

BUYER BEWARE: THE UNEXPECTED CONSEQUENCES OF THE VISUAL ARTISTS RIGHTS ACT

By Natalia Thurston

“[I]n destroying my paintings, the Rockefellers have committed an act of cultural vandalism. There ought to be, there will be yet, a justice that prevents assassination of human creation as of human character.”—Diego Rivera¹

Artist Diego Rivera publicly accused John D. Rockefeller, Jr. of committing “art murder” after Rockefeller ordered the destruction of a mural his family commissioned Rivera to paint at their Manhattan headquarters in 1934.² The controversy hinged on Rivera’s expression of political themes in the mural, including “May Day marchers in Moscow, gas masks and death rays, and venereal-disease germs hovering over dissolute society ladies,” an antithetical adornment for the headquarters of one of the most powerful capitalist American families of the time.³ The final death blow to the mural occurred when Rivera painted a portrait of Lenin in the mural, an image to which the Rockefellers strongly objected. Rivera refused to remove the image of Lenin, and as a result, without notice to Rivera, the Rockefellers had the mural completely destroyed in February of 1934.⁴ At the time, Rivera had no cause of action against the Rockefellers for destruction of the mural because the Rockefellers had paid Rivera in full for the commission. Consequently, the mural was the Rockefellers’ property and they were legally entitled to destroy it.

Today, under the Visual Artists Rights Act of 1990 (“VARA”),⁵ Rivera could have sued the Rockefellers for violating his moral right of integrity. VARA grants visual artists two distinct moral rights: integrity and attribution. Under VARA, Rivera’s right of integrity would prevent the Rockefellers from intentional distortion, mutilation or modification of his work.⁶ Prior to the mural’s destruction, Rivera could have filed suit

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1. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 15 (1999), *quoted in* N.Y. TIMES, Feb. 13, 1934, at 21.

2. *Id.* at 15.

3. *Id.* at 14.

4. *Id.* at 14-15.

5. 17 U.S.C. § 106A (2000).

6. *Id.* § 106A(a)(3).

against the Rockefellers for injunctive relief and damages under VARA because destruction of the mural—a work of recognized stature—arguably caused harm to his reputation as an artist.⁷

On its face, VARA appears to benefit artists by providing protection for their works and reputations. However, the introduction of moral rights into American jurisprudence has had broader, unexpected implications. Two recent decisions under VARA, *Phillips v. Pembroke Real Estate*⁸ and *Pollara v. Seymour*,⁹ illustrate not only the limited scope of VARA, but also the divide between an artist's lifelong moral right in a work and the traditional rights of property owners to control their property. In addition, since the majority of cases litigated under VARA involve public works, the public also has a cultural interest in preserving or destroying the works. Finally, the economic impact of the assertion of rights under VARA may in effect dampen rather than promote the creation of arts, due to inefficiencies in the bargaining process and property holders' fear of impending litigation if they commission a work.¹⁰

Part I of this Note reviews the background behind the relatively recent recognition of artists' moral rights in the United States and the scope of the rights granted under VARA. Part II evaluates the decisions in *Phillips* and *Pollara* with regard to the courts' specific application of VARA. Part III examines the implications of the decisions in *Phillips* and *Pollara* from three perspectives: that of the artist, the property holder, and the public. An economic analysis of the impact of VARA indicates that the competing interests in a work of art create tension between the traditional rights of property holders, the artist's desire to protect her reputational interests, and the benefit the public gleans from art's contribution to the body of culture.

I. BACKGROUND

Congress enacted the Visual Artists Rights Act of 1990 to codify the protection of artists' moral rights, namely the rights of attribution and in-

7. *Id.* Even if Rivera's work fell under VARA's exception for works incorporated into a building, the Rockefellers still would have been required to provide notice to Rivera that they were going to destroy the mural in order to give him an opportunity to remove it. *Id.* § 113(d).

8. 288 F. Supp. 2d 89 (D. Mass. 2003).

9. 344 F.3d 265 (2d Cir. 2003).

