool used by courts today).

119 *See id.* at 266.

not define "destroy,"[120] the court finds that Vermont Law School's permanent enclosure of Kerson's murals did not "damage (something) so thoroughly as to make unusable, unrepairable, or nonexistent; to ruin."[121] The court also references the definition of "destroy" used by the Southern District of New York in *Board of Managers of Soho International Arts Condo v. City of New York*, 2005 WL 1153752, which defines destruction as "to tear down or break up."[122] Doing so leads the court to conclude neatly: "[i]ndeed, the [panels enclosing the mural were] designed so as not to touch the Murals and thus did not physically alter them whatsoever, let alone ruin them or render them unrepairable."[123] Upon finding no destruction to the mural's paint strokes, the court determines that destruction, plainly, has not occurred.[124]

Regarding modification, the court explains that modification is only relevant in instances where the modification adulterates the viewing experience of a work that remains, at least in part, within public view.[125] If the work is fully covered, the court explains, it does not matter whether the work is modified because modification only applies "to perceptible changes to an artwork *that affect how the work is viewed*."[126] The court does not consider how permanently covering a work that was once in public view for nearly thirty years, well-known to passersby, and well-documented in the media,[127] could negatively impact the artist's reputation. Instead, the court concludes its analysis of modification with the physical aspects of the work.

According to the Second Circuit, destruction and modification are purely aesthetic questions, and an artist's reputation may only be marred by changes to

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120 *See* 17 U.S.C. § 101.

121 *Kerson III*, 79 F.4th at 266.

122 *Id.* (citing *Board of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 Civ. 1226, 2005 WL 1153752 (S.D.N.Y. May 13, 2005), which concerned the permanent removal of a sculpture from the outer wall of a building in New York City).

123 *Id.*

124 *See id.* ("VLS plainly did not destroy the Murals by erecting a barrier shielding them from view.").

125 *Id.* at 267 (finding that "'modification' as used in VARA connotes a change … that somehow adulterates the viewing experience, presupposing that at least some portion of the work remains visible").

126 *Kerson III*, 79 F.4th at 267–69.

127 *See* Chused, *supra* note 2, at 539–40 (referring to a Boston Globe article from the time of the celebration).

his aesthetic choices, not by the anxious coverage of his work by the university housing it.[128] Because the court sees no modification to the face of the mural, it finds that it does not matter whether the artist's reputation or honor was prejudiced.[129]

The Opinion concludes by finding that Kerson's expert witness did not raise a sufficient issue of fact regarding whether the panels permanently constructed around his murals pose a tangible environmental threat to the works.[130] Thus, the Second Circuit affirmed the District of Vermont's holding that destruction or, in the alternative, modification did not occur.[131]

## V. LEGAL ANALYSIS & POLICY RECOMMENDATIONS

The Second Circuit raises a key point in its Opinion: VARA balances an author's right to protect the integrity of his work with an art owner's right to control the objects they own.[132] However, the court avoids considering the policy matters that stabilize this balance. Rather than identifying the protection against destruction of works of recognized stature as a protection developed, in significant part, to foster artistic creation for the public good,[133] the Second Circuit limits its

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128 *See Kerson III*, 79 F.4th at 267; *see also* Jo Lawson-Tancred, *Vermont Law School Can Conceal Murals Deemed Racially Offensive, Against the Artist's Wishes, a Circuit Court Ruled*, ARTNET: NEWS (Aug. 21, 2023), https://news.artnet.com/art-world/sam-kerson-murals-can-be-covered-up-court-rules-2352198 [perma.cc/AS5N-JXQ7] (describing the murals as offensive and quoting a school administrator: "All of a sudden I said to myself, 'that mural has got to go'").

129 *See Kerson III*, 79 F.4th at 269.

130 *See id.* at 271–73.

131 *See id.* at 274 (2d Cir. 2023). The court also addresses Kerson's 17 U.S.C. § 113(d) argument. 17 U.S.C. § 113(d) carves out protection for artworks incorporated into buildings in cases where (1) the removal will cause destruction and (2) the author has consented to the installation of the work in a written instrument in which the owner of the building and author acknowledged that such installation may be subject to future distortion. Here, however, Vermont Law School and Kerson did not enter into any such agreement, meaning Kerson's work is not subject to the 113(d) carve-out provision.

