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J.D. Candidate, 2001, Fordham University School of Law. I should like to thank professors Hugh Hansen and Benjamin Zipursky and attorneys Daniel Weiner and Ronald Ponzoli for their helpful suggestions. I would also like to thank my parents, my wife, and my children for their support. This is for my father.

THE "RECOGNIZED STATURE" STANDARD IN THE VISUAL ARTISTS RIGHTS ACT

Christopher J. Robinson[*]

> [The Visual Artists Rights Act ("VARA")] recognizes that visual art plays an important role in our cultural life, and that artists who have put their hearts and souls into their creations deserve protection for their efforts.
>
> *Representative Kastenmeier, June 5, 1990*[1]

> [O]ne person's art is another person's garbage.
>
> *David Cazares, Sun-Sentinel, September 29, 1995*[2]

INTRODUCTION

In the dying hours of the 101st Congress, the United States Senate enacted the Judicial Improvements Act of 1990, authorizing eighty-five federal judgeships.[3] Tacked on to the Act under a separate title was the Visual Artists Rights Act ("VARA") which, for the first time in federal law, recognized an artist's moral rights in his works of art.[4] The Act was a compromise between many conflicting interests, and the result was immediately criticized from several quarters.[5] The passage of VARA, however, marked a significant departure from prior property law.[6] VARA grants artists two new rights, the right of

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1. 136 Cong. Rec. 12,608 (1990).

2. David Cazares, *Art Attack?: Hollywood Center Calls Artist's Materials 'Junk,'* Sun-Sentinel (Fort Lauderdale), Sept. 29, 1995, at 1B; *see infra* notes 206-19 and accompanying text.

3. *See* Pub. L. No. 101-650, 104 Stat. 5089 (1990).

4. Visual Artists Rights Act ("VARA"), Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990) (codified in part in 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (1994)); *see infra* note 6.

5. *See infra* notes 245-48 and accompanying text.

6. The last-minute enactment of such a revolutionary measure as VARA, without serious debate and riding on the coattails of a key bill, was criticized by George C. Smith, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law. "Without so much as a word of debate or discussion, the Artists Act (sic) became law. The lack of debate is unfortunate because the new statute constitutes one of the most extraordinary realignments of private property

attribution and the right of integrity.[7] The right of attribution concerns the artist's right to claim authorship of a work created by him and to deny authorship of a work not his own.[8] The right of integrity concerns the artist's right to prevent or to recover damages for the intentional distortion, mutilation, modification, or destruction of his work.[9] The revolutionary aspect of VARA is that the artist retains these rights throughout his lifetime, even when the original work to be protected is no longer in his possession.

Unlike the European recognition of moral rights, which is centered on the artist's right to protect and exploit his creative output for his own honor or reputation,[10] the policy bases of VARA are more complex. On the one hand, moral rights are personal to the artist. Fine art is unique among the arts in one important sense. A disproportionate percentage of the value of a work of fine art is in the physical object created, rather than the exploitation of derivatives or copies.[11] Damage to the original object is prejudicial to an artist's ability to exploit the object for his enhanced honor and reputation, in a way that is not true for an author of a literary work or musical composition. VARA was an attempt to compensate visual artists for this imbalance in copyright law.[12]

On the other hand, VARA recognizes a public interest in the encouragement of artists to work and in the preservation of their work once created.[13] Appealing to the public interest on a narrow front helped ensure the passage of the legislation by invoking a higher social good than that of the individual gain of the artist or property holder.[14] Public interest thus justified the intervention of federal law into what many considered a private contractual matter. By underpinning a copyright act with the public duty to preserve the nation's art and cultural patrimony, the Act also responded to a world-wide concern over issues of cultural protection and integrity.[15]

This Note concentrates on one particularly contentious provision of VARA—the "recognized stature" provision contained in 17 U.S.C. §

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rights ever adopted by Congress." John Henry Merryman & Albert E. Elsen, Law, Ethics and the Visual Arts 283-84 (3d ed. 1998).

7. *See infra* notes 24, 100-01 and accompanying text.
8. *See infra* notes 24, 100-01 and accompanying text.
9. *See infra* notes 24, 100-01 and accompanying text.
10. *See infra* notes 22-24 and accompanying text.
11. *See infra* notes 258-61.
12. *See infra* notes 258-61.
13. *See infra* notes 38-40 and accompanying text.
14. For Representative Fish's comments in support of VARA, see 136 Cong. Rec. 12,610 (1990) ("This legislation should not be viewed as a precedent for the extension of so-called moral rights into other areas. This legislation addresses a very special situation in a very careful and deliberate way.").
15. *See, e.g.*, John Henry Merryman, *The Public Interest in Cultural Property*, 77 Cal. L. Rev. 339 *passim* (1989) (pointing to the validity of a public interest in cultural property and the conflicting goals of preservation, truth, and access).

106A(a)(B). The section states that an artist of a work of visual art[16] has the right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."[17] The existence of the recognized stature provision in VARA was both generous and restraining: generous in that it granted a moral right beyond that commonly accepted in Europe; restraining in that it qualified the right in a way antithetical to traditional United States copyright law and likely to lead to judicial confusion.

Part I lays out the theory and practice of moral rights in Europe and the United States leading up to the enactment of VARA in 1990. It first discusses the definition and scope of moral rights as they are conceived in Europe and in the United States, the use of a "recognized quality" standard for the protection of art in some states, the inclusion of a recognized stature standard in moral rights bills in Congress in the late 1980s, and the ultimate enactment of VARA in 1990. Part II discusses the application of the recognized quality or recognized stature standard in the few cases published and describes a brief selection of disputes invoking the recognized stature provision of VARA in the destruction of large-scale sculpture and murals. Part III analyzes the issues raised by the recognized stature provision both from a theoretical standpoint and in light of the cases and disputes outlined in Part II. The issues are discussed as they impact VARA first as a copyright measure and second as a preservative measure. The recognized stature provision neither protects fully the rights of artists in the integrity of their works, nor furthers the aims of United States copyright law as expounded in the copyright clause. Furthermore, the inclusion of a recognized stature standard results in a weakening of the preservation aims of the statute. This part concludes with a discussion of some of the practical evidentiary problems of the recognized stature standard that have been revealed by the litigation. Part IV offers a tentative proposal to approach the personal copyright and public preservation goals of VARA more effectively. This part argues that the recognized stature standard should be abandoned and that VARA should offer the same protection against the destruction of works of art as it does to their alteration or mutilation. More controversially, this part concludes that the preservation goals of VARA might be better served by separate legislation establishing a national registry of significant works of art. Works, regardless of date, would be chosen for the registry by a panel of experts. Registered works would be protected by a complete ban on modification or destruction within the United States, supported by criminal penalties. To encourage registration and to

16. For a definition of "visual art," see *infra* note 100.
17. 17 U.S.C. § 106A(a)(3)(B) (1994).

preserve the market value of a work, registered works might be freely exported or sold. The two-pronged legislation proposed in this Note would not protect all works of art from mutilation or destruction, and would face constitutional and practical challenges, but the proposal has the merit of promoting the copyright interests of artists in an equitable manner as well as preserving the most significant art in the United States for future generations.

I. MORAL RIGHTS AND THE VISUAL ARTISTS RIGHTS ACT

This part outlines the policy justifications and the scope of artists' moral rights in Europe and the United States. It discusses the state statutes of the 1980s recognizing moral rights in visual artists, and concludes with the legislative history and ultimate enactment of VARA.

A. *Moral Rights in Europe and the United States: Theory and Practice*

Moral rights appear to have originated in France in the 19th century, premised on the work of the German philosophers Kant and Hegel.[18] Commentators have pointed to several catalysts to the creation of moral rights, from the fall of the Ancien Régime,[19] the rise of the artist as entrepreneur, free of aristocratic or church patronage, to the Romantic emphasis on the original creation of the lonely genius.[20] But it is no coincidence that such rights arose in a culture that was both proud of its modern accomplishments, yet acutely aware of its dependence on the art of the past. French artists and writers were as much concerned with how future generations of Frenchmen would judge them, as they were with their contemporaneous

18. *See* 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, 370-72 (1998).

19. *See generally* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 Bull. Copyright Soc'y 1, 7-11 (1980) (discussing nineteenth century judicial development of moral rights in France based on Revolutionary laws and the growing philosophy of individualism); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tul. L. Rev. 991, 996 (1990) (arguing that French Revolutionary and early American copyright law were both designed to encourage the creation of works of art promoting national social goals); Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 Ind. Int'l & Comp. L. Rev. 423, 428-33, 449-52 (1999) (tracing the evolution of moral rights in France from Revolutionary legislation through nineteenth century judicial interpretation); Swack, *supra* note 18, at 370 ("In France, the state of the law addressing artists' rights did not change until the fall of the *ancien régime*.").

20. *See* Peter H. Karlen, *Moral Rights in California*, 19 San Diego L. Rev. 675, 682-84 (1982); Peeler, *supra* note 19, at 449-52.

reputation.[21]

Moral rights vary in scope, but they all recognize certain rights in an artist's work that are distinct from traditional property rights and that rely less on economic rationales than on the right to the continued control of the artist's creative personality through control over the art itself.[22] Moral rights acknowledge that an artist has, in addition to an economic interest in his reputation, a creative persona that is injected into the work of art at creation and which remains a part of the work despite his physical relinquishment of the object to others.[23] The subsequent disposition of the work, especially if it lies in public view, has a lasting effect on the artist's reputation, with impact on his dignity and career.

At their most expansive, moral rights invest in the artist the right to: (1) have his name associated with all his creations and no others (paternity or attribution); (2) prevent mutilation, distortion or alteration of the art (integrity); (3) choose when and if his work will be revealed to the public (disclosure); and (4) withdraw and alter his work once revealed (retraction or withdrawal).[24] The scope of moral rights protection in Europe varies widely.[25] The Berne Convention adopts a minimalist approach, requiring only that member countries enact provisions protecting rights to paternity and integrity, leaving some countries, such as France, to add protections of their own.[26]

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21. An acute awareness of the great traditions of their art form, coupled with a realization that many of those traditions were artistically played out, led many nineteenth century artists and writers to debate their status in that creative pantheon. Moral rights ensured that their work obtained every present advantage for the future assessment of that status.

22. Moral rights, not surprisingly, are a favorite of academics, and articles on the subject far outnumber the cases in which moral rights are invoked. Particularly authoritative are those by Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. Rev. 1 (1997); Edward J. Damich (*e.g.*, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 Cath. U. L. Rev. 945 (1990)); Jane C. Ginsburg (*e.g.*, *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 (1990)); John Henry Merryman (*e.g.*, *The Refrigerator of Bernard Buffet*, 27 Hastings L.J. 1023 (1976)).

23. The creative persona rationale leads to a *droit de suite* or resale right in which the artist shares in the profits of resale of his work. *See* Michael B. Reddy, *The* Droit de Suite*: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 Loy. L.A. Ent. L.J. 509, 515-17 (1995). The resale right has a limited acceptance in Europe and in California in the California Art Preservation Act, Cal. Civ. Code § 987 (West 1982 & Supp. 2000). *See infra* note 45.

24. *See* Swack, *supra* note 18, at 365-66.

25. *See generally* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 Colum.-VLA J.L. & Arts 199 (1995) (discussing the scope of moral rights in Europe); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 Colum.-VLA J.L. & Arts 229 (1995) (discussing the scope of moral rights primarily in England and the United States).

26. Article 6*bis* of the Convention states:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the

Significantly, there is no express provision in the Berne Convention against the complete destruction of a work of art, on the principle that no harm to an artist's reputation and honor can come from a work that no longer exists.[27]

In the United States, hostility to the concept of moral rights was founded on the dual factors of a more limited interpretation of copyright protection, derived from the Constitution, and a profound respect for traditional economic rights in property.[28] The United States Constitution grants Congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[29] Rather than protecting some natural right, the statutory copyright protection derived from the copyright clause has as its principal aim the interests of society as a whole.[30] Natural rights are limited to those that encourage the creation and dissemination of Science and the Useful Arts.[31] Authors other than visual artists are generally able to exploit their paternity and integrity rights because they either retain their original works and license with care, or they sell their rights. Licensing or sale encourage the creation and dissemination envisaged by the Framers.[32] In answer to the

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work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

Article 6bis, Berne Convention for the Protection of Literary and Artistic Property, Sept. 9, 1886, revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. The Berne Convention, the most important international treaty on copyright, was opened for signature on September 9, 1886. Although the United States participated in the convention as an observer, it did not join the treaty at that time due to the philosophical differences between United States and European copyright. *See generally* Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, *passim* (1987). For calls to broaden or revise the moral rights provisions of Berne, see, for example, Dietz, *supra* note 25, at 225-27; Dworkin, supra note 25, at 263-66.

27. The omission of protection against the complete destruction of a work of art is controversial in Europe. The Berne Convention stopped short of including destruction in article 6bis, but passed a Resolution suggesting that member countries should on their own initiative prevent destruction in their moral rights legislation. *See* Dworkin, *supra* note 25, at 251 n.81.

28. *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554, 569 (1940); *see also* Yardley v. Houghton Mifflin Co., 25 F. Supp. 361, 364 (S.D.N.Y. 1938) ("When a man, hereinafter referred to as a patron, contracts with an artist to paint a picture for him, of whatever nature it may be, the contract is essentially a service contract, and when the picture has been painted and delivered to the patron and paid for by him, the artist has no right whatever left in it.").