10. It is unlikely the Rockefellers would have commissioned a work by the politically-charged Rivera if they had no control over their right to display or preserve the work.

tegrity.¹¹ The right of attribution grants an artist the right to claim authorship to a work and the right to forbid usage of her name in connection with a work she did not create.¹² The right of integrity grants an artist the right to prevent distortion, truncation, and/or mutilation of a work of visual art of recognized stature that would damage the honor or reputation of the artist.¹³

A. Origin of Moral Rights

Moral rights are concerned with the personal expression of the artist and therefore flow from the relationship between personhood and property.¹⁴ Traditional property rights are fungible in nature; however, the personhood theory of property suggests that certain property is imbued with intangible meaning as well.¹⁵ The viewer of a work of visual art instills the work with intangible meaning. For example, to the Rockefellers, Rivera's mural represented far more than paint applied decoratively to a wall—the mural's depiction of communist ideals directly attacked the character of the Rockefeller family. To Rivera, the mural represented the expression of his life-long commitment to social justice, a theme that influenced his entire body of work.

Consequently, art as property creates tension between an artist's right to control reputational externalities—or her artistic “voice”—and the art owner's right to exercise traditional property rights over the work. As Professor Burton Ong explains, “[t]he recognition of . . . [moral] . . . rights in a manner which favors the artistic sensibilities of the artist over the competing interests of those who own the objects . . . signals a measure of respect for the artist's position within the community.”¹⁶ Art as a physical object has meaning that extends beyond both the artist and the owner. An artist's work benefits the larger community. There is a public interest in preserving and protecting art works to enhance cultural development and promote the creation of new works.

Before the enactment of VARA, the range of claims filed by artists to protect their work, from First Amendment claims to copyright infringement, indicates that the only method for artists to protect their integrity

11. 17 U.S.C. § 106A.

12. *Id.* § 106A(a)(1); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.03 (2004).

13. 17 U.S.C. § 106A(a)(3); 3 NIMMER & NIMMER, *supra* note 12, § 8D.04.

14. See Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

15. See *id.*

16. Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 303 (2003).

right was to either contract for protection or piece together an arguably valid claim from various bodies of law including copyright, constitutional, and trademark law.¹⁷

Several court opinions acknowledged moral rights prior to VARA, such as *Crimi v. Rutgers*¹⁸ and *Gilliam v. ABC*.¹⁹ In *Crimi*, the court declined to award damages to an artist whose mural had been painted over in a church, holding that the artist should have contracted for the display rights.²⁰ In *Gilliam*, the Second Circuit reached a different conclusion from *Crimi* and held that absent an agreement, the right to make changes to the *Monty Python* show resided in the authors of the show.²¹ The court upheld the plaintiffs' copyright infringement and Lanham Act claims and held that the defendants, in broadcasting an edited version of the *Monty Python* show, misrepresented the plaintiffs' work, thereby causing injury to the plaintiffs' business and personal reputations.²²

In order to comply with the Berne Convention's Article 6*bis* and compete internationally, the U.S. Congress finally codified moral rights under VARA, sixty years after the Berne Convention adopted moral rights in 1928.²³ The relatively late adoption of moral rights in the United States was due to the judiciary's reluctance to attach non-economic rights to property that do not belong to the traditional property owner.²⁴ Traditional property rights pass with physical possession of the property—when property is transferred, so are the accompanying rights and duties associated with the property. However, in the case of a work of visual art, moral rights are retained by the artist regardless of who owns the work of visual art, including the copyright.²⁵

17. See generally *Serra v. U.S. Gen. Serv. Admin.*, 847 F.2d 1045 (2d Cir. 1988); *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976); *Wojnarowicz v. Am. Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990); *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949).

18. 89 N.Y.S.2d 813

19. 538 F.2d 14.

20. 89 N.Y.S.2d at 818-19.

21. 538 F.2d at 17.

22. *Id.*

23. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896 (revised June 2, 1928), art. 6*bis*, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726; see Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827 (1992). VerSteeg suggests that Congress's motivation in complying with Article 6*bis* was to protect American works of visual art in the world market as well as to have a role in shaping international copyright law.

24. Ong, *supra* note 16 at 304.

25. *Id.*

The slow adoption of moral rights reflected the judiciary's concern with fragmenting traditional property rights and recognizing non-pecuniary interests in property.²⁶ Congress' impetus in codifying the moral rights of attribution and integrity however stemmed from its desire to spur creation of new works as well as to preserve existing works for the public's cultural benefit.²⁷ Since American artists only gained international clout beginning with abstract expressionists such as Jackson Pollock in the 1940s,²⁸ the rise of the economic value of American art may have contributed to concern that destruction of such work would have a negative impact both culturally and economically.