132 *See Kerson III*, 79 F.4th at 260.

133 AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 76 ("Congress intended the right of integrity to further the public interest in preserving and

analysis to definitions external to the statute. In doing so, the court finds that VARA protection is only violated if a work is painted over or physically marred.[134] Although this method is consistent with contemporary approaches to statutory interpretation,[135] it exposes a critical gap in the Second Circuit's application of VARA: the failure to account for the destruction of aspects of the work that exist outside of its four corners, such as its experiential qualities. By focusing narrowly on physical damage, the court overlooks the fact that an artist's moral rights may be violated when the audience's encounter with the work is fundamentally altered or eliminated.[136]

As the following Sections illustrate, if VARA is to meaningfully protect works of recognized stature from destruction, "destruction" must be understood more broadly than physical defacement alone. Accordingly, this Part offers judicial guidance for interpreting "destruction" in a manner that better safeguards artistic integrity. Recognizing the difficulty of applying a broad definition of destruction in all cases, this Note limits its guidance to disputes between artists and public-facing charitable institutions—namely museums and universities—that house their work, as exemplified by *Kerson v. Vermont Law School*. Such a proposal is grounded in the evolving role of museums and universities as mission-bound stewards of culture—institutions whose statutory and self-imposed educational mandates position them as custodians of complicated artworks and public dialogue, capable of withstanding broad moral rights protection. In conclusion, this Note recommends that Congress codify the unique status of mission-bound art owners within much-needed guidance regarding how to interpret VARA's "destruction" clause.

### A. ANALYZING "DESTRUCTION" FOR WORKS OF RECOGNIZED STATURE

This Section argues that "destruction" of recognized works under VARA must encompass not only physical obliteration of an art object but also acts that permanently eliminate the public's ability to experience the work. By treating permanent concealment as categorically distinct from destruction, the Second Circuit collapses VARA's moral rights protections into a purely physical inquiry. This ignores the reality that a work of visual art, particularly one of recognized

protecting works of visual art and thereby preserving the integrity of our shared culture.").

134 *See Kerson III*, 79 F.4th at 266.

135 Peters, *supra* note 118, at 1231 (noting that textual interpretation through use of dictionaries is the preeminent interpretative tool used by courts today).

136 *See* 17 U.S.C. § 106A(a)(3)(B).

stature, may be effectively destroyed when its owner renders it permanently inaccessible to viewers.

Although unaddressed by the Second Circuit, it is significant that the court adds the pronoun "something" to its definition of destruction.[137] "Something" connotes an object. In the context of art, it refers to the work—here, the mural painted onto the walls of Vermont Law School's main community hub—in other contexts, a sculpture, painting, or print. In doing so, the court subtly veers VARA away from its non-economic protection of the creative impulse and the and into the territory of economically-minded object-centered copyright protection.

VARA protects the integrity of a work and the reputation of the artist.[138] Neither integrity nor reputation necessitates a physical object to take shape. Rather, "integrity" as defined by Black's Law Dictionary, refers to honesty and authenticity.[139] "Reputation" refers to the beliefs or opinions generally held about an individual or thing.[140] When the Second Circuit inserts the pronoun "something" into its definition of destruction, it limits VARA's scope to a disturbance of the physical aspects of the work, rather than the integrity of the work as it relates to the artist's identity, idea, and reputation.[141] By framing destruction as an act that happens to "something," the Second Circuit implicitly confines destruction to physical objects alone, excluding forms of annihilation that operate through concealment, inaccessibility, or erasure of experience. A work's integrity depends on its continued realization as conceived by the artist, and an artist's reputation depends on the work's ability to be encountered and understood. When access is permanently foreclosed—for example, by permanently concealing an immovable mural under white panels—both interests are impaired regardless of whether the physical work survives.