29. U.S. Const. art. I, § 8, cl. 8.

30. *See* Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 Cardozo L. Rev. 373, 389-90 (1995).

31. *See id.*

32. Furtherance of the creation and dissemination goals of the Framers is the rationale behind statutory exceptions to exclusive rights of authors in the Copyright Act. *See, e.g.*, 17 U.S.C. § 115 (1994) (addressing compulsory licenses for non-

limited protections afforded by copyright law, causes of action in defamation, breach of contract, and unfair competition provided some protection analogous to moral rights.[33]

The inadequacy of protections afforded the artist was a subject of debate long before the United States entry to Berne in 1988.[34] Attempts to enforce a moral right equivalent under common law actions such as defamation, although promising in principle, were rarely successful, in particular when the courts saw traditional property rights compromised.[35] Congress made numerous unsuccessful attempts to pass moral rights legislation.[36] Prompted by press attention to particularly egregious maltreatment of well-known works of art, state legislatures, led by California, began to enact their own moral rights protection.[37]

State moral rights provisions fall into two categories, each reflecting a choice of emphasis between two separate protection rationales.[38] The first rationale is primarily preservative, having as its goal the preservation of artistic works for their value to society.[39] Supporters of this view note the beneficial effects art has on the spiritual and mental health of those who live among it, and seek to protect art in its infancy when it is most vulnerable to the perils of development, neglect, and greed.[40]

The second rationale, and the dominant one, looks primarily to the artist, to his incentives to create and his interest both economic and

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dramatic musical works); *id.* § 107 (addressing fair use).

33. For an analysis of the common law alternatives to moral rights legislation, see Roeder, *supra* note 28, at 575-78.

34. *See id.*

35. *See, e.g.*, Crimi v. Rutgers Presbyterian Church in New York, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) (denying a cause of action to an artist for damage to a mural in a church once artist received payment for the original commission). *But cf.*, Gilliam v. American Broad. Cos., 538 F.2d 14, 24-25 (2d Cir. 1976) (granting the creators of a television comedy program the equivalent of a moral right). Other cases are summarized in Ralph E. Lerner & Judith Bresler, Art Law 950-59 (2d ed. 1998).

36. Bills of some kind were presented in almost every year from 1979 onward. *See* H.R. Rep. No. 101-514, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918 n.13.

37. The catalyst to the California legislation was the dispute over Simon Rodia's "Watts Towers" sculpture. *See* Joseph L. Sax, Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures 23-24 (1999). The impetus to the New York legislation was the destruction of Joseph Serra's sculpture "Tilted Arc." *See* Public Art Public Controversy: The Tilted Arc on Trial *passim* (Sherrill Jordan et al. eds., 1987) (presenting documentation and commentary on the Serra controversy). *See generally* Serra v. United States Gen. Servs. Admin., 667 F. Supp. 1042 (S.D.N.Y. 1987) (dismissing complaint by artist against USGSA when the agency decided to relocate site-specific sculpture in a plaza adjoining a government office building), *aff'd*, 847 F.2d 1045 (2d Cir. 1988).

38. *See* Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 Hofstra L. Rev. 317, 325-26 (1989); Merryman & Elsen, *supra* note 6, at 257.

39. *See* Merryman & Elsen, *supra* note 6, at 257.

40. *See* Sax, *supra* note 37, at 24.

personal in his reputation and honor.[41] By preserving art in the form the artist intended, and by ensuring that he is acknowledged the author of that art and no other, moral rights legislation encourages the creation and dissemination of art.[42] The injury to the artist's reputation occurs in the public's perception of a mutilated or modified work. Under this view, art deserves no protection unless launched into the public sphere.[43] The beneficial effect of the art on members of society is a fortuitous bi-product of an essentially private matter.

State legislatures, beginning with California, saw the merits of both principles.[44] The preamble to the California Art Preservation Act ("CAPA") states:

> The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.[45]

CAPA, following the lead of Berne, affords protection to the rights of paternity and integrity by granting artists a cause of action against anyone who intentionally alters, defaces, destroys, or mutilates a work of fine art executed by them.[46] The Act departs from Berne in several ways, most notably for present purposes in protecting works from complete destruction and limiting any protection to works of fine art, a minimum quality standard laid out in the table of definitions.[47] Fine art is defined as art of "recognized quality" in certain media.[48] The Act also states that: "In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art."[49] The recognized quality standard and the cited list of professionals are consistent with the Act's emphasis on preservation of the artistic heritage, the first of the two moral rights rationales.[50] The Act's

41. *See* Davis, *supra* note 38, at 326; Merryman & Elsen, *supra* note 6, at 257.

42. *See* Gilliam v. American Broad. Cos., 538 F.2d 14, 23 (2d Cir. 1976) ("[T]he copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.").

43. The protection in several state moral rights statutes is linked to works publicly displayed. *See infra* note 66 and accompanying text.

44. *See* Davis, *supra* note 38, at 325-29.

45. Cal. Civ. Code § 987(a) (West 1982 & Supp. 2000).

46. *See id.* § 987(c)(1). The protection is extended to the artist's heir, legatee, or personal representative for an additional 50 years after the artist's death. *See id.* § 987(g)(1).

47. *See id.* § 987(b)(2).

48. *Id.*

49. *Id.* § 987(f).

50. *See supra* notes 39-40 and accompanying text.

language also reflects a legislative fear of nuisance or trivial suits.[51] The Act as written, however, leaves the height of the recognized standard bar to the courts.

Following California's lead, other states enacted moral rights legislation.[52] Massachusetts (1984),[53] Pennsylvania (1986),[54] Louisiana (1986),[55] and New Mexico (1987)[56] granted rights based on the California model. Although each has its peculiarities, they all impose a "recognized quality" standard for protected work and recognize a societal benefit to the preservation of the artistic heritage.[57] They also state that the court should rely on the same professionals listed in the California statute.[58]

A number of states, New York (1983),[59] Maine (1985),[60] New Jersey (1986),[61] Rhode Island (1987),[62] Connecticut (1988)[63] and Nevada (1989),[64] rejected any overt acknowledgement of the broader goal of protecting the cultural heritage of art and based their moral rights statutes on the Berne concern for the personal reputation and honor of the artist.[65] These states, beginning with New York, premised the rights of paternity and integrity on the present display of the work of art at issue.[66] They included no provision for the protection against destruction and required no finding of recognized quality.[67]

In 1982, three years after the enactment of CAPA, the California legislature reacted to popular and academic criticism of the limits of the Act and passed the Cultural and Artistic Creations Preservation Act ("CACPA").[68] This Act supplements CAPA by acknowledging a public interest in preserving cultural and artistic works independent of

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51. *See* Merryman & Elsen, *supra* note 6, at 264.

52. For analyses of state moral rights statutes, see generally Davis, *supra* note 38; Lerner & Bresler, *supra* note 35, at 959-65; Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA Ent. L. Rev. 35, 55-70 (1998).

53. *See* Mass. Ann. Laws ch. 231, § 85S (Law. Co-op. 1986 & Supp. 1999).

54. *See* Pa. Stat. Ann. tit. 73, §§ 2101-2110 (West 1993).

55. *See* La. Rev. Stat. Ann. §§ 51:2151–:2156 (West 1987 & Supp. 2000).

56. *See* N.M. Stat. Ann. §§ 13-4B-1 to -3 (Michie 1997).

57. *See* Davis, *supra* note 38, at 325-26.

58. *See id.* at 327 n.63, 329 n.94, 333 n.140, 337 n.173.

59. *See* N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney Supp. 1999).

60. *See* Me. Rev. Stat. Ann. tit. 27, § 303 (West 1988).

61. *See* N.J. Stat. Ann. §§ 2A:24A-1 to -8 (West 1997).

62. *See* R.I. Gen. Laws §§ 5-62-2 to -6 (Michie 1999).

63. *See* Conn. Gen. Stat. Ann. § 42-116s–t (West 1992 & Supp. 1999).

64. *See* Nev. Rev. Stat. Ann. §§ 597.720–.760 (Michie 1999).

65. Utah, Georgia, Montana, and South Dakota have some abbreviated form of protection. *See* Lerner & Bresler, *supra* note 35, at 965; McCartney, *supra* note 52, at 70.

66. *See* Davis, *supra* note 38, at 325-26.

67. *See id.* at 326 n.57.

68. *See* Cal. Civ. Code § 989 (West Supp. 2000). Massachusetts followed suit with a similar provision. *See* Mass. Ann. Laws ch. 231, § 85S (Law. Co-op. 1986 & Supp. 1999).

the interest of the artist.[69] This public interest extends to the work of artists deceased or unknown, whose work remains unprotected by CAPA.[70] The Act gives a cause of action to any established arts organization acting in the public interest to seek an injunction preventing damage to or restoring a work of fine art.[71] A work of fine art is defined as a work of "recognized quality, and of substantial public interest."[72] California and Massachusetts remain alone in enacting legislation granting a public cause of action for what are effectively community moral rights.[73]

B. *The Visual Artists Rights Act*

When the United States adhered to the Berne Convention in 1988, the Committee on the Judiciary concluded that current United States law met the requirements of Article 6bis by providing to authors protection equivalent to Article 6bis moral rights.[74] Nonetheless, dissatisfaction over the moral rights protection of fine artists, as well as the edifying examples of the states, encouraged the pursuit of federal protection for paternity and integrity rights.[75]

1. Genesis of Federal Moral Rights Protection

While Congress was debating proposals for Berne adherence legislation, moral rights bills were already in discussion in the Senate and the House.[76] In 1987, Senator Edward Kennedy introduced The Visual Artists Rights Act,[77] and hearings were held in December 1987.[78] The bill contained many of the provisions that characterize the Act of 1990. Important differences between the two exist, however, which help explain the presence of the recognized stature provision in the 1990 Act. As introduced, the 1987 bill contained both a moral

69. *See* Cal. Civ. Code § 989(a).
70. *See id.* § 989(b)(1).
71. *See id.* § 989(c).
72. *Id.* § 989(b)(1).
73. The New York legislature considered, but did not adopt, a bill allowing the state attorney general to sue to protect works of art by deceased artists in public view. *See* Janine V. McNally, Comment, *Congressional Limits on Technological Alterations to Film: The Public Interest and the Artists' Moral Right*, 5 High Tech. L.J. 129, 148 n.136 (1990).
74. *See* S. Rep. No. 100-352, at 38 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3736. The United States had considerable support in Europe for this belief. *See* Dworkin, *supra* note 25, at 240-42.
75. *See* H.R. Rep. No. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917-19.
76. *See id.* at 6915-16, 6918 n.12.
77. *See* S. 1619, 100th Cong., 133 Cong. Rec. 22,950-52 (1987).
78. *See Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong. (1987) [hereinafter *S. 1619 Hearing*]. Senator Kennedy had introduced a similar bill, S. 2796, to the 99th Congress in 1986. *See* 133 Cong. Rec. 22,950 (1987).

rights and a resale rights (*droit de suite*) component, modeled closely on CAPA.[79] The moral rights provisions gave authors of publicly displayed "works of fine art" the right to claim or disclaim authorship of such work.[80] The "significant or substantial distortion, mutilation, or other alteration" of any publicly displayed work was a violation of the author's rights and enforceable by the author, or by his estate for fifty years after his death.[81] Subject to provisions concerning works fixed within buildings, the bill afforded protection against destruction of any work of fine art.[82] A work of fine art was defined as "a pictorial, graphic or sculptural work of recognized stature."[83] The bill offered guidance for the finding of recognized stature:

> In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art.[84]

The bill, therefore, resembled CAPA in that it suggested that the court look to expert opinion in deciding recognized stature.

Ralph Oman, Register of Copyrights, analyzed the 1987 bill for the Committee.[85] He acknowledged that the recognized stature standard entailed a departure from traditional United States copyright law:

> Traditionally, the [U.S.] copyright law has not given additional rights to a work based on its quality.... The proposed distinction based on aesthetics has preservation and national cultural interests as the *raison d'être*; it may be in the national interest to treat works of greater aesthetic merit with greater respect. In copyright law, however, the marketplace has traditionally controlled the benefits accorded works of differing quality. Congress has so far been unwilling to let judges act as arbiters of aesthetic quality.[86]

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79. As a Senator from Massachusetts, Kennedy had experience with the California moral rights legislation model in his own state's statute. *See supra* notes 52-58 and accompanying text. On resale rights, see *supra* note 23.

80. *See* S. 1619, 100th Cong. § 106(b)(1)–(2), 133 Cong. Rec. 22,951 (1987).

81. *Id.* § 106(c)(1).

82. *See id.* § 106(c)(2).

83. *Id.* § 101.

84. *Id.* Note that this provision differs from the California equivalent in several ways, including the substitution of "may" for "shall," the substitution of "recognized stature" for "recognized quality," and the expansion of the list of experts. The shift in the wording of the standard to "stature," without precedent in the state legislation, has not been explained, although it may have been an attempt to emphasize that the personal aesthetic judgement of the court was not to be a factor in the court's analysis. At least one practitioner who has experience in litigation under CAPA and VARA considers the "stature" standard a higher bar to liability than "quality." *See* Peter H. Karlen, *What's Wrong With VARA: A Critique of Federal Moral Rights*, 15 Hastings Comm. & Ent. L.J. 905, 916-17 (1993).

85. *See S. 1619 Hearing*, *supra* note 78, at 21 (statement of Ralph Oman, Register of Copyrights).

86. *Id.* at 24-25 (statement of Ralph Oman, Register of Copyrights).