B. Overview of VARA

Effective June 1, 1991, VARA grants authors of visual works of recognized stature the moral rights of attribution and integrity.²⁹ The right of attribution entitles an artist to claim authorship of a work, and to deny authorship if his work is altered or damaged in a way that would harm his honor or reputation.³⁰ This right is codified under 17 U.S.C. § 106A(a)(1) and (2) which state that:

- (a) . . . the author of a work of visual art—
 - (1) shall have the right—
 - (A) to claim authorship of that work, and
 - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
 - (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation³¹

The right of integrity grants the artist the right to prevent distortion, mutilation, or alteration of a work of recognized stature that would harm

26. See *supra* note 17.

27. H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925 [hereinafter VARA House Report].

28. See *Abstract Expressionism: Artists and their Works*, ARTCYCLOPEDIA, at <http://www.artcyclopedia.com/history/abstract-expressionism.html> (last visited Mar. 14, 2005).

29. 17 U.S.C. § 106A(a)(3) (2000).

30. *Id.* § 106A(a)(1), (2); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 270 (2003).

31. 17 U.S.C. § 106A.

the artist's honor or reputation.³² The pertinent part of § 106A relating to the right of integrity is as follows:

- (a) . . . the author of a work of visual art—
 - (3) subject to the limitations set forth in section 113(d), shall have the right—
 - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
 - (B) to prevent destruction of a work of recognized stature and any intentional or grossly negligent destruction of that work is a violation of that right.³³

The Act defines a "work of visual art" as a "painting, drawing, print, or sculpture" that exists solely as a unique original or limited to prints of 200 or fewer that are signed and consecutively numbered by the author.³⁴ A photograph is protected if it was "produced for exhibition purposes."³⁵ Courts determine whether a work qualifies as a "work of recognized stature" by using "common sense and generally accepted standards of the artistic community."³⁶ The plaintiff bears the burden of proof on this issue, and this standard is generally established through expert witness testimony by art curators, critics, and other members of the artistic community.³⁷

An artist's moral rights vest with the creation of an original work that meets the statutory requirements of a "work of visual art."³⁸ The protection of moral rights lasts for the life of the author, or in the case of joint authorship, for the life of the last surviving author.³⁹ Because moral rights flow from the artist's creative process and personality vested in the work, moral rights are inalienable and non-transferable. Moral rights are, however, waivable via written contract.⁴⁰

32. See LANDES & POSNER, *supra* note 30, at 270.

33. 17 U.S.C. § 106A.

34. *Id.* § 101.

35. *Id.*

36. 3 NIMMER & NIMMER, *supra* note 12, § 8D.06[A][1] (internal quotation marks omitted).

37. See *id.*

38. See *id.* § 8D.06[A][2].

39. See 17 U.S.C. § 106A(d)(1), (3); see 3 NIMMER & NIMMER, *supra* note 12, § 8D.06[E].

40. 17 U.S.C. § 106A(e)(1).

Only the artist may assert a claim under VARA, and may do so even if the artist has not retained ownership of the copyright in the original work.⁴¹ The remedies for violation of the right of integrity include injunctive relief and/or damages.

VARA is limited in scope by several factors. First, a work-for-hire does not qualify for protection.⁴² Second, works excluded from protection include:

any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

any merchandising item or advertising, promotional, descriptive, covering or packaging material or container.⁴³

For example, a print made by an employee of a graphic design studio would not be protected under VARA. Finally, VARA covers works created after June 1, 1991, and applies to works created before this date if title has not transferred from the author.⁴⁴ If violation of the integrity right occurred before the effective date of VARA, the work is not protected.⁴⁵

The final issue with regard to the mechanics of VARA is whether or not an artist's claim under state law is preempted by VARA. Section 301(f) establishes that an artist cannot bring a claim under state law if that right is conferred under section 106 of VARA.⁴⁶ If a right is broader under state law as the court held in *Phillips*, then VARA will not preempt the state law as interpreted by the court.⁴⁷

41. *Id.* § 106A(e)(2).

42. *Id.* § 101 ¶ 48(B). Works-for-hire are exempted from protection under VARA because it is assumed that the employer retains significant control over the output in exchange for paying the artist's wage, and therefore the employer would necessarily seek a waiver of moral rights. See LANDES & POSNER, *supra* note 30, at 274. Whether a work constitutes a work-for-hire has been the subject of cases litigated under VARA. See, e.g., *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994) *rev'd in part, vacated in part, aff'd in part*, 71 F.3d 77 (2d Cir. 1995).