Full-bodied protection of artworks requires the understanding that many works are experiential rather than object-centered.[142] The "'esthetic' may be verbic in character rather than 'noun-al'" wrote dance critic, George Beiswanger, musing

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137 *See Kerson III*, 79 F.4th at 266. As stated above, the court uses the following definition of 'destroy' in its analysis: "damage (something) so thoroughly as to make unusual, unrepairable, or nonexistent; to ruin."

138 *See* 17 U.S.C. § 106A(a).

139 *Integrity*, THE LAW DICTIONARY, https://thelawdictionary.org/integrity/ [perma.cc/HV5H-R3B9].

140 *Reputation*, THE LAW DICTIONARY, https://thelawdictionary.org/reputation/ [perma.cc/7BLJ-NUS5].

141 *Kerson III*, 79 F.4th at 266.

142 *See* Beiswanger, *supra* note 48, at 599.

over the dual aspects of art: both a physical object and a manifestation of an amorphous idea.[143] The work of art, he argued, exists beyond canvas and clay but, instead, is more fully encompassed by its experiential qualities.[144] Such an understanding forecloses a definition of destruction that ends with the marring of physical aspects of a work alone. Permanently covering a work may distort or destroy its experiential qualities, violating the artist's right of integrity.[145]

VARA was crafted to protect artists and to provide protections that are both exclusive to the artist and nontransferable.[146] As such, allowing artistic theory to define the boundaries of VARA's protections is not only appropriate but necessary to properly protect those rights. At the very least, deciding whether a modification was detrimental to a work or whether a destruction has occurred requires a basic understanding of the character of creation and artistic effect.[147] Such an understanding begins with considering the work's purpose and its existence in context with art history and other similar works. Take, for example, Kerson's mural, which evokes the aesthetics of twentieth-century American folk art.[148] In using these aesthetics, Kerson not only paints a colorful scene, but also invokes the role of folk art aesthetics[149] and the mural format as modes of communication, protest, and gathering.[150] Murals exist to be shared with the public, and folk art, by nature, is a tool of communication, functioning to share

143 *See id.* at 587.

144 *See id.*

145 *See id.*; 17 U.S.C. § 106A(a), (3)(A)-(B).

146 *See* 17 U.S.C. § 106A(b), (e).

147 *See* Beiswanger, *supra* note 48, at 587.

148 Complaint and Jury Demand, *supra* note 3, at 5; *see also* Chused, *supra* note 2, at 576 (comparing Kerson's murals to murals by Thomas Hart Benton that were also subject to a call for removal and similarly featured "folk-art style with some measure of caricaturizing," "[b]oth … created by artists with anti-racist intentions"). As Professor Chused notes, aesthetically the mural fits into the canon of folk art: it is richly colored, features 2D graphics, and is cobbled together like a quilt of different moments throughout history. *See id.*

149 *Cf.* Bernard Bell, *Folk Art and the Harlem Renaissance*, 36 PHYLON 155, 155 (1975) (outlining the relevance of folk art to the Harlem Renaissance).

150 *See* Amanda Winstead, *Urban Art: Elevating Aesthetics and Cultural Identity in Cities*, THE URBANIST (Dec. 23, 2023), https://www.theurbanist.org/2023/12/23/urban-art-elevating-aesthetics-and-cultural-identity-in-cities/ [perma.cc/ZLU9-4NC3] (describing how murals are an effective tool for community engagement).

history and intergenerational storytelling.[151] Covering such a work, as Kerson's mural was covered, rendering it unable to fulfill its purpose as a reflection of Vermont's history and a spine-straightening reminder of the evils of slavery, set within an institution of thought and civic engagement, destroys the work's integrity.[152] The mural's purpose—to educate, provoke dialogue, and instigate collective memory—is inextricable from its visibility within a civic space. Its existence as a work of art depends upon public encounter and engagement in a site of civic life, such as a law school's community center. Permanently covering the mural destroys it. Although this conception of art—as a tool greater than the four corners of its canvas—presses uncomfortably against the economically-driven copyright regime (from which the definitions of VARA are drawn), this nuance is necessary to keep courts from collapsing VARA's moral rights framework into the rest of the economically-driven Copyright Act.