In answer to a written question from Senator Hatch on this stature bar, Oman stated that the Copyright Office approved of the departure from prior copyright practice because "strong moral rights provisions attaching to all pictorial and sculptural works regardless of quality could be overly stringent."[87] The right against destruction, absent from Article 6bis of the Berne Convention, was an "extraordinary right . . . awarded exclusively to works of fine art in recognition of the national interest in preserving both the unique intellectual property and its embodiment."[88] The 1987 bill failed, in large part due to the inclusion of the resale right provision.

2. The Enactment of VARA

When the Visual Artists Rights Act was reintroduced in June 1989 as H.R. 2690, there were important differences from the 1987 bill in the recognized stature provisions.[89] In place of the CAPA-inspired definition of a work of fine art as a work of recognized stature, the new definition of a work of "visual art" contained no minimum stature standard.[90] All visual art under the new definition was protected from "destruction, distortion, mutilation, or other modification" of a work that would be prejudicial to the artist's honor or reputation.[91] Furthermore, such destruction, distortion, mutilation, or other modification of a work of *recognized stature* would "constitute prejudice to the honor and reputation of the author of that work."[92] The bill created a virtual per se standard for the protection of works of recognized stature.[93]

Four days before the introduction of H.R. 2690 in the House, Senator Kennedy had introduced his new proposed Visual Artists Rights Act ("VARA").[94] Although similar to the House bill, Senator Kennedy's proposal retained the distinction in his previous bills between the distortion, mutilation, and modification rights that were prejudicial to an artist's honor and reputation, and the destruction of a

87. *Id.* at 61 (responses to Supplemental Written Questions from Senator Hatch).
88. *Id.* at 26 (statement of Ralph Oman, Register of Copyrights).
89. *See* 135 Cong. Rec. 12,596-98 (1989).
90. *See* H.R. 2690, 101st Cong. § 101, 135 Cong. Rec. 12,597 (1989) (defining "work of visual art").
91. *Id.* § 106A(a)(3).
92. *Id.*
93. The per se standard was criticized by Ralph Oman in the House Hearing. *See Visual Artists Rights Act of 1989: Hearing Before the Subcomm. On Courts, Intell. Prop., and the Admin. of Justice of the Comm. on the Judiciary, H.R. 2690*, 101st Cong. 66 (1989) [hereinafter *H.R. 2690 Hearing*] ("[T]he Office recommends reconsideration of this provision. Perhaps a per se standard could be justified in the interest of preservation, and only the destruction of the work should constitute a per se violation. Alternatively, distortion or mutilation, as well as destruction, might constitute per se violations of the right in works of recognized stature.").
94. *See* 135 Cong. Rec. 12,250-52 (1989).

work of recognized stature.[95] Similarly, courts were urged to consult a very similar list of experts in their recognized stature determination to that proposed in the 1987 bill.[96] Following hearings on the House bill, the Committee on the Judiciary adopted essentially the Senate bill of Senator Kennedy, deleting from H.R. 2690 the recognized stature standard for harm short of destruction.[97] In support of its decision, the Committee cited fears of increased litigation due to a battle of expert witnesses over the standard, and a desire to make clear that "an author need not prove a pre-existing standing in the artistic community" to be protected.[98] The recognized stature standard was retained, however, for the complete destruction of a work.[99] Although the House Report affirms the provision's preservation rationale, it makes no comment on the retention of a recognized stature standard for preservation, nor on the decision to omit from the Act the recommended list of experts.[100]

VARA thus establishes rights of attribution and integrity for authors of works of visual art as defined in the amendment to section 101.[101] The right of integrity, subject to important limitations on works fixed in buildings as set forth in section 113(d), is:

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[102]

The cause of action is limited to the author of the work.[103] The

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95. *See supra* notes 80-82 and accompanying text.

96. *See* S. 1198, 101st Cong. § 106A(a)(3)(B), 135 Cong. Rec. 12,251 (1989).

97. *See* H.R. Rep. No. 101-514, at 14-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6924-26.

98. *Id.* at 6925.

99. *See id.* at 6926. The retention of a recognized stature standard for the destruction of an artwork was suggested by the Copyright Office. *See H.R. 2690 Hearing*, *supra* note 93, at 66, 73.

100. *See id.*

101. *See* 17 U.S.C. §§ 101, 106A (1994). A "work of visual art" is defined as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id. § 101.

102. *Id.* § 106A(a)(3)(A).

103. *See id.* § 106A(b). Only at the last minute was the term of protection under

rights are unassignable, untransferable, and uninheritable, but they are waivable.[104] Works that are incorporated into buildings with the artist's consent and that may not be removed without mutilating or destroying the work are not protected by VARA.[105] When the work can be removed without causing the enumerated harm, however, moral rights do apply, unless the building owner makes an unsuccessful good-faith attempt to contact the artist who fails to remove the work or pay for its removal.[106]

The conflicting ideologies and rationales from which VARA emerged resulted in a narrow but profound amendment to the Copyright Act. While VARA incorporated a personality and preservation rationale, it left many questions of application of these twin goals unanswered, not least the impact of the recognized stature standard. Part II examines the application of the recognized stature provision in subsequent litigation.

II. LITIGATION UNDER VARA AND STATE MORAL RIGHT STATUTES

Judicial application of VARA and the related state statutes is limited to a mere handful of cases, and in even fewer is the recognized stature or recognized quality provision at issue. The standard is cited often enough in the case law and in recorded disputes, however, to allow an analysis of the standard's theoretical and practical application. This part discusses those cases and disputes in which recognized stature or recognized quality are at issue. The litigation reveals confusion over the purpose of the recognized stature provision—for example, whether the standard is intended merely to filter out nuisance suits or should act as a substantial hurdle for the plaintiff—and what type of proof is required to satisfy the standard.

A. *Case Law Involving Recognized Stature*

The earliest and most influential case addressing the recognized stature provision of VARA is *Carter v. Helmsley-Spear, Inc.*[107] Three sculptors sought an injunction to prevent the owners of a commercial building in Queens, New York, from altering or destroying a sculpture

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VARA reduced from the author's life plus 50 years to the author's life alone. *See* Sherman, *supra* note 30, at 407 n.198.

104. *See* 17 U.S.C. § 106A(d)–(e).

105. *See id.* § 113(d).

106. *See id.*

107. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). *See generally* Rebecca J. Morton, Note, Carter v. Helmsley-Spear, Inc.*: A Fair Test of the Visual Artists Rights Act?*, 28 Conn. L. Rev. 877 (1996) (analyzing *Carter* and arguing for amendments to VARA to improve VARA's preservation effects).

made by the artists for the lobby of the building.[108] The court found that the elements of the sculpture and mosaic floor of the lobby constituted a single work of art for the purposes of VARA, and that the functional character of parts of the work did not define it as applied art and thus beyond the protection of VARA.[109] The court went on to find that the installation satisfied the definition of a work of art under VARA and that it was not a work for hire.[110]

The court next considered the claim that "intentional distortion, mutilation, or modification" of the work would be "prejudicial to [plaintiff's] honor or reputation."[111] Both parties presented expert witnesses.[112] Testifying for the plaintiffs were Professor Robert Rosenblum, an art critic and professor of art history at New York University, Jack S. Shainman, president and director of a contemporary art gallery, and Professor Aedwyn Darroll, a professor at the Parsons School of Design and at the Fashion Institute of Technology in New York.[113] Appearing for the defendant was the editor and art critic of The New Criterion, Hilton Kramer.[114] Judge Edelstein was candid in his assessment of the credibility of the expert witnesses on this issue, crediting the testimony of the plaintiffs' experts, but criticizing Mr. Kramer, whose appalled reaction to most contemporary art, familiar to readers of his journal, evidently colored his testimony.[115] The judge noted that "in [Kramer's] opinion, the artists have no reputation," and that "no artist has a reputation in the art world unless Mr. Kramer is familiar with writings about that artist."[116] In contrast to the active "involve[ment in] contemporary art and in the contemporary artistic community" of the plaintiffs' experts, Judge Edelstein characterized Mr. Kramer's expertise as "myopic."[117] Accordingly, the court found that the plaintiffs did have honor and reputations worthy of protection and that these reputations would be "damaged by 'intentional distortion, mutilation, or modification' of

108. *See Carter*, 861 F. Supp. at 312-13.

109. *See id.* at 314-16. A work of applied art is described by Judge Edelstein as "two-and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects." *Id.* at 315 (citing *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 997 (2d Cir. 1980)). Works of applied art are not "works of visual art" as defined by VARA in 17 U.S.C. § 101.

110. *See Carter*, 861 F. Supp. at 316-23. Works for hire are explicitly excluded from the definition of "works of visual art." 17 U.S.C. § 101. The definition pertinent to *Carter* of a work for hire is "a work prepared by an employee within the scope of his or her employment." *Id.*

111. *Carter*, 861 F. Supp. at 323; *see also* 17 U.S.C. § 106A(a)(3)(A).

112. *See Carter*, 861 F. Supp. at 323-24.

113. *See id.*

114. *See id.* at 324.

115. *See id.* For an aptly named selection of Kramer's essays, see Hilton Kramer, The Revenge of the Philistines: Art and Culture, 1972-1984 (1985).

116. *Carter*, 861 F. Supp. at 324.

117. *Id.*

the Work."[118]

The court went on to consider whether the work was one of "recognized stature" for purposes of 17 U.S.C. § 106A(a)(3)(B).[119] As an initial premise, the court observed that the recognized stature provision was "preservative in nature," rather than a reputational right, and that it recognized Congress's concern that "the destruction of works of art represented a significant societal loss."[120] The recognized stature provision was a "gate-keeping mechanism," by which nuisance lawsuits were avoided and only art valued by society was afforded protection against destruction.[121] Assessment of that recognized stature should not be based on the subjective aesthetic judgment of the trier of fact—rather, the trier of fact was to inquire after the opinion of "art experts, the art community, or society in general."[122] Adopting a plain meaning approach to the text of the provision, and mindful of the provision's preservative intent, the court established the two-part standard that has since been widely quoted:[123]

> Thus, for a work of visual art to be protected under this Section, a plaintiff must make a two-tiered showing: (1) that the visual art in question has "stature," *i.e.* is viewed as meritorious, and (2) that this stature is "recognized" by art experts, other members of the artistic community, or by some cross-section of society.[124]

The standard would generally, "but not inevitably,"[125] require the in-court testimony of expert witnesses, who are to be drawn from the ranks of those groups specified in the Kennedy Bill and any other sources the court sees fit to consult.[126]

Appearing to apply its own two-pronged test,[127] the court proceeded to weigh the expert testimony before it and found the recognized stature requirement satisfied.[128] Professor Darroll's testimony, as characterized by the court, concerned his personal evaluation of the work's stature rather than its appreciation in the community.[129] In contrast, the testimony of Kent Barwick, president of the Municipal Art Society of New York, and a former chairman of the New York City Landmarks Preservation Commission, focused on the first "recognized" prong of the standard; those who had seen the work on one of the Municipal Art Society's tours of noteworthy works of art

118. *Id.*
119. *See id.* at 324-26.
120. *Id.* at 324.
121. *Id.* at 325.
122. *Id.*
123. *See id.*
124. *Id.*
125. *Id.*
126. *See id.* at 325 n.10.
127. *See id.* at 324-26.
128. *See id.*
129. *See id.* at 326.

and architecture in New York "were anxious to have the tour of the Work made a permanent part of the Society's tour schedule."[130] In his view, the public interest would be served by preservation of the work. Professor Rosenblum again testified, based in part on the merits of the work, which he declared "an incredible phenomenon," and in part on its recognition by others.[131]

In finding the work to be of "recognized stature," Judge Edelstein again discredited the testimony of the defendants' expert witness, Hilton Kramer.[132] Kramer testified that he found the work to be without merit, remarking in an apparent play on the recognized stature standard that the work was merely "a pastiche of recognized cliches."[133] Kramer's denunciation of the work backfired, however, as it became clear that his distaste embraced almost all contemporary art, for which he stated "the very notion of quality in art has been discarded."[134] Opinions characterized by such lack of nuance were of little probative value beside that of the plaintiffs' experts, "who are intimately familiar with evolving standards in the area of contemporary art."[135] The judge's comments on the need for expert testimony, his formulation of a two-pronged test for recognized stature, and his insistence on the preservation rationale for the provision have proved both influential and unfortunate.