43. 17 U.S.C. § 101 ¶ 48(A)(i), (ii).

44. *Id.* § 106A(d).

45. *Id.*

46. *Id.* § 301(f).

47. See *Phillips v. Pembroke Real Estate*, 288 F. Supp. 2d 89, 92 (D. Mass. 2003); see also *Pavia v. 1120 Ave. of the Ams.*, 901 F. Supp. 620 (S.D.N.Y. 1995) (holding that plaintiff's claim under state law was not preempted by VARA when the effective date of mutilated display occurred before VARA's enactment, and denying protection under state law for display thereafter).

II. APPLICATION OF VARA

To date, only two courts have awarded injunctive relief or damages to artists asserting their right of integrity under VARA, both involving publicly displayed sculptural works.⁴⁸ In more recent cases litigated under VARA—*Phillips v. Pembroke Real Estate*⁴⁹ and *Pollara v. Seymour*⁵⁰—preservation of public art was once again at issue. In contrast to the prior two cases, the courts in *Phillips* and *Pollara* denied the artists protection under VARA, highlighting the narrow scope of types of works protected under VARA as well as the broader implication that VARA is perhaps more harmful than helpful to artists in promoting the creation of new works.

A. *Phillips v. Pembroke Real Estate*

Phillips was a case of first impression with regard to interpreting an artist's right to preserve site-specific art created for a public space under both VARA and Massachusetts state law. *Phillips* established a standard for types of works protected under VARA and the Massachusetts Art Preservation Act ("MAPA"), the test for works of a certain stature, and whether removal, alteration, or destruction of the work damages the artist's reputation and honor.⁵¹

In 1999, the well-known and established artist David Phillips was commissioned by Pembroke Real Estate to create sculptures for Eastport Park in conjunction with the development of the adjacent World Trade Center East office building.⁵² Pembroke and Phillips executed two agreements setting forth the details of the commission.⁵³ Phillips did not waive any of his rights under VARA or MAPA in the agreement.⁵⁴ Pursuant to the agreements, Phillips created fifteen abstract sculptures and twelve realistic marine-themed bronze sculptures including crabs, shrimps, and

48. See *Martin v. City of Indianapolis*, 193 F.3d 608 (7th Cir. 1999) (awarding non-willful damages to artist Martin for the City's destruction of a large stainless steel sculpture commissioned by the City); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994) (enjoining property owner Helmsley-Spear, Inc. from removing a sculptural installation made from over fifty tons of recycled material because it would damage the reputation of the artists), *rev'd in part, vacated in part, aff'd in part*, 71 F.3d 77 92d Cir. 1995) (reversing and vacating district court's grant of permanent injunction because the sculptures were works made for hire and thus exempt from VARA).

49. 288 F. Supp. 2d 89 (D. Mass. 2003).

50. 344 F.3d 265 (2d Cir. 2003).

51. 288 F. Supp. 2d at 89.

52. *Id.* at 93.

53. *Id.* at 94.

54. *Id.*

frogs.⁵⁵ In addition, Phillips created paths connecting the sculptures using granite and worked with stone masons to create “Chords,” the centerpiece of the park.⁵⁶ During creation of the sculptures and connecting paths, Phillips also worked closely with a renowned landscape architect, Craig Holvorson, to integrate the sculptures with the park’s landscape and nautical theme.⁵⁷

Phillips’ moral rights claim under VARA arose after the project was completed in 2000, and in 2001, Pembroke hired another landscape artist to redesign the park because of what Pembroke believed were “conceptual” problems with the park.⁵⁸ The redesign included removal and relocation of some of Phillips’ sculptures.⁵⁹ Phillips sought a temporary restraining order pursuant to VARA and MAPA to enjoin Pembroke from removing or altering any of the sculptures or stone work in Eastport Park. In seeking the order, Phillips asserted that his sculptures and stone work at Eastport Park were site specific, and that the individual works collectively formed one work of visual art protected under VARA and MAPA.⁶⁰ On October 2, 2003, the district court granted Phillips a temporary restraining order that enjoined Pembroke from modification, destruction or removal of Phillips’ work at Eastport Park pursuant to VARA and MAPA.⁶¹ The temporary restraining order was granted until the court could rule as to whether Phillips’ work qualified for protection under VARA and/or MAPA.⁶² Phillips then filed suit seeking a preliminary injunction to enjoin Pembroke from removing, destroying, or altering his work at Eastport Park.