### B. POLICY RECOMMENDATIONS FOR WORKS OF RECOGNIZED STATURE

This Section begins by addressing the policy analysis conducted by the Second Circuit, noting the cases used by the court to illustrate its understanding of VARA's principal policy concerns. This Section continues, addressing a concern the Second Circuit acknowledges but does not undertake: the public's interest in robust VARA protection.[153] In doing so, this Section proposes guidelines for

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151 *See* Lindsay Kathryn Hamilton, *The Storytelling of Public Spaces: Rhetoric, Community, and Social Change* (Jan. 1, 2016) (Ph.D. dissertation, University of Texas at El Paso) (on file with DigitalCommons@UTEP) (discussing how murals have made public spaces more democratic, using murals in Fort Bliss, Texas as a case study).

152 *See* Jon Kalish, *When Murals Depict Traumatic History, Schools Must Decide What Stays on the Walls*, NPR (Oct. 14, 2022), https://www.npr.org/2022/10/14/1127843326/when-murals-depict-traumatic-history-schools-must-decide-what-stays-on-the-wall [https://perma.cc/MJ3G-FVNH] ("for an institution to say "we're going to whitewash this black history," Kerson said referring to his mural, "now that's something else").

153 *Kerson III*, 79 F.4th at 263 (quoting Carter v. Helmsley-Spear, Inc., 852 F.Supp. 228) (noting that the purview of the right of integrity depends on the "jurisdiction's conception of moral rights as either 'stress[ing] the public interest in preserving a nation's culture'—in which case destruction is prohibited—or 'emphasiz[ing] the author's personality'—in which case destruction is 'seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist'").

resolving VARA disputes when they arise between artists and charitable organizations with public-facing education-centered missions.

### *1. Policy Considerations in* Kerson

In its limited policy analysis, the Second Circuit cites *English v. BFC & R East 11th Street LLC,* No. 97 Civ. 7446 (HB), 1997 WL 746444, which holds that "obliterating a visual artwork from view" does not rise to cognizable destruction. In *English*, a collection of street artists requested an injunction to stop construction in front of a building they had graffitied.[154] They argued that the new construction would permanently block the view of their work, which they believed was a destruction cognizable under VARA.[155] In response, the Southern District of New York noted how such a holding would "effectively allow building owners to inhibit the development of adjoining parcels of land by simply painting a mural on the side of their building."[156]

In analogizing the two cases, the Second Circuit notes that, although Kerson's claim did not raise the same policy issues, it was essentially the same request as what was requested by the artists in *English*.[157] Such an equivalence is surface-level. While it is true that Kerson also cites coverage as a form of destruction, the court in *English* was guided heavily by a reluctance to block future construction and to prevent future building owners from asserting control over land beyond their own.[158] Such policy concerns are not only absent from *Kerson*, but, in *Kerson*, the construction of the panels was for the exact purpose of permanently rendering the mural unseeable due to Kerson's artistic decisions, unlike the incidental coverage at issue in *English*.[159] In other words, the dispute in Kerson rested fully within the balance VARA intends to maneuver: a dispute

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154 *Kerson III*, 79 F.4th at 266.

155 English v. BFC & R E. 11th St. LLC, No. 97 Civ. 7446 (HB), 1997 WL 746444, at *2 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom*. Eng. v. BFC Partners, 198 F.3d 233 (2d Cir. 1999).

156 *Id.* at *6.

157 *Kerson III*, 79 F.4th at 266.

158 *English*, 1997 WL 746444, at *6.

159 *Compare English*, 1997 WL 746444, at *4 (finding that murals on a building were not protected by VARA where the murals were placed illegally and would prevent future construction) *with Kerson III*, 79 F.4th at 261 (finding that permanent coverage did not violate VARA despite the goal of coverage being to render the art, which had been previously celebrated by the institution, unseeable).

between an artist and the owner of his work. As such, English, which concerns a balance between an art owner and his potential future neighbor, is inapposite. Furthermore, *English* itself rests on shaky ground as the court held that the grafitti in English was not protected because it was illegally placed on the buildings,[160] despite the fact that whether placement was illegal should not interfere with moral rights.[161]