In *Pavia v. 1120 Avenue of the Americas Associates.*,[136] the district court dismissed an action brought under VARA by Pavia, a sculptor whose work, The Ides of March, had been commissioned to adorn the lobby of the Hilton Hotel in Manhattan.[137] Created in 1963, Pavia's four-part sculpture was disassembled in 1988 and taken for reassembly in the public lobby of a commercial warehouse in Queens.[138] Only two elements of the sculpture were shown at the warehouse, however, and Pavia sued under the New York Arts and Cultural Affairs Law and under VARA for intentional mutilation of the work.[139] Although Pavia's claim fell under section 106A(a)(3)(A) of VARA, claiming "intentional... mutilation... prejudicial to his or her honor or reputation" (and thus requiring no finding of recognized stature), the court still made the factual finding that "'The Ides of March' was recognized by critics and the news media as a noteworthy work of

130. *Id.* at 325-26.
131. *Id.* at 325.
132. *See id.* at 326
133. *Id.*
134. *Id.* at 326 n.13.
135. *Id.* The Second Circuit reversed on the issue of whether the sculpture was a work-for-hire. In doing so, the Court did not review the lower court's findings on recognized stature. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 86-87 (2d Cir. 1995).
136. 901 F. Supp. 620 (S.D.N.Y. 1995).
137. *See id.* at 623-24.
138. *See id.* at 624.
139. *See id.*; N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney Supp. 1999).

art."[140] This wording seems calculated to respond to a factual requirement of recognized stature, though in its discussion of the mutilation claim the court seems to realize that section 106A(a)(3)(A) makes no such requirement.[141]

Recognized stature under section 106A(a)(3)(B) was discussed in more detail in an appeal from a state action brought under the CAPA.[142] The plaintiffs, Martin and Lorraine Lubner, lost much of their life work as artists when a city garbage truck rolled down a hill and destroyed their home.[143] The primary issue for the Lubners on appeal was whether the state statute permitted a cause of action for damages caused by negligence alone, and whether VARA preempted the state action.[144] Without deciding the issue of preemption, the court examined the Lubners' claim under section 106(A)(a)(3)(B) and found that, even if VARA preempted the state statute, the lack of intentional or grossly negligent action on the part of the City absolved it of liability.[145] The question of recognized stature was an interesting one for the court because the complete destruction of so many undocumented artworks presented a potential problem of proof.[146] In this case, recognized stature was found by inference.[147] The court looked to evidence, excluded at trial on motions *in limine*, of the Lubners' active forty-year careers as painters and art instructors.[148] Both painters showed that their work was widely exhibited in the United States and Europe, and that it had entered both private and public collections.[149] VARA, however, requires that the work destroyed, not the artist, be of recognized stature.[150] The court resolved the problem by "[a]ccepting the Lubners' argument that they are recognized artists who have created and exhibited their paintings and drawings for over 40 years, we assume that their [destroyed] art included works of recognized stature . . . ."[151] The court's finding of recognized stature by inference is a creative solution. It is doubtful, however, that inferred recognized stature would have been so easily accepted by this or any other court had the outcome of the case depended on it.

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140. *Pavia*, 901 F. Supp. at 624, 627. The court dismissed the VARA claim on the grounds that the acts of mutilation predated the effective date of VARA and thus VARA did not apply. *See id.* at 628-29.

141. *See id.* at 627-28.

142. *See* Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (Cal. Ct. App. 1996).

143. *See id.* at 26. Judge Nott commented that the case presented "a factual scenario that seems to have been taken from a law school hypothetical." *Id.*

144. *See id.* at 27-29.

145. *See id.* at 29.

146. *See id.* at 26.

147. *See id.* at 29.

148. *See id.* at 26-27, 29.

149. *See id.* at 26.

150. *See id.* at 29.

151. *Id.*

VARA was also invoked by six artists in a 1997 dispute over a community garden in New York City.[152] The City had sold the vacant lot to the defendants for development under the City's affordable housing program.[153] In the years before development began, a group of local residents had transformed the lot with plantings and art for public use.[154] Artwork in the garden included murals on adjoining walls, freestanding sculptures, and an ornamental pathway.[155] The plaintiffs claimed that the garden, as a conceptual whole, was a single work of art, "an environmental sculpture," in the same way that the entire lobby of the hotel in *Carter* constituted a single work, and that alteration or removal of any part constituted violations of both sections 106A(a)(3)(A) and (B).[156]

The district court dismissed the complaint without deciding the single work issue.[157] If the garden were considered a single work of art so that no element could be removed without destroying the whole, Judge Baer argued, VARA would not apply, as the garden was illegally cultivated on another's property without the owner's consent.[158] If the various works of art in the garden were considered separable, then again VARA would not apply. The sculptures could be removed without damage to the plaintiffs under the terms of the Act.[159] The murals, although seriously obstructed by the proposed development, would not be physically destroyed or mutilated.[160] Although the plaintiffs had argued that "obliterating a visual artwork from view is the equivalent of destroying it, and is actionable as a matter of law," Judge Baer found no applicable law in support of the proposition, and ultimately rejected it on the policy ground that to find otherwise would "allow building owners to inhibit the development of adjoining parcels of land by simply painting a mural on the side of their building."[161]

In dicta, Judge Baer addressed the elements of honor and reputation, and of recognized stature.[162] Both sides had offered an expert witness, and the judge's findings on honor, reputation, and recognized stature were based solely on a weighing of the credibility of each side's experts, the critics Phyllis Tuchman for the defense and Robert Costa for the plaintiffs.[163] Judge Baer found Tuchman's

152. *See* English v. BFC & R East 11th Street LLC, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), *aff'd*, 198 F.3d 233 (2d. Cir. 1999).
153. *See id.* at *1.
154. *See id.* at *1-*2.
155. *See id.* at *1.
156. *See id.* at *3.
157. *See id.* at *4.
158. *See id.* at *4-*5.
159. *See id.* at *5.
160. *See id.* at *6.
161. *Id.*
162. *See id.*
163. *See id.*

testimony more credible than Costa's, implying that if the case had hinged on proof of damage to reputation or the recognized stature of the art, the court would have found for the defendants.[164] The judge's confidence in Costa was evidently compromised when Costa speculated that the peeling of paint on one of the murals was not a condition problem, but rather an integral part of the mural's theme of decay in nature.[165] In evaluating expert evidence, the judge was ultimately forced to evaluate competing experts' testimony based on the credibility of their aesthetic theories.

Murals were again the subject of an action under VARA in a case decided in Ventura, California, in June 1998.[166] The plaintiff, M. B. Hanrahan, and a large group of neighborhood children painted a twelve-by-seventy-two-foot mural on the exterior wall of a liquor store using an anti-drug, alcohol, and smoking theme as part of a community improvement plan.[167] Three years later, the storeowners whitewashed half of the mural and replaced it with a painted advertisement for the store.[168] Finding for the plaintiff, Judge Paez awarded damages and an injunction to permit the artist to restore the mural.[169] Hanrahan had brought suit under both the mutilation and destruction clauses of section 106A(a)(3).[170] Despite the humble origins of the mural, there was ample evidence of recognized stature and damage to honor and reputation. The mural was chosen in 1996 as one of fifty winners in a national contest for youth-oriented projects aimed at drug and alcohol abuse, in connection with which photographs were displayed at the U.S. Capitol in Washington.[171] The destruction of the mural prompted much local media coverage, and local residents held a rally in support of the work.[172] Thus, recognized stature was found based on national and local community reaction, with little reference to the world of professional art criticism. The political content, far from undermining the aesthetic stature of the work, situated the work in the mainstream of contemporary art, and

164. *See id.*

165. *See id.*

166. *See* Hanrahan v. Ramirez, No. 97-CV-7470 (C.D. Cal. June 3, 1998), Intell. Prop. Litig. Rep., July 8, 1998, at 3.

167. *See id.* For an illustration of the mural, see Robin J. Dunitz & James Prigoff, Painting the Towns: Murals of California 142 (1997).

168. *See Hanrahan*, Intell. Prop. Litig. Rep., vol. 4, no. 23, at 3.

169. *See id.* The artist was awarded $15,000 in damages, $15,000 to restore the mural, and attorney's fees and costs of approximately $18,000. *See id.*

170. *See* Steve Chawkins, *A Line in the Paint; Ventura Muralist fights Obliteration of one of her Works by Store Owner*, L.A. Times (Ventura County ed.), June 29, 1998, at B1; Robert Rootenberg, *Art Preservation Case Compensates Ventura Muralist in Paint-over Case*, Mural Conservancy of Los Angeles (MCLA) Newsletter, (Summer 1998) (visited Dec. 1, 1999) <http://www.lamurals.org/MCLA/MCLANewsletter.html>.

171. *See* Robin Dunitz, *Murals under Attack*, *in* MCLA Newsletter, *supra* note 170.

172. *See* Rootenberg, *supra* note 170.

supported a finding of recognized stature.[173]

The most recent case to be decided invoking VARA is *Martin v. City of Indianapolis*.[174] Martin is a sculptor of significant local repute, and an employee of the Tarpenning-Lafollette Company, designers and manufacturers of metal objects.[175] Over a period of two-and-a-half years, Martin created a large metal sculpture named "Symphony #1."[176] His employer provided some assistance in the creation of the work as well as a site on its land for the completed sculpture, but the work was made on Martin's own time and, as the court later determined, was not a work-for-hire.[177] The site was granted after obtaining a zoning variance from the City.[178] Under the terms of the variance, the City was to give Martin and Lafollette ninety days in which to remove the sculpture should it no longer be compatible with the existing land use or if the acquisition of the property on which it stood became necessary.[179] Four years later, the City did indeed acquire the land for redevelopment and, despite the artist's repeated offers to donate Symphony #1 to the City and to aid in its removal to another site, the City demolished the sculpture.[180]

Martin filed suit pursuant to section 106A(a)(3)(B), claiming that the defendants had intentionally destroyed the work.[181] On cross-motions for summary judgment, the defendants argued *inter alia* that Martin had failed to prove by admissible evidence that Symphony #1 was a "work of recognized stature."[182] The City asserted that Martin's proof, which was exclusively documentary and included no in-court testimony, was inadmissible hearsay.[183] Martin had proffered newspaper and magazine articles and other materials, which showed that the model for Symphony #1 had been awarded the "Best of Show" in a local art show, that the *Indiana Arts Commission*

173. On the prevalence of political subject matter in contemporary art, see James Gardner, Culture or Trash? A Provocative View of Contemporary Painting, Sculpture, and Other Costly Commodities 147-69 (1993) (decrying the strong emergence of political art in the late 1980s and 1990s, and the shift from interest in the art to its meaning and the cause it propounds).

174. 982 F. Supp. 625 (S.D. Ind. 1997), *and* 4 F. Supp. 2d 808 (S.D. Ind. 1998), *aff'd*, 192 F.3d 608 (7th Cir. 1999). *See generally* Sonia Tara Banerji, *Recent Developments in Law and Policy under the Visual Artists Rights Act of 1990:* Martin v. City of Indianapolis *and the Problem of Unwanted Art*, 9 Windsor Rev. Legal Soc. Issues 99 (1999) (analyzing *Martin* and proposing an "Alternative Placement" rule for removal of site-specific art); Molly McDonough, *Beauty of Art-Shield Law in Eye of Beholder*, Chi. Daily L. Bull., Nov. 30, 1998, at 3 (discussing the district court opinion in *Martin*).

175. *See Martin*, 982 F. Supp. at 628.

176. *See id.*

177. *See id.* at 628, 632-35.

178. *See id.* at 628.

179. *See Martin*, 192 F.3d at 610.

180. *See id.* at 611.

181. *See Martin*, 982 F. Supp. at 630.

182. *Id.*; *see also* Banerji, *supra* note 174, at 117-19.

183. *See Martin*, 982 F. Supp. at 630.

Quarterly had featured Symphony #1 in an article on art in Indiana public spaces, and that the construction and completion of the sculpture had been favorably received.[184] Martin also offered letters from the Director of the Herron Gallery of the Herron School of Art at Indiana University, Indianapolis, from an art critic of the *Indianapolis Star*, and a letter to the editor of a local newspaper in support of the work.[185]

In granting the plaintiff's motion, Judge Barker held that the statements were not hearsay, as they were not offered for the truth of the matters asserted, i.e. that Symphony #1 had inherent merit.[186] Rather, they were offered to show that art critics, professors, and the public noticed the work and that *they* considered it a newsworthy work of art.[187] The court noted *Carter*'s two-pronged interpretation of recognized stature,[188] although it is unclear to what extent, if at all, the court applied such a test, for in its brief discussion of Martin's evidence the court made no attempt to identify which exhibits tended to prove each of the two elements.[189] For Judge Barker, the *Carter* test seems merely to have served as a useful reminder that "[t]he critical element of 'recognized stature' involves community opinion about Martin's work, not a determination that Martin's work is inherently meritorious."[190]

On appeal to the Seventh Circuit, the City challenged Judge Barker's holding on the recognized stature evidence.[191] The court in a 2-1 decision found for Martin and affirmed the district court ruling.[192] Noting the plaintiff's contention that the *Carter* two-pronged test "may be more rigorous than Congress intended," Judge Harlington Wood, writing for the majority, accepted the test for the purpose of the decision.[193] The documentary evidence was admissible to show that Symphony #1 had not gone unnoticed and that the writers considered the work meritorious.[194] Judge Manion dissented.[195] He too accepted the *Carter* two-pronged test for recognized stature.[196] But for Judge Manion, the test presented an insuperable problem for claimants proffering only documentary evidence and eschewing expert testimony.[197] If the evidence were admitted only to prove that the

184. *See id.* at 631.
185. *See id.*
186. *See id.* at 630.
187. *See id.*
188. *See supra* note 124 and accompanying text.
189. *See Martin*, 982 F. Supp. at 631.
190. *Id.* at 630.
191. *See* Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999).
192. *See id.* at 614.
193. *Id.* at 612.
194. *See id.* at 612-13.
195. *See id.* at 615-16 (Manion, J., dissenting).
196. *See id.* (Manion, J., dissenting).
197. *See id.* at 616 (Manion, J., dissenting).

work of art was recognized and thus not admitted for the truth of the facts asserted (i.e. "that the art in question was good or bad"), then the second prong of the *Carter* test, that the work had stature, remained unproven, at least for the high standards required for summary judgment.[198] For Judge Manion, expert testimony was always necessary to prove recognized stature, except in those rare cases when "something of unquestioned recognition and stature was destroyed."[199]