In relying on *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, 593 F.3d 38,[162] to demonstrate what *is* actionable under the modification clause of VARA, the Second Circuit determines that precedence should be given to protecting an artist's ego rather than allowing a work to remain visible. The Second Circuit presents the case, which concerned an incomplete work by the Swiss artist Christoph Büchel, as an instance where VARA should apply.[163] In doing so, the Second Circuit suggests that coddling persnickety, drama-prone artists, personified by Büchel in his dealings with Mass MoCA over his work "Training Ground,"[164] is a more important policy objective than preventing the permanent, reputation-damaging concealment of artworks.

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160 *English*, 1997 WL 746444, at *4.

161 Cambra Stern, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. LAW 295, 333 (2013).

162 *See Kerson III*, 79 F.4th at 270. In *Büchel*, the artist objected to Mass MoCA's decision to cover his installation with a tarp after he failed to complete the work by contractually agreed upon deadlines. The Museum noted its repeated efforts to work with Büchel to get the work into serviceable shape, to no avail. In denying the Museum's motion for summary judgment, the First Circuit found that, although the work was complete enough to be eligible for VARA protection, it remained in an "unfinished state."

163 *See Kerson III*, 79 F.4th at 270.

164 *Castillo*, 950 F.3d at 57–58. In interactions leading up to the suit, Büchel referred to the Museum's efforts to get his work into a mutually beneficial, serviceable state before exhibition as "sabotage." Furthermore, Büchel submitted a list of demands to the Museum, refusing to complete "Training Ground" until such demands were met. One demand included not being told "if an airplane fuselage section fits in the show or not" given that he would not "negotiate constantly [his] art with [the Museum] or Nato (sic)."

*2. Protecting the Public's Interest in Artworks*

Art is a public good, and its preservation is a public service.[165] Such a concern was principal in enacting VARA[166] and is explicitly recognized by most moral rights laws, structured around the dual concern for protecting the artist against alteration of his work and protecting the public against alteration or destruction of its visual culture.[167] Particularly in mission-bound nonprofit educational and cultural institutions, which receive tax benefits due to their charitable missions,[168] such as Vermont Law School, moral rights must be used to protect the public's interest in the integrity and attribution of artwork, as the loss of such work deprives the public "of a widely used part of its previously shared vocabulary."[169] However, because the public's interest in a work is not codified within the plain text of VARA, courts can easily pass over such concerns. Furthermore, courts may become blinded by an overbroad concern for the

[165] Hansmann & Santilli, *supra* note 43, at 106.

[166] AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 32, at 76 (citing H.R. REP. NO. 101-514, at 5–6 (1990) ("Congress intended the right of integrity to further the public interest in preserving and protecting works of visual art and thereby preserving the integrity of our shared culture."); *see also* Cambra Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 U.C.L.A. L. REV. 849, 860 (2004) (noting a hearing leading up to the enactment of VARA, in which former Senator Edward Kennedy stated, "you get a greater understanding, greater sensitivity, and greater awareness by the population with a federal statute … the result would be greater preservation of art").

[167] *See* John Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 343–44 (1989) (establishing a framework for creating legislation governing cultural property that centers the public's interest in maintaining these works).

[168] *See See Exempt Organization Types, IRS, https://www.irs.gov/charities-non-profits/exempt-organization-types [https://perma.cc/273U-YN6B].*

[169] Hansmann & Santilli, *supra* note 43, at 105.

property rights or First Amendment rights[170] of the private owner, assuming these owners have an extensive right to destroy, despite unclear allowances.[171]

Authors Henry Hansmann and Marina Santilli warn of a scenario in which the public's interest in the preservation of a work is threatened by the private owner's preferences:

> Yet, though the idea embodied in the work is valuable to society, that value may not be well reflected in the value of the work to its private owner, who cannot easily charge others for what they learn from the painting, and who may face a low market value for the work owing to the generally conservative tastes of the most prosperous collectors and museums. Consequently, the owner may not only have insufficient incentive to protect and display the work but may even have an incentive to alter or destroy it.[172]