Pervading Judge Manion's opinion is his reading of the purpose of VARA, his disdain for Symphony #1, and his sympathy for traditional, non-moral property rights. For Manion, "VARA was not designed to regulate urban renewal, but to protect great works of art from destruction and mutilation, among other things."[200] Evidence indicative of stature was evidence that the artwork "met a certain high level of quality."[201] The recognized stature clause was intended to present more than just a deterrent to nuisance suits, but was rather a significant limitation on the right to protection under VARA. Given such a reading of the statute, it is not surprising that Judge Manion would require more in defense to a motion of summary judgment than Martin provided. Judge Manion concluded that the majority decision posed real dangers to the purchasers or donees of art, who risked becoming the "perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster."[202] Judge Manion counseled the obtaining of waivers to avoid liability for the statutory $20,000 for "art of questionable value."[203]

The few cases brought under VARA or the relevant state statutes reveal a predictably inconsistent application of the recognized stature/recognized quality standard. The courts are divided on the level of proof required. Thus, in *Lubner*, works of recognized stature were inferred from careers of recognized stature;[204] in *Martin*, purely documentary evidence satisfied the standard;[205] and the *Carter* court considered in-court expert testimony a virtual requirement.[206] These cases illustrate that while judges are aware that their role is not that of art critic, they must often struggle with classifying art that is large-scale, politically charged, and aesthetically challenging. Furthermore,

198. *See id.* (Manion, J., dissenting).
199. *Id.* (Manion, J., dissenting).
200. *Id.* at 615 (Manion, J., dissenting).
201. *Id.* at 616 (Manion, J., dissenting).
202. *Id* (Manion, J., dissenting).
203. *Id.* (Manion, J., dissenting).
204. *See* Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24, 29 (Cal. Ct. App. 1996); *supra* notes 142-51 and accompanying text.
205. *See* Martin v. City of Indianapolis, 982 F. Supp. 625, 630-31 (S.D. Ind. 1997); *supra* notes 174-203 and accompanying text.
206. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994); *supra* notes 107-35 and accompanying text.

the cases reveal significant problems with determining who qualifies as an art world expert, and how to evaluate an expert's testimony without resorting to personal aesthetic bias. The standard, however, has rarely been the central issue in reported cases. To present a fuller picture of the problems inherent in the standard, therefore, a few of the published disputes and settled cases must be examined.

B. *Disputes*

Most disputes involving VARA and state moral rights statutes are settled before trial, not least because of the relatively modest damages available. The disputes that attract the attention of the press predominantly concern large-scale sculpture and murals.

1. Sculpture

Given the large size and site-specificity of much commissioned sculpture, it is unsurprising that VARA disputes frequently involve damage to or destruction of sculpture. For example, a Florida artist invoked VARA in his long-running dispute with The Art and Cultural Center of Hollywood ("Center") near Fort Lauderdale, Florida.[207] Marc Leviton is an artist who creates sculptures with found objects such as auto parts, plumbing fixtures, and scrap wiring.[208] In 1995, he was the Artist in Residence at the Center, maintaining a studio there and using the grounds for storage of his finished works and elements for future sculptures.[209] Responding to neighborhood complaints, the City issued a five-day notice to remove the "junk" from the grounds or face a code violation.[210] The Director of the Center ordered the objects gathered and removed.[211]

Leviton sued the Center for destroying his art works under section 106A(a)(3)(B) of VARA.[212] In pre-trial publicity, the issue of recognized stature was much discussed.[213] Counsel for the defendant stated to the press that Leviton, a retired New York electrician, was not an artist meriting protection under VARA.[214] He had never submitted his creations to peer review, had not entered juried competitions, and had not received established critical acclaim.[215] The Director insisted that no works were disassembled, and that the only

207. *See* Paul Brinkley-Rogers, *Law Protecting Rights of Artists to Face Test*, Miami Herald, Mar. 11, 1999, at 1A; Sean Rowe, *You Call This Art and Culture?*, New Times Broward-Palm Beach, Mar. 26, 1998 (News); *supra* note 2.
208. *See* Cazares, *supra* note 2.
209. *See id.*
210. *See* Brinkley-Rogers, *supra* note 207.
211. *See id.*
212. *See id.*
213. *See id.*
214. *See id.*
215. *See id.*

objects junked were some of the artist's raw materials—"'bicycle parts, shovels, different metal parts with jagged edges.'"[216] The plaintiff, however, noted that the defendant valued his work highly enough to appoint him Artist in Residence and even now kept one of his works in its permanent collection.[217] The former director of the Center was quoted as calling Leviton "'an up-and-coming representative South Florida artist.'"[218] Furthermore, Leviton had photographs of the completed works which, he says, the Center destroyed, thus enabling expert opinion on the recognized quality of the destroyed pieces.[219] The case is still awaiting trial.[220]

The Leviton dispute is but one example of the application of VARA to the destruction of large-scale sculpture.[221] The highly visible nature of large-scale sculpture encourages impassioned views. The Leviton dispute is also indicative of the problem of distinguishing between the recognized stature of a work of art and the publicity surrounding its demise.

2. Murals

If large-scale sculpture has proved a fertile area of interpretation of VARA, the other major area is the mural. Before the enactment of VARA, destruction of murals was the catalyst to unsuccessful attempts at establishing through the courts a moral right or its equivalent. For example, in the 1949 case *Crimi v. Rutgers Presbyterian Church in New York*,[222] the court found that the artist had no right to prevent the mutilation or destruction of his mural once the painting was completed and paid for.[223] It is not surprising that the

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216. Rowe, *supra* note 207 (quoting the former director of the Center).

217. *See* Brinkley-Rogers, *supra* note 207.

218. *Id.*

219. *See id.*

220. In January 2000, the defendant moved for summary judgment on the grounds that VARA was unconstitutional due in part to the vagueness of the term "recognized stature." Telephone Interview with Ronald P. Ponzoli, counsel for the defendant (Feb. 23, 2000). For examples of settled cases in which recognized stature was an issue of importance, see Peter H. Karlen, *Moral Rights and Real Life Artists*, 15 Hastings Comm. & Ent. L.J. 929, 941-42 (1993).

221. For other cases involving sculpture, see *supra* notes 107-41, 174-203 and accompanying text.

222. 89 N.Y.S.2d 813 (Sup. Ct. 1949).

223. *See id.* at 819. One of the few cases brought under the Massachusetts Art Preservation Act ("MAPA") concerned the destruction of a mural. In *Moakley v. Eastwick*, an artist sued under MAPA for the destruction of a mural located in a church. 666 N.E.2d 505, 505-06 (Mass. 1996). The Brockton Superior Court (unpublished decision) found that the art was protected by MAPA, but that application of the Act offended the constitutional right to freedom of religion and worship. *See id.* at 506-07. Recognized quality was proved by the testimony of Catherine Mayes, director of a Newton gallery. *See* Sandy Coleman, *Shaping a Case for Artists' Rights*, Boston Globe, Sept. 13, 1991, at 25. The Supreme Judicial Court affirmed on the ground that the act did not apply to art created before the date on

change came first in California. In California, murals have long been an important element of visual culture, in part due to the reliable climate, but also to the dominance of the automobile.[224] The first case brought under the California Art Preservation Act of 1979 ("CAPA") concerned a large external mural by Kent Twitchell entitled "Old Woman of the Freeway," a favorite of motorists on the Hollywood Freeway near downtown Los Angeles.[225] When the new owners of the hotel on which the mural was painted whitewashed the wall in 1986, the artist, aided by public outcry, sued under CAPA and was awarded $175,000.[226]

Inspired by this example, litigation over the destruction or defacement of murals citing CAPA and VARA is now frequent in California. In 1991, disputes arose over the defacement of murals painted by professional artists with the aid of school children in San Diego elementary schools.[227] In Los Angeles, *Hanrahan v. Ramirez*, in which the plaintiff painted a mural on the exterior wall of a liquor store, is unusual only in that it was not settled.[228] Ironically, the City's concern for the visual environment has precipitated several disputes. In a program to combat the practice of "tagging," the spraying of generally gang-related graffiti on neighborhood walls, city agencies paint over the tags, sometimes obliterating murals beneath.[229] City agencies were allegedly responsible for the fate of "The Wall That Cracked Open," a mural by Willie Herron, depicting the stabbing of his brother by gang members.[230] Whatever the other merits of Herron's case, the artist should have no problem proving recognized stature. Los Angeles is considered the preeminent home of mural art

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which the law became effective. *See Moakley*, 666 N.E.2d at 508.

224. *See* Patt Morrison, *Defending the Mural Capital of America*, L.A. Times, Apr. 5, 1998 (Magazine), at 7 (referring to the advantages for exterior mural painting in the hot, dry climate of the Los Angeles area).

225. *See* Shauna Snow, *Homecoming for Lady of the Freeway*, L.A. Times, Mar. 20, 1992, at F1. The mural is reproduced in Dunitz & Prigoff, *supra* note 167, at 157.

226. *See* Snow, *supra* note 225, at F1. Restoration of the mural began in the Spring of 1999. *See* George Ramos, *Freeway Lady is Returning Artwork*, L.A. Times (Orange County ed.), Apr. 25, 1999, at A16.

227. *See* Teri Sforza, *$500,000 Claim Filed in School Censorship Case*, San Diego Union, Oct. 3, 1991, at B-2; Teri Sforza, *Some Murals Have People Climbing the Walls*, San Diego Union, July 22, 1991, at B-1.

228. *See* Hanrahan v. Ramirez, No. 97-CV-7470 (C.D. Cal. June 3, 1998), Intell. Prop. Litig. Rep., July 8, 1998, at 3; *supra* notes 166-73 and accompanying text. In *Botello v. Shell Oil Co.*, the California Court of Appeal reviewed a grant for summary judgment in favor of the defendant who argued in an action brought under CAPA after the destruction of a mural that a mural was not a "painting" under CAPA and was therefore beyond the protection of the Act. 280 Cal. Rptr. 535, 536 (Cal. Ct. App. 1991). The Court of Appeal reversed and remanded. *See id.* at 540. The case was subsequently settled, such that no finding concerning "recognized quality" was made. *See* Shauna Snow, *Mural Group Claims Victory*, L.A. Times, July 18, 1992, at F4.

229. *See* Lorenza Muñoz, *Distinctive L.A. Art Legacy Under Siege*, L.A. Times, July 23, 1999, at A1.

230. *See id.*

in America, especially Chicano murals.[231] Furthermore, the established art community holds Herron's mural in high esteem: Max Benavidez, a vice chancellor at the University of California Los Angeles and an art historian and critic, has been quoted as saying: "As far as murals are concerned, [Herron's 'Wall'] was a landmark art piece in Los Angeles. This was the great signifier of Chicano art, and the fact that it has been destroyed is a great tragedy for the art world and our community."[232]

More interestingly, recognized stature in that case might be provable by reference to the local Chicano community, which is the subject of the mural. Herron's mural, like many murals, was a peculiarly community work.[233] Friends aided in the creation of the mural,[234] and its subject, "the physical and psychic violence surrounding many disenfranchised youth," was a crucial concern of the immediate community.[235] The mural's exposed position ensured its incorporation into the daily life of the community.[236] Under such circumstances, the *Carter* court's finding that courts may look not only to art experts and other members of the artistic community for evidence that the stature is recognized, but also to "some cross-section of society," would surely be relevant.[237]

In San Francisco, VARA rights are increasingly cited in disputes over murals. In a recently reported dispute, the new owners of a hotel in the low-income Tenderloin district announced plans to paint over a 1992 mural, "The Leap of Compassion," by local artist Paul Scofield.[238] The mural, located on the exterior wall of an apartment building, had been commissioned by the previous owner of the hotel over whose pool and courtyard the building looms.[239] Painted to benefit a local youth project, the mural has the support of local residents and activists, many of whom came to the mural's unveiling.[240] Again, local support might be decisive on the issue of

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231. *See id.*; *see also* Michael Quintanilla, *Once Bustling, Now Bust*, L.A. Times, Dec. 25, 1998, at E1 (describing the threat to famous Latino murals on the walls of failing clothing store); Brenda Rees, *Talking Walls: A Guide to L.A.'s Vast Collection of Murals, Where Artists Paint Snapshots of History and Hope*, L.A. Times, Apr. 16, 1998, at F6 (listing some of the more famous murals in Los Angeles). For reproductions of major Los Angeles murals, see Dunitz & Prigoff, *supra* note 167, at 148-235. The Mural Conservancy of Los Angeles ("MCLA") is an active volunteer organization publicizing artists' rights under CAPA and VARA. *See supra* note 170.

232. Muñoz, *supra* note 229.

233. *See id.*

234. *See id.*

235. *Id.*

236. *See id.*

237. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 & n.10 (S.D.N.Y. 1994).

238. *See* Sheila Muto, *Muralists See the Writing on the Wall: It's a Billboard*, Wall St. J. (Cal.), July 14, 1999, at CA1.

239. *See id.*

240. *See id.* The value of exterior walls as advertising space is fueling many of the recent VARA disputes over murals. *See id.* In another recent case, a VARA suit was

recognized stature.

Finally, in one of the largest settlements yet under VARA, plaintiffs are to receive $200,000 for the destruction of their 1986 Mission District mural "Lilli Ann."[241] The four-story-high painting was whitewashed in July 1998 by the new owners of the building, who claim that they were unaware that their purchase of the building did not include rights to the mural.[242] Again, recognized stature would have been easily proved. San Francisco is a major center of mural art, and the Mission District in particular is known for its murals.[243] Furthermore, the destroyed mural was "'at the nexus of two major trends in the art world: the Mexican muralist tradition and the San Francisco muralist tradition,'" and was beloved by the local Latino community, especially because one of the two artists who executed the mural trained under assistants to the great muralist Diego Rivera.[244]

In examining the case law and reported disputes under VARA and state moral rights statutes for evidence of the application and interpretation of the recognized stature/recognized quality standard for destroyed works of art, the record is thin and patchy. While analysis of those statutory provisions is not extensive, their invocation has grown more prevalent within the last few years.[245] The cases and disputes reveal an inconsistent application of the recognized stature standard that springs, at least in part, from idiosyncratic readings of VARA, the policies embodied within it, and its application to art of widely varying genesis, aim, and pretension. The violent interaction

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avoided over a mural entitled "Extinct" on the exterior wall of a hotel when the owner, wishing to lease the wall to a billboard company, agreed to allow the artist to recreate the mural on another wall of the hotel. *See id.* The mural is reproduced in Dunitz & Prigoff, *supra* note 167, at 69.

241. Campusano v. Cort, No. 98-3001 (N.D. Cal. filed July 31, 1998). *See* Torri Still, *Artists vs. Landlords. Battles are Brewing in S.F. Over Muralists' Right to Preserve Their Work Versus Landlords' Property Rights*, Recorder, Nov. 2, 1999, at 1. The mural is reproduced in Dunitz & Prigoff, *supra* note 167, at 73.

242. An ancillary suit remains, *Cort Trust v. Lilli Ann Corp.*, in which the new owners claim damages from the previous owners for failing to disclose that they did not own the mural and had not painted it themselves. *See* Still, *supra* note 241.

243. *See* Timothy W. Drescher, San Francisco Bay Area Murals: Communities Create Their Muses 1904-1997, at 7, 19-28 (expanded 3d ed. 1998).

244. Still, *supra* note 241 (quoting the artists' attorney). Other cities in the United States known for the quality and quantity of their public murals have launched programs which, when cited in VARA legislation, may provide significant evidence of "recognized stature." Philadelphia, as part of its 1984 Mural Arts Program designed to combat graffiti, commissioned almost 1800 murals. *See* Todd Pitock, *Off-the-Wall Philadelphia*, Globe & Mail (Toronto), Apr. 21, 1999, at D12. The City has begun guided tours of those murals it considers the most important. *See id.* Chicago has a similar, but more modest, program. *See id.*

245. An indication of the slow growth in VARA litigation is seen by comparing the case law discussed in the present Note with the only slightly smaller case law in Simon J. Frankel, *VARA's First Five Years*, 19 Hastings Comm. & Ent. L.J. 1 (1996) (discussing cases brought under VARA and the issues of preemption of state law and of waiver).

of artistic creation with the practical world of zoning, urban development, social protest, community values, or changing fashion undermines the credibility of the statute in its protection of private and societal interests. The next part analyzes the application of VARA in these cases and disputes against the goals of the statute.

III. ANALYSIS OF RECOGNIZED STATURE

Academics, practitioners, and artists greeted the enactment of VARA in 1990 with a storm of criticism, tempered only by the relief that some form of federal moral rights legislation, however imperfect, had entered the United States Code.[246] The criticism was of two types. The first attack focused on the theoretical, pointing to limitations in the Act's scope and its imperfect application of Berne principles.[247] The second criticism was focused on the pragmatic, pointing to the difficulties inherent in applying a compromise Act of this type.[248] The recognized stature standard was among the provisions most keenly criticized.[249] The paucity of case law under VARA to date requires that analysis of the Act remains to some extent theoretical.[250] The existing cases and disputes do, however, allow some testing of VARA's recognized stature provision against experience.

A. *Recognized Stature in VARA as a Copyright Measure*

There is no evidence that the enactment of VARA serves the copyright policy of encouraging the creation or dissemination of art. In theory, the assurance of future control over the condition of a work of art should encourage artists to create, as the artist may count on the beneficial effects on his future career of a visible successful work, and he may have the peace of mind that his efforts will be preserved for posterity.[251] There may be some validity to this idea in the decision to disseminate a work already created. It would be a sterile interpretation of the creative impulse, however, to suppose that

246. *See, e.g.*, Sherman, *supra* note 30, at 428-29 (arguing that the waiver provision in VARA greatly weakens its impact).

247. *See, e.g.*, Damich, *supra* note 22, at 947-48 (claiming that although the enactment of VARA was a victory for artists, United States law was still not in conformity with the Berne Convention).

248. *See, e.g.*, Karlen, *supra* note 84, at 906-07 (providing a point-by-point critique of VARA).

249. *See, e.g.*, Damich, *supra* note 22, at 962-63 ("Limiting the right against destruction to works of recognized stature is inconsistent with moral rights theory, the Berne Convention, and the United States copyright law tradition of refraining from judgments as to quality."); Davis, *supra* note 38, at 354-57 (discussing the difficulty of establishing a consistent standard); Ginsburg, *supra* note 22, at 480 n.19 ("[T]he reference to 'recognized stature' is regrettable."); Karlen, *supra* note 84, at 916-17 (outlining the aesthetic and temporal problems with the standard).

250. *See supra* Part II.A.

251. *See supra* note 42 and accompanying text.

concern for the future physical integrity of a work has much impact on the creation of a work of art in most cases. Case law and the public reporting of disputes show that most applications of VARA are to works created for and already launched into the public sphere. The plaintiffs in *Carter*[252] and *Pavia*[253] created their sculptures as works-for-hire or on commission, circumstances quite sufficient to ensure their completion without the benefit of VARA protection. Similarly, the cooperative and impassioned genesis of many murals or community gardens, created in the face of far more unfavorable conditions than a lack of VARA protection, has little to do with traditional copyright purposes.[254] Even if it were conceded that VARA protection may encourage creation of art, one could rationally argue that the recognized stature standard discourages the creation of art of quality or potential importance, for only art of such quality risks complete destruction without VARA protection.

Indeed, there is evidence that the threat of a VARA suit if a waiver is not obtained has discouraged the commission or installation of large-scale artwork.[255] Fear of future VARA litigation has similarly reduced tolerance for ad hoc community projects such as unauthorized murals and community gardens, prompting rapid destruction of such art before the art can attain recognized stature, with a resultant impoverishment of art "dissemination."

On the other hand, if VARA should be seen as the introduction of the quintessentially European natural right of the artist to the fruits of his effort and skill, then the recognized stature provision is an anomaly. As the framers of VARA acknowledged, there is little validity to the argument that the complete destruction of an artist's work of art results in no harm to his honor or reputation.[256] If destruction of an artist's work results in the same harm to his honor and reputation as mutilation of the work, there is no justification for treating the damage differently.[257] Reputations are formed by

252. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). *See supra* notes 107-35 and accompanying text.

253. Pavia v. 1120 Avenue. of the Americas Assocs., 901 F. Supp. 620 (S.D.N.Y. 1995); *see supra* notes 136-41 and accompanying text.

254. *See supra* notes 152-65 and accompanying text; Part II.B.2.

255. *See, e.g.*, Bob Keefer, *Carving Out a Career: A Creswell Sculptor Earns a Living by Creating Fine but Functional Knives*, Eugene Register-Guard, July 3, 1994, at 1F (discussing Oregon State System of Higher Education requirement for waiver of VARA rights before purchase of art); Mary McLachlin, *County wants Artists to give up their Rights*, Palm Beach Post, June 20, 1997, at 1A (detailing announcement by Palm Beach County to insist on waiver of VARA rights before purchase or receipt by gift of artwork); Muto, *supra* note 238 (citing a recent example of a building owner deciding not to commission a mural on being informed of VARA).

256. *See* H.R. Rep. No. 101-514, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6926 ("[T]he preservation model . . . recognizes that destruction of works of art has a detrimental effect on the artist's reputation . . . .").

257. *See id.*

cumulative weight—an artist's entire oeuvre—as much as by individually significant pieces. Art is subject to the vagaries of fashion, and today's insignificant work may be a seminal work for a future movement.

Despite the decision that current United States law was generally adequate for Berne adherence, Congress continued to develop moral rights legislation for visual artists.[258] The effort was predicated on the unique relationship between the artist and the physical object of his creation.[259] Protection of derivative works is impotent if the original is a unique object, no longer in the artist's possession.[260] Unlike other works of authorship, the primary market value in a painting or sculpture usually lies in the original created object, not in its derivatives.[261] If a legitimate imbalance in the exploitable value of a work existed in pre-VARA copyright law, however, its correction is severely compromised when work lacking recognized stature is excluded.

Perhaps the most controversial element of the recognized stature standard is that it requires courts for the first time in copyright law to make distinctions based on aesthetic considerations.[262] In *Bleistein v. Donaldson Lithographing Co.*,[263] Judge Holmes warned of the dangers of expecting judges or juries to make balanced decisions on aesthetic merit.[264] One might argue that the Act merely requires courts to weigh expert evidence, as they might in a medical malpractice suit. It would be naïve, however, to expect that every trier of fact, even with the aid of expert testimony, would remain immune to his or her aesthetic taste. Moreover, as a question of fact, findings of recognized stature are to be accorded high deference on review, theoretically making them virtually unappealable.[265]

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258. *See id.* at 6918.

259. *See id.* at 6918-19.

260. *See id.* at 6918. "A derivative work consists of a contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work." 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 3.03 (1999).

261. *See supra* notes 11-12 and accompanying text.

262. Copyright law generally requires only a modicum of creativity to satisfy the originality requirement. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362-64 (1991).

263. 188 U.S. 239 (1903).

264. *See id.* at 251-52.

265. In practice, however, appeals courts increasingly review findings of fact in some copyright cases de novo. *See* 3 Nimmer & Nimmer, *supra* note 260, § 12.12 (discussing Second Circuit's review of substantial similarity in infringement cases under a de novo standard); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431, 2461-62 (1998) (discussing circuits that already practice independent appellate review in copyright cases implicating the First Amendment). Professor Jane Ginsburg raised the issue of standard of review for a per se recognized stature standard in the VARA hearings. *See H.R. 2670 Hearing*, *supra* note 93, at 88 ("Is 'recognized stature' a question of law or of fact? Can it be resolved at the summary judgment stage? From

As a copyright measure, therefore, the recognized stature standard is both theoretically and practically flawed. It fails to encourage the creation and dissemination of art and compromises the right of an artist to the integrity of his product and his reputation. Finally, it obliges courts to consider aesthetic quality, if only in the form of competing aesthetic evaluations by experts, in a manner antithetical to traditional copyright law.

B. *Recognized Stature as a Preservation Measure*

Protection under CAPA and VARA against the destruction, as opposed to mutilation, of works of art is largely motivated by the societal interest in preserving the cultural patrimony.[266] Yet the desire to accommodate moral rights legislation to the traditional expectations of property owners and the art market makes VARA a flawed vehicle for the enforcement of that interest for several reasons.[267]

First, VARA provides a cause of action only to the artist of the work during his lifetime, a shorter period than provided for in CAPA and under the early versions of VARA.[268] Second, no equivalent of the perpetual public interest cause of action in the California CACPA exists in VARA.[269] Thus, the vast bulk of art of recognized stature in the United States remains unprotected from mutilation or destruction by an owner.

If, as the Register of Copyrights suggested,[270] the purpose of the recognized stature standard is to acknowledge that the national interest is served by treating works of greater artistic merit with greater respect, then the recognized stature standard should be more than a mere gate-keeping mechanism.[271] No evidence supports a

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the bill's reference to expert testimony, it would appear the standard is factual."). Unlike CAPA or VARA, the Massachusetts Moral Rights Statute states that "recognized quality" is a question of law. *See* Mass. Ann. Laws Ch. 231, § 85S (Law. Co-op. 1986 & Supp. 1999). Perhaps the only true equivalent to aesthetic judgments in jurisprudence are moral judgments. For example, the finding of fact that a pornographic work has "serious literary, artistic, political, or scientific value" is a defense to an obscenity charge. Miller v. California, 413 U.S. 15, 24 (1973). *See* Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L.J. 1359 (1990) (arguing that the "serious artistic value" standard is obsolete); Karlen, *supra* note 20, at 696 n.132 (comparing recognized stature provision with defense to obscenity).

266. *See supra* notes 38-40, 45 and accompanying text (CAPA); notes 41-43, 99 and accompanying text (VARA).

267. *See* Morton, *supra* note 107, at 907-11.

268. *See supra* notes 46, 81 and accompanying text.

269. *See supra* notes 68-73 and accompanying text; *see also* Morton, *supra* note 107, at 914-15 (describing CACPA and noting absence of similar provision in VARA).

270. *See supra* note 85 and accompanying text.