Although Kerson's work was not for sale, Hansmann and Santilli's warnings are still applicable. In the case of Kerson's murals, the public's interest in the work's preservation was second-tier to the pressures of some of Vermont Law School's students, and, in turn, the public's interest in the works, a fundamental concern of VARA, was snubbed by Vermont Law School.[173] This concern is especially pertinent in the case of works held in cultural and educational institutions, the missions of which revolve around the preservation of work for the public good, as these institutions face increasing pressure (but typically short-lived incidents) to permanently conceal complicated artworks[174] due to imagery

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170 Although out of the scope of this Note and unaddressed in the Second Circuit's decision in *Kerson*, the first amendment rights of the institution to choose what it has on display is a natural question. In the case of an immoveable mural, however, coupled with the charitable, education-centered mission of the institution, it seems the rights of the institution become significantly more tenuous.

171 JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 16 (Univ. Mich. Press, 3d ed. 2001); *see also* Gregory S. Alexander, *Of Buildings, Statues, Art, and Sperm: The Right to Destroy and the Duty to Preserve*, 27 CORN. J. PUB. POL'Y 619, 634 (2018) (describing the fragile basis for a broad right to destroy within the bundle of United States property rights).

172 Hansmann & Santilli, *supra* note 43, at 106.

173 *Kerson III*, 79 F.4th at 259–60.

174 Kalish, *supra* note 152 (citing multiple instances in which cultural institutions faced pressure to take down, cover, or destroy complicated artworks). At a

that may not clearly or immediately align with the political perspectives of some of the institution's patrons.[175]

### 3. *Cultural Stewardship as a Guide for Future VARA Adjudication*

Reinforcing VARA's purpose—to protect artists' reputations and the integrity of their works—would serve to advance cultural institutions'[176] missions as repositories of culturally significant objects[177] and houses of fruitful

high school in San Francisco, debates arose about whether to cover a life-size image of a dead Native American. *Id.* Contemporary artist Dewey Crumpler, who was commissioned to paint a response to the painting in the 1960s, objected to the permanent coverage of the disturbing imagery noting "all great murals exist to teach … they exist to speak about history and history is full of discomfort. [The artist of the original work] attempted to give us clarity of our history, as all great works should do." *Id.* The article cited similar instances at the University of Kentucky, in which the University announced its decision to remove a 1934 mural depicting enslaved people bent over a tobacco field. *Id.* Like Dewey Crumpler, Karyn Olivier, an artist commissioned to create an artistic response to the mural objected to taking the mural down, noting: "I understand the impetus but I think in that act you've rendered my work blind and mute … [my work can't exist without the artwork it was created to confront. I think in one fell swoop you've censored me as well…]." *Id.*

175 Barbara A. Spellman & Frederick Schauer, *Artists' Moral Rights and the Psychology of Ownership*, 83 TUL. L. REV. 661, 670 (2009) (presenting the results of a study which found that individuals are more likely to find a violation of VARA where the work that is modified or destroyed is one that shares their stance on a political issue rather than a work that shares the opposite stance).

176 While "cultural institution" is a broad term and encompasses many types of institutions, at their core, these institutions are educational in mission and are generally tasked with housing cultural artifacts of some type and with helping spur reflection about the past and debate about what should come. As such, a university's common space, when used to house a floor-to-ceiling mural, is nearly identical to the experience of a small gallery.

177 Spellman & Schauer, *supra* note 175, at 664 ("Now, when we buy a painting by Jasper Johns, we are in part the owner, but in part we are also the steward of Johns's artistic reputation and the country's (and the world's) artistic heritage.").

discussion.[178] As such, to aid in the future adjudication of VARA disputes when they arise in cultural institutions, Congress should draft legislation that applies the theory of cultural stewardship to nonprofit art owners embroiled in VARA disputes. Such guidelines should require cultural institutions seeking to destroy or modify artworks to show that the modification or destruction the institution proposes does not mar the integrity of the work, and is not, in actuality, a thinly veiled maneuver to kowtow to an unfavorable letter (as was the case with the Law School's decision leading up to *Kerson*) or social media blast—likely at odds with the institution's own mission statement and at the expense of the work's integrity and the artist's reputation. While out of the scope of this Note, in drafting such guidelines, the First Amendment rights of the cultural institution, guided by the institution's mission statement, must be considered.