271. Judge Manion adopted the position that the recognized stature provision should be more than a mere gate-keeping mechanism. *See* Martin v. City of Indianapolis, 192 F.3d, 608, 615-16 (7th Cir. 1999) (Manion, J., dissenting); *supra*

contention that VARA has protected any work currently acknowledged as artistically significant.[272] While it may be true that VARA may act as a deterrent to the contemplated destruction of art of recognized stature, the Act is currently so little known or understood by owners (with the possible exception of landlords) that the deterrent argument is weakened.[273]

The case law and published disputes reveal that the Act is increasingly invoked to protect work of minimal artistic or societal value—indeed in some cases VARA may hamper efforts to protect the visual environment, as much an element of cultural patrimony as an individual work of art.[274] Unsurprisingly, the mutilation or destruction of highly visible art in public or semi-public spaces generates a disproportionately large amount of VARA litigation. The court's reluctance to act as arbiter in questions of aesthetics, however, has led to an undue emphasis on the "recognized" element of the standard.[275] A work that is simply highly visible due to its size and location may always be found to fulfill the recognized stature standard.[276] This result is facilitated by an unfortunate observation by the *Carter* court. In a footnote, Judge Edelstein notes that "VARA does not delineate *when* a work must attain 'recognized stature' in order to be entitled to protection . . . ."[277] Suggesting that this "omission" is deliberate, given the preservative goal of section 106A(a)(3)(B), Judge Edelstein strongly implies that a work may attain recognized stature after the VARA suit is filed and still fulfil the terms of the provision.[278] The publicity surrounding the filing of a VARA suit may alone be sufficient to provide evidence of recognized stature. While this deference to public opinion is laudable, it opens the judicial process to a significant risk of manipulation, where the connected or media-experienced plaintiff can manufacture "recognized stature" overnight in the course of a trial.

If the protection in VARA against destruction of works of art

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notes 174-203 and accompanying text.

272. Congressman Markey, in his remarks before Congress in sponsorship of VARA, invoked the case of a dismembered Picasso print to underscore the problem VARA was designed to combat. *See* 136 Cong. Rec. 12,609 (1990). No work by an artist even approaching Picasso's stature has been cited in VARA litigation. Ironically, VARA would not have protected the Picasso print because the artist was no longer alive.

273. It might be argued that no deterrent is needed to protect work of recognized stature because such works are generally protected by their significant resale value for the owner on the art market. This reasoning may be valid in a healthy market. When, however, the market is less buoyant and auction houses less liberal in their consignment policies, the economic incentive argument loses force.

274. An example is the Los Angeles anti-graffiti program. *See supra* note 229; *see also* Banerji, *supra* note 174, at 128-35 (discussing the problem of unwanted art).

275. *See supra* Part II.B.1–2.

276. *See supra* Part II.B.1–2.

277. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 n.12 (S.D.N.Y. 1994).

278. *See id.* at 325 & n.12.

responds to a societal interest in preserving society's artistic output, then the recognized stature standard threatens to betray that interest. By setting the standard too high, courts risk the destruction of the unrecognized masterwork; by setting it too low, courts risk alienating those forced to live with art they may despise, and whose legitimate property interests are curtailed.

C. *Problems of Application of the Recognized Stature Standard*

Despite the theoretical shortcomings of VARA, application of the statute has not always been complicated. Where the recognized stature standard has been an issue, courts have been creative in finding the standard fulfilled, even in the absence of expert testimony.[279] In resolved disputes, recognized stature has been easily shown when the work of art was purchased, commissioned, or was a prize in a charity auction.[280] The fact that the owner selected the work from among others and paid value for it is frequently enough to prove recognized quality or stature.[281]

Some practical issues of application of the recognized stature standard have arisen, however. First, the two-pronged standard enunciated by the *Carter* court and since widely quoted,[282] if not always carefully applied, is problematic. The test requires that the plaintiff show that the work of art has stature, "i.e. is viewed as meritorious," and that the stature is "'recognized' by art experts, other members of the artistic community, or by some cross-section of society."[283] While a close textual interpretation in which the two-word test is divided into a two-part test is attractive, it is not logically necessary and leads to technical evidentiary problems. There is nothing in the wording of the statute, nor in the accompanying House Report, that requires a finding that a work be viewed as "meritorious" for the work to qualify for protection against destruction.[284] The Act was designed to guard against precisely this kind of aesthetic judgement on the part of art owners.[285] Stature alone is meaningless unless the stature is recognized. Similarly, if a work of art is widely recognized, it is either famous or notorious—either way it has

279. *See, e.g.*, Martin v. City of Indianapolis, 192 F.3d 608, 612-13 (7th Cir. 1999) (finding recognized stature based solely on newspaper articles, letters, and catalogues).

280. *See* Karlen, *supra* note 220, at 941-42.

281. *See id.* Karlen finds the defendant effectively "estopped" from asserting a lack of recognized quality or stature when he purchased or commissioned the work, or when the work is the result of a competition or public bidding. *See id.*

282. *See Carter*, 861 F. Supp. at 325; *see supra* note 124 and accompanying text.

283. *Carter*, 861 F. Supp. at 325.

284. *See supra* Part I.B.2.

285. *See* 135 Cong. Rec. 12,252 (1989) ("We have all heard the horror stories about paint being removed from sculpture, murals painted over, paintings altered." (statement of Sen. Kasten)).

recognized stature. To require, as the *Carter* test does, a finding that the work is considered meritorious is to deny protection to the disliked and misunderstood, but undeniably important, object that future generations may value highly. Failing to safeguard this art is contrary to the preservation purposes of the Act.[286]

The *Carter* two-pronged test leads to the evidentiary problem revealed by *Martin*.[287] Martin proved recognized stature with documentary evidence and no in-court expert testimony.[288] Theoretically, at least, Judge Manion was surely right that if the *Carter* test were to be adopted by the court, separate proof of stature was required by expert testimony to avoid the hearsay problem. On equitable grounds, however, the majority was no doubt right to admit the documentary evidence proffered by Martin as to recognized stature.[289] In effect, the majority in *Martin* rejects the *Carter* test, despite paying it lip service.[290]

A second practical problem in the application of the recognized stature standard was signaled by the Committee on the Judiciary when it rejected a per se recognized stature standard for all modification of a work of art, namely a battle of the experts.[291] Although neither case was decided on the issue of recognized stature, the cases of *Carter*[292] and *English*[293] show how crucial the relative credibility of expert witnesses can be. The defendants in *Carter* found to their detriment that impassioned opinion can degenerate into legally discounted bias.[294] The testimony of the defendants' expert witness in *English* was similarly discounted by a judicial interpretation of what may have been an offhand or creative remark.[295] As collectors, critics, and curators have frequently discovered, neither familiarity with contemporary art nor a position of authority in the field of art is any guarantee of an ability to evaluate the current, let alone future, importance of an individual work of art.[296] Furthermore,

286. *See supra* note 100 and accompanying text.

287. *See* Martin v. City of Indianapolis, 192 F.3d 608, 612-14 (7th Cir. 1999); *supra* notes 183-203 and accompanying text.

288. *See Martin*, 192 F.3d at 613.

289. *See id.*

290. The majority signaled its dislike of the two-part test by acknowledging that the test "may be more rigorous than Congress intended." *Id.* at 612.

291. *See* H.R. Rep. No. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925; *supra* note 97-99 and accompanying text.

292. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994).

293. English v. BFC & R East 11th St. LLC, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997).

294. *See supra* notes 133-35 and accompanying text.

295. *See supra* notes 163-65 and accompanying text.

296. The controversy surrounding the Biennial exhibitions of contemporary art at the Whitney Museum in New York is an example of the lack of consensus among collectors, critics, and curators on the nature and value of modern art. When the six guest curators for the 2000 Biennial first met to submit fifty names each of artists they considered the most important for inclusion in the show, few artists were on more

if the *Carter* court was right that recognized stature may be proved from the testimony of "society in general" or "some cross-section of society," then is not the reliance on experts elitist and unnecessary? The list of recommended experts in the state statutes and VARA bills is omitted in the Act presumably to allow courts to go outside the parameters of traditional art experts.[297] In the case of public art, it is perhaps more appropriate that recognized stature be tested against the views of those who live and work with the art every day, those for whom the beneficial effects of the cultural patrimony are directly felt, rather than against the opinion of qualified but remote experts.

Finally, as is the case in most intellectual property law, the legal elements of VARA, including the recognized stature provision, are highly susceptible to manipulation in the face of competing policy goals.[298] Judge Baer's opinion in *English* is an example.[299] His finding that the complete obstruction of murals on walls overlooking a community garden did not amount to the murals' destruction, while perhaps supportable by the text of VARA, defies common sense.[300] His finding is understandable only when viewed in light of the public policy concerns he then elucidates. Judge Baer finds it unthinkable, from a policy as well as a constitutional perspective, that the preservation of a mural on the outside wall of a building should ever inhibit the development of an adjoining parcel of land completely masking the mural from view.[301] Given the court's findings, no mural, whatever its stature, is safe from urban development.

The analysis of the recognized stature provision in this part highlights a number of problems with VARA. The recognized stature provision fails to serve the policy goals of United States copyright law. As a preservation measure, it protects a tiny minority of the art in the United States that forms the artistic heritage of the nation. Furthermore, actual and potential issues of proof threaten to undermine the integrity of the Act. The paucity of case law in the ten years since the enactment of VARA masks the scope of these problems. The next part suggests one possible solution.

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than one curator's list and there was "no confirmed canon." *See* Carol Vogel, *Choosing a Palette of Biennial Artists; Surprises in the Whitney's Selections*, N.Y. Times, Dec. 8, 1999, at E1.

297. Judge Edelstein adopted this view in *Carter*, 861 F. Supp. at 325 n.10.

298. *See* Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 Vand. J. Transnat'l L. 579, 589 (1996) (citing cases in which Supreme Court opinions on intellectual property issues have been ignored by lower courts).

299. *See* English v. BFC & R East 11th St. LLC, No. 97 Civ. 7446, 1997 WL 746444, at *6 (S.D.N.Y. Dec. 3, 1997).

300. *See id.*

301. *See id.*

IV. MORAL RIGHTS AND THE PRESERVATION OF SIGNIFICANT WORKS OF ART: A PROPOSAL

According to one's interest in a work of art, the enactment of VARA in 1990 was either a disastrous compromise of traditional property rights, or a welcome acknowledgement of the principle of an author's moral right in his creation.[302] The attempt to serve the dual purpose of protecting the honor and reputation of the individual artist while safeguarding elements of the artistic heritage of the nation resulted in a flawed and limited act.

One solution may be to set clear goals and pursue two independent lines of legislation.[303] The first would be a broad recognition of an artist's moral rights in his work. In harmony with the bulk of copyright law, these rights would apply to all works regardless of monetary or aesthetic stature. The aim of this legislation would be to extend VARA to protect the honor and reputation of all living artists through a ban on alteration, modification, mutilation, or destruction of their original works. This may be achieved simply by the removal of section 106A(a)(B), and the rewriting of 106A(a)(A), to include intentional or grossly negligent distortion, mutilation, destruction, or other modification of any work of art. No finding of recognized stature would be required for protection against destruction of an artwork. The amended Act would be consistent with Congress's finding that an artist's honor and reputation is damaged by the destruction of his work.[304] Rewriting VARA in this manner would retain the Act's secondary preservative function, but focus the Act's intent on providing artists with a means to protect their reputation and honor. Ideally, these moral rights would be extended to all "authors" currently afforded protection under United States Copyright legislation.[305]

The second line of legislation would likely be more controversial and would have as its aim the preservation of the nation's artistic heritage or patrimony. The national artistic heritage consists not only of those works of art considered important for their association with

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302. *See supra* notes 5-9 and accompanying text.

303. The suggestion to separate and develop the preservative and moral right goals of VARA has been made before. *See* Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 Marq. Intell. Prop. L. Rev. 65, 82 (1997); Morton, *supra* note 107, at 907-16. A different proposal, but engendering similar effects, is to strengthen VARA by permitting third-party actions by enumerated organizations, based on the model of the California CACPA. *See supra* notes 68-73 and accompanying text; *see also* Morton, *supra* note 107, at 903-16.

304. *See supra* note 256.

305. The Copyright Act of 1976 does not define "author." *See* 17 U.S.C. § 101 (1994). Section 102(a), however, suggests a broad range of categories of "works of authorship." This expansive definition is supported by the Supreme Court's broad interpretations of "authors" in the Copyright Clause. *See* 1 Nimmer & Nimmer, *supra* note 260, § 1.06.

the history of the United States, but also works of art of significant aesthetic or art historical importance, regardless of their importance to American culture.[306] This new legislation would draw on and complement existing legislation on the international, federal, state, and local levels aimed at the preservation of historical, archaeological, and cultural artifacts.[307]

The key to this proposal would be the establishment of a national registry of highly significant art.[308] Works on the registry would be chosen for listing by a panel of experts.[309] The panel would consider in its selection process a work's aesthetic, art-historical, historical, and cultural significance, regardless of current private, institutional, or public ownership and regardless of the work's national origin or date of creation. Proposals of individual works for the registry would be accepted from a wide variety of sources, and an expedited registration would be available for works threatened by imminent destruction.

Once a work is accepted for registration under this system, anyone causing the significant modification or destruction of the work would be liable for criminal and civil penalties. Similar registries in other countries, Italy or France for example, have been only marginally successful because sale of registered works is monitored, export

306. Protecting art executed outside the United States is consistent with Merryman's concept of the public interest in cultural property as an international obligation to protect art of all cultures and periods. *See* Merryman, *supra* note 15, at 341. The concept should be distinguished from cultural nationalism, the philosophy that "objects forming part of the [nation's own] cultural heritage should remain in or be returned to the national territory." *Id.* at 361. For recent developments on this debate in international law, especially in Europe, see Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. Int'l. L. & Pol. 79 *passim* (1998); John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. Int'l. L. & Pol. 1, 3-9 (1998).

307. For an overview of the protections given historical and archaeological property in the United States, see Julia H. Miller, *Historic and Cultural Resources Protection Under Historic Preservation Laws*, *in* Heritage Resources Law: Protecting the Archaeological and Cultural Environment 17 (Sherry Hutt et al. eds., 1999). For the protection of the cultural heritage outside the United States, see Kifle Jote, International Legal Protection of Cultural Heritage 125-257 (1994).

308. A similar proposal for the protection of architecturally significant modern buildings was suggested by Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-modern Architecture*, 15 Cardozo Arts & Ent. L.J. 69, 90-100 (1997). Identifying a gap in the preservation law, Ashe proposes an Architectural Landmark Designation ("ALD"), in which architecturally significant modern buildings would be selected by an Architectural Landmark Review Commission ("ALRC") for inclusion in a national register. *See id.* at 90-92. An extension of the current regime of local, state, and national Landmark law to art in public places was proposed by Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 Cardozo Arts & Ent. L.J. 431, 461-65 (1994).

309. While no group of experts can be expected to agree on the significance of all works of art put before it, the current alternative of a judge or jury is hardly a more reliable solution. Furthermore, the panel would have the advantage in most cases of historical and critical hindsight in its evaluation, because it will generally be evaluating works of some age.

permits forbidden, and the registers are used by governments in their efforts to enforce tax compliance.[310] The result is a thriving black market in art and antiquities, unchecked illegal export, and vulnerability to theft.[311] To encourage registration in the proposed registry, therefore, and to prevent any economic disincentive to the owner, registration would simply trigger a complete ban on any intentional or grossly negligent mutilation or destruction of the work. The owner would be free to sell, donate, or export the work as he wished. As an additional incentive and to further the preservation purposes of the legislation, necessary expenses for the physical preservation of the work of art—such as additional security or restoration and maintenance of the work of art—may be tax deductible.

Two existing national registers provide a precedent for this proposal. The first is the National Register of Historic Places,[312] established under the National Historic Preservation Act ("NHPA").[313] The register is administered by the Secretary of the Interior, who reviews districts, sites, and buildings significant in American history, architecture, and culture for inclusion on the register.[314] Registration, however, does not guarantee an historic place's physical integrity. The NHPA does not have the power to prevent the alteration or destruction of sites.[315] Registration simply requires a federal agency involved in a federal or federally assisted undertaking to take into account the effect of the undertaking on the site, and to report its findings to an Advisory Council on Historic Preservation, also established by the Act, for comment.[316] State, local, or private projects require no review of listed buildings.[317]

A second precedent for the proposal is the national register of significant films authorized by the National Film Preservation Act of 1988 ("NFPA 1988").[318] NFPA 1988 arose from concerns primarily in the movie industry about the perceived damage to the director's

310. *See* Jote, *supra* note 307, at 140-44 (discussing the measures adopted by Italy and France to protect cultural property in state and private hands); Guy Stair Sainty, *What Makes Italy a Major Black Market in Art*, N.Y. Times, Mar. 16, 1990, at 34; Alexander Stille, *Art Thieves Bleed Italy's Heritage*, N.Y. Times, Aug. 2, 1992, at 27 (citing, among other problems, chronic underfunding of the national register of Italy's artistic patrimony under the leadership of the National Institute of the Catalogue in Rome).

311. *See* Sainty, *supra* note 310.

312. *See* 16 U.S.C. § 470a(1)(A) (1985 & Supp. 1999).

313. *See id.* §§ 470–470mm, *amended by* Pub. L. No. 102-575, tit. XL, 106 Stat. 4753 (1992).

314. *See* Ashe, *supra* note 308, at 79.

315. *See id.* at 81.

316. *See id.* at 79-80.

317. *See id.* at 81.

318. *See* Pub. L. No. 100-446, 102 Stat. 1994 (1988) (codified at 2 U.S.C. §§ 178–178l (1988) (repealed 1992)). On the subsequent legislative history of the Act, see H.R. Rep. 104-558, at 8-14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3818, 3818-30.

artistic vision by the colorization of film shot originally in black-and-white.[319] The right infringed was characterized as the director's moral right, and early versions of VARA contained protection for movies as well as works of fine art.[320] NFPA 1988 is not a copyright act, however. It established a National Film Preservation Board charged with the establishment of a National Film Registry.[321] The Act called for the addition to the Registry of twenty-five films per year for three years that were deemed by the Board "culturally, historically, or aesthetically significant."[322] Chosen films received a seal indicating that they were "an enduring part of our nation's historical and cultural heritage" and that they were in their original state.[323] The Librarian of Congress oversaw the choice of films.[324]

Under the NFPA 1988, registered films that were shown in an altered state, for example colored or cut, had to be preceded by a disclaimer that the original creators of the film had not participated in the alteration.[325] When the NFPA 1988 was repealed after its three-year sunset provision was triggered, the replacement National Film Preservation Act ("NFPA 1992")[326] omitted the disclaimer provision, thereby removing the primary incentive to respect the artistic integrity of the original.[327]

Despite their severe limitations, the NHPA and the NFPA provide some precedent to a national registry of significant works of art.[328] Both registers are federally funded, and the NFPA has enforcement

319. *See* David A. Honicky, *Film Labelling as a Cure for Colorization [and Other Alterations]: A Band-Aid for a Hatchet Job*, 12 Cardozo Arts & Ent. L.J. 409, 414-15 (1994); McNally, *supra* note 73, at 130-32; Dan Renberg, *The Money of Color: Film Colorization and the 100th Congress*, 11 Hastings Comm. & Ent. L.J. 391, 404-06 (1989).

320. *See* H.R. Rep. No. 101-514, at 8-9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918-19.

321. *See* Honicky, *supra* note 319, at 420.

322. *Id.* at 421.

323. *Id.*

324. *See id.* at 421 n.89.

325. *See id.* at 421.

326. *See* Pub. L. No. 102-307, tit. II, 106 Stat. 267 (1992) (codified at 2 U.S.C. §§ 178-79).

327. *See* Honicky, *supra* note 319, at 422-23. On expiration of NFPA 1992, Congress enacted NFPA 1996, reauthorizing the National Film Preservation Board for another seven years. Pub. L. No. 104-285, tit. I, 110 Stat. 3377 (1996). The 1996 Act also created the National Film Preservation Foundation. The Foundation, charged with seeking private funds to match the mere $250,000 annual federal funding, concentrates on preserving non-commercial films that are considered most at risk of destruction.

328. Other registries exist on an international level. For example the World Heritage Committee, under the mandate of UNESCO's World Heritage Convention, maintains a list of sites throughout the member states of outstanding cultural or natural value and provides financial and technical assistance for the sites' preservation. *See* Jote, *supra* note 307, at 250-56. United States participation is codified at 16 U.S.C. § 470a-1 (1985 & Supp. 1999).

provisions.[329] Both registers employ the advice of experts in their fields who make decisions in part based on aesthetic merit and historical significance.[330] The registry proposed here would gradually provide a safety net for works of art currently unprotected by VARA, would remove from judges and juries hard decisions on the preservation of aesthetically challenging works of art, and establish a national criteria for preservation. Operating in conjunction with VARA, the two lines of legislation would together allow the artist to protect the integrity of his own work, while the nation protects the integrity of its artistic heritage.

Important questions remain, however. Given the great effort expended before VARA could be enacted, it is hard to see where the political will would be found to establish and fund the register proposed here. The act would have to be crafted skillfully to avoid constitutional challenge.[331] Selection of the registry panel, criteria of selection of the art, enforcement, and the sheer numbers of works of art to be sifted are significant hurdles. Nonetheless, the combination of a strengthened moral rights legislation enforceable by the artist, and a minimal preservation measure for art of all periods enforceable by the state, would be a potent combination.

CONCLUSION

> The art of painting cannot be truly judged save by such as are themselves good painters; from others verily it is hidden even as a strange tongue.
>
> *Albrecht Durer (1471-1528)*[332]

VARA is a short, but remarkable, piece of legislation. Representative George Smith was correct when he characterized VARA as "one of the most extraordinary realignments of private property rights ever adopted by Congress."[333] By opening the door to a federally protected moral right, Congress acknowledged, if only in a very limited application, the principle that an artist retains a

329. *See* McNally, *supra* note 73, at 148 (discussing the enforcement by the Attorney General of violations of NFPA).

330. *See* 16 U.S.C. § 470a(b) (authorizing Secretary of the Interior to accept nominations for inclusion in the National Register of Historic Places from State Historic Preservation Officers and State Historic Preservation Review Boards); Honicky, *supra* note 319, at 420 n.83 (listing examples of organizations from whom the members of the National Film Preservation Board may be chosen).

331. The primary concern would be that listing on the registry might constitute a "taking." On the constitutionality of historical preservation statutes and landmarking ordinances, as well as of a proposed Architectural Landmark Designation, see Ashe, *supra* note 308, at 74-78, 100-01; Gerstenblith, *supra* note 308, at 457-61.

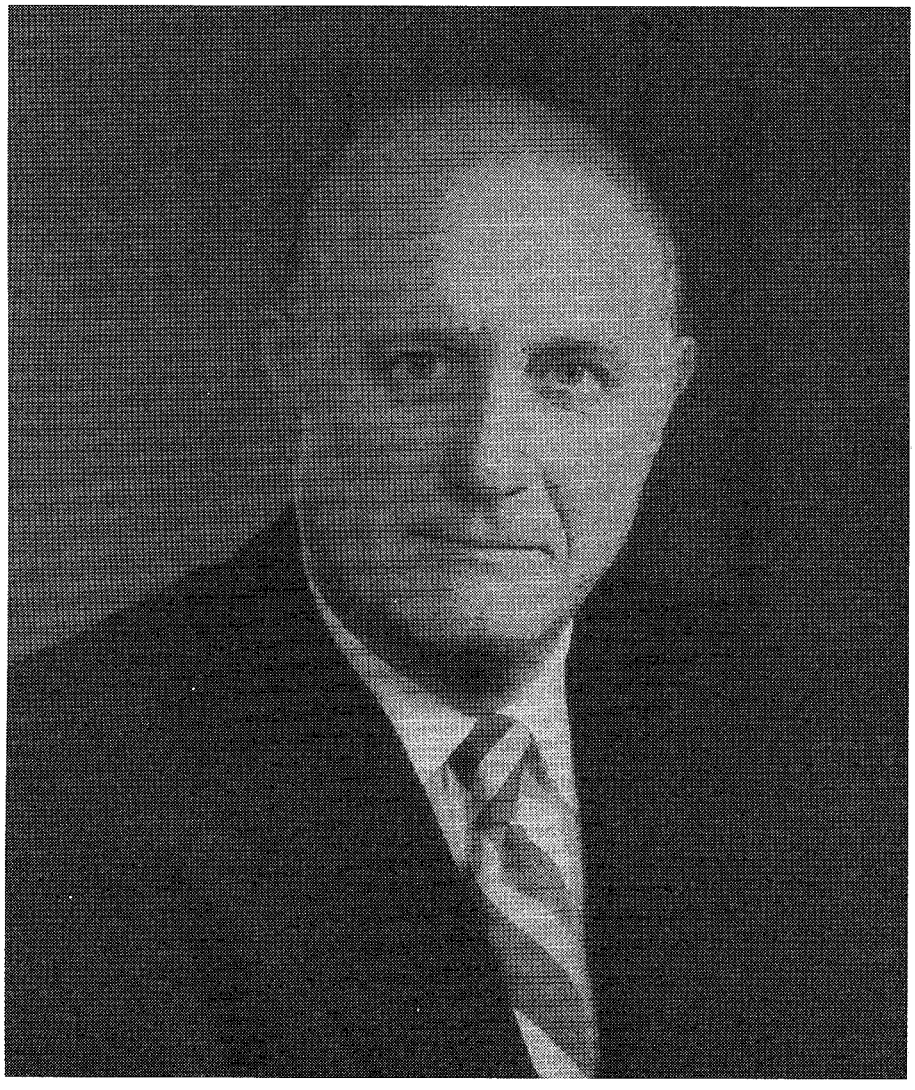
332. The Writings of Albrecht Durer 177 (William Martin Conway ed. & trans., 1958).

333. *See supra* note 6.

personality interest, independent of his economic interests, in the physical object of his creation, even if he no longer owns the object. Less dramatic has been the practical result of the enactment of VARA and state moral rights statutes. Cases invoking moral rights are few. The existence of moral rights remains little known, even among artists who are the rights' beneficiaries. For example, a search of *Artforum*, one of the foremost magazines for critics, curators, and practitioners of contemporary art, reveals only one short piece on VARA in the decade since its enactment.

Nonetheless, as art becomes increasingly visible and artists take on celebrity status, VARA will be invoked more frequently and its problematic clauses, such as the recognized stature provision, will stand at the forefront of the ensuing litigation. Judges and juries will have to tackle the issues raised by recognized stature, issues that are today largely theoretical or dodged by the courts. Meanwhile, important works of art will remain unprotected because the artist is unknown, deceased, or otherwise unwilling or unable to protect the art through his moral rights.

Courts are suited to the role of protecting the personal interests of artists through the protection of their moral rights. On the other hand, the protection of art of established significance, art that is truly of recognized stature, should not depend on the judgment of an individual judge or jury. When Durer wrote of the "art of painting," he meant his craft, the process of artistic production. But his remark is often true for the meaning and wider significance of a work of art. The preservative purpose of VARA should be distinguished from the establishment of moral rights. The dual line of legislation proposed in this Note offers an imperfect, but effective, protection for a wide range of art, while respecting the interests of artists, property owners, the public, and later generations for whom we hold the art in trust.



Caesar L. Pitassy

The Editors of the Fordham Law Review *dedicate this Issue in memory of*
Caesar L. Pitassy '41 and Charles Malcolm Wilson '36.
May we never forget the tremendous contribution they
made to the public and to Fordham Law School.