Today's cultural and educational institutions are evolving. Once lauded as storied cabinets of curiosity, many cultural institutions are now looked at with newly suspicious gazes.[179] Individuals want to know about how the works they see framed and spotlighted ended up within these institutions, how each institution chooses what works it will or will not exhibit, and, often, what the political leanings of the institution itself are.[180] These are, of course, extremely complicated questions to answer: concerning the length of the time the institution has been in existence, its financial capabilities, and current leadership. Some cultural institutions have responded by implementing new, public-facing collections management practices.[181] Others respond with retroactive letters,[182]

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[178] *Mission and Vision*, SMITHSONIAN, https://www.si.edu/about/mission [perma.cc/L9GB-VAUJ].

[179] *See, e.g.*, *Contested Objects From the Collection: Benin Bronzes*, THE BRITISH MUSEUM, https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/benin-bronzes [perma.cc/8J3E-8PCM].

[180] *Shared Stewardship and Ethical Returns Policy*, SMITHSONIAN ETHICAL RETURNS WORKING GRP. (Apr. 29, 2022), https://ncp.si.edu/sites/default/files/files/Ethical%20Return%20Docs/shared-stewardship-ethical-returns-policy_4.29.2022.pdf [perma.cc/6EX8-QDN8]; *see also* Ginia Bellafante, *The Brooklyn Museum is Progressive. Why is the Left Attacking It?*, N.Y. TIMES (Jun. 14, 2024), https://www.nytimes.com/2024/06/14/nyregion/brooklyn-museum-protests.html [perma.cc/2DFQ-E253].

[181] *See, e.g.*, *Shared Stewardship and Ethical Returns Policy*, *supra* note 180 (providing the Smithsonian's public policies regarding stewardship of their collections).

[182] *See* Coco Fusco, *Censorship, Not the Painting, Must Go: On Dana Schutz's Image of Emmett Till*, HYPERALLERGIC (Mar. 27, 2017),

while some cling to their works even tighter, regardless of provenance.[183] Still, others are attempting to straddle the often cavernous gap between the desires of donors and the desires of visitors.[184] As the public's expectations for cultural institutions change and conversations about cultural ownership and stewardship take center stage in museums, universities, and libraries, Congress must consider some of the practices being undertaken by these institutions as equitable solutions to VARA claims.

Among these solutions could include requiring the institution to post a 'chat' label next to the artwork explaining any controversy, as was the case with Kerson's mural until the 2020 letter was distributed.[185] Alternatively, cultural institutions may consider offering lectures and public conversations educating protesters about artists' moral rights and the institution's role as a protector of visual culture in response to pressures to remove artworks. Identifying VARA to the public—making knowledge of this law widespread and part of the educational goals of museums—would serve to strengthen public knowledge of the legal protections available to authors. Such an option is in line with many initiatives cultural institutions are today taking to disclose how they collect, acquire, display, and deaccession art.[186]

Congress may consider requiring a disclosure by the cultural institution, highlighting any possible community dissatisfaction with a work or the

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https://hyperallergic.com/368290/censorship-not-the-painting-must-go-on-dana-schutzs-image-of-emmett-till/ [perma.cc/9HH4-R4GC].

183 *Contested Objects From the Collection: Benin Bronzes*, *supra* note 179.

184 *See* Hopson, *supra* note 25 (comparing the Whitney Museum's management of a controversy regarding a Dana Schutz painting during the 2017 Whitney Biennial with Indiana University's Eskenazi Museum of Art's management of a controversy surrounding an upcoming retrospective of the work of Palestinian artist Samia Halaby).

185 Becker, *supra* note 22. In 2014, an informational 'chat' label was installed next to the murals. *Id.* It read, in part, "intent (is) to depict the shameful history of slavery as well as Vermont's role in the Underground Railway." *Id.*

186 *See* Dorothy Spears, *How the Guggenheim Collects Art*, GUGGENHEIM (Feb. 10, 2023), https://www.guggenheim.org/articles/checklist/how-the-guggenheim-collects-art [perma.cc/PFP6-NUA3]; Max Hollein, *Building and Caring for The Met Collection*, THE MET (Feb. 17, 2021), https://www.metmuseum.org/perspectives/building-and-caring-for-the-met-collection [perma.cc/AW4Z-4NY6]; *Collections Management Policy*, MUSEUM OF THE BIBLE, https://www.museumofthebible.org/acquisitions-policy [perma.cc/EE2L-7NXZ].

institution's perspective on the aesthetic success of the work.[187] Such disclosures would better protect the integrity of the work and preserve it for future viewership, without creating anxiety in the institution's governance that it might be seen as condoning themes in the work due to its role in exhibiting it. Promoting disclosures would align with the educational missions of cultural institutions and align with the provenance disclosures currently gaining popularity across cultural institutions."[188]

Another potential equitable solution, although not ideal in every situation, could be temporary or moveable coverage—like a curtain—as was suggested by Kerson himself, but not adopted by Vermont Law School.[189] In this case, the work would be preserved for the artist and the public without putting the institution in a position in which it is seen as condoning uncontextualized viewership of disturbing imagery. Such a solution would allow the work to be visible still—for the experiential quality of the artwork to be possible—without requiring the cultural institution to condone the imagery displayed within.

Cultural institutions are unique among the art owners that VARA contemplates.[190] These institutions have a wide berth regarding the works in their collections, which has led to potential overstep by these institutions, as *Kerson* illustrates.[191] It is critical that we do not allow the broader public interest and the

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187 *See* Ginsburg, *supra* note 65, at 483 (considering the efficacy of a disclosure requirement in VARA).

188 *See Museum Increases Availability of Provenance Information*, PRINCETON UNIV. ART MUSEUM (Apr. 11, 2024) https://artmuseum.princeton.edu/art/stories-perspectives/museum-increases-availability-provenance-information [https://perma.cc/2CAN-9NBG] (in which a university's art museum notes that such disclosures align with the educational missions of museums and teaching institutions).

189 Chused, *supra* note 2, at 589.

190 Although one could argue that Vermont Law School functions more as an owner of a private collection than a museum, its community center is a space of rich thought and dialogue. Furthermore, this case will predictably be applied to museums and cultural institutions for which permanent coverage does lean toward destruction and is at odds with the organizations' educational purposes.

191 *See* Gail Levin, *Hopper Horrors at the Whitney*, THE NEW CRITERION (Jan. 2024), https://newcriterion.com/article/hopper-horrors-at-the-whitney/ [perma.cc/BCM7-74QY]. Another example of potential institutional overreach can be seen in the Whitney Museum's handling of the contested provenance of Edward Hopper's work.

artist's interest in a work to be threatened by the individual owner's preferences for a work, especially when that owner is one that receives financial benefits due to its stated mission to encourage dialogue, house culture, and frame complicated issues.[192] Legislative clarification structured around the mission of cultural and educational institutions would help those institutions fulfill their missions while cementing artists' moral rights and the public's interest in the upkeep of those rights. *Kerson* is a critical warning as we journey deeper into an era in which individuals look to their institutions not only for unbiased education but, often, to take political stances that match their own.

## VI. CONCLUSION

When the Second Circuit affirmed the lower court's ruling that permanently covering Samuel Kerson's murals was not a destruction cognizable under VARA, it allowed a value judgment about the success of a mural in communicating its message to override protecting that work's integrity. In doing so, this case highlights the need for judicial guidance when considering what destruction looks like for works of recognized stature. Furthermore, as we embark further into a period in which individuals turn to their cultural and educational institutions for political and moral guidance, it is critical that Congress provide guidelines for delicate and exacting analysis of what constitutes destruction under VARA when issues crop up in mission-bound educational institutions. In evaluating the Court's decision, this Note introduces guidelines for interpreting VARA's destruction clause when it arises in mission-bound cultural and educational institutions.

[192] *See* Hansmann & Santilli, *supra* note 43, at 113.