To determine whether the work qualified for protection under VARA, the district court engaged in an analysis of the provisions of VARA, and denied Phillips protection under VARA because the work as a whole did not fall within one of the definitions of a work of visual art as set forth in § 101 ¶ 48.⁶³ The district court rejected Phillips’ argument that the entire park was a work of visual art, holding instead that only the sculptures along the northwest and southeast axis of the park, including the centerpiece “Chords,” were one integrated work of visual art.⁶⁴ The district court

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 93-94.

59. *Id.* at 95.

60. *Id.* at 95.

61. *Id.*

62. *Id.*

63. *Id.* at 100.

64. *Id.* at 99.

reasoned that the sculptures along the northwest to southeast axis constituted a single work because of the "integrated marine theme and recurring spirals, as well as the use of marine granite boulders and pavers."⁶⁵ However, the district court held that the remaining sculptures, including the "whimsical sea creatures," that were not part of this axis were individual free standing pieces.⁶⁶

In its reasoning, the district court asserted that whether a work of art is protected under VARA is to be construed narrowly, and that because many of the elements of the park were not created specifically by Phillips, but rather under his artistic direction, the work could not be viewed as a unified whole.⁶⁷ Because the district court held that Phillips' work was not entirely site-specific, it accepted Pembroke's argument that the work fell under the "public presentation" exclusion in § 106A(c)(2), which permits Pembroke to move Phillips' sculptures from one location to another without altering or destroying the entire work.⁶⁸ Therefore, while the works along the northwest and southeast axis of the park were protected under VARA from alteration, mutilation, or destruction, Pembroke had a right to move the sculptures under VARA's public presentation exclusion.⁶⁹

On the other hand, the district court held that under MAPA, the defendant could not alter, modify, destroy, or *move* sculptures from the unified work along the northwest and southeast axis of the park.⁷⁰ Here, VARA did not preempt MAPA because the definition of a work of visual art under MAPA is broader than it is under VARA.⁷¹ Under MAPA, there is no exhaustive list of what constitutes a work of visual art protected under the statute; a work of visual art is broadly defined as any "original work of visual or graphic art of any media."⁷² Based on expert testimony from an urban arts executive, the district court concluded that under MAPA, Phillips' work along the northwest and southeast axis of the park constituted a unified whole and was site specific to Eastport Park.⁷³ In addition, MAPA does not contain VARA's public presentation exclusion which would exempt modification from a change in placement of the sculptures.⁷⁴ Under MAPA, the district court held that changing the location of Phillips' inte-

65. *Id.* at 98.

66. *Id.* at 99.

67. *Id.*

68. *Id.* at 100.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 102.

74. *Id.*

grated sculptures would constitute an alteration under section 85S(b) and section 85S(c).⁷⁵

After the definitional requirements of a work of visual art to be protected under MAPA were satisfied, the district court concluded, based on expert testimony, that Phillips' site-specific art was work of recognized quality.⁷⁶ Pembroke conceded that Phillips is an artist of international reputation.⁷⁷ Phillips was well-known for his site-specific visual works using sculpture and had won numerous commissions, exhibited in galleries, and had been featured in art magazines.⁷⁸ Therefore, the district court held that removal or destruction of Phillips' work would necessarily damage his reputation and integrity as an artist.⁷⁹ The *Phillips* decision is on appeal to the Supreme Judicial Court in Massachusetts on a certified question from the district court.⁸⁰

B. *Pollara v. Seymour*

Pollara also addressed the narrow scope of works protected under VARA, yet has less far reaching implications than *Phillips* because the work in question more clearly falls within VARA's provision excluding protection for works of a promotional nature. *Pollara* involved interpretation of VARA with regard to destruction of an artist's banner commissioned by a nonprofit for purposes of drawing attention to an information desk at a promotional event.⁸¹

Plaintiff Joanne Pollara is a New York artist who is often commissioned to create large, hand-painted banners for private parties and corporate events.⁸² In 1999, Gideon Coalition, a nonprofit legal service, commissioned Pollara to create a banner to hang above an information table in the Empire State Plaza as part of a "Lobbying Day."⁸³ The banner Pollara created was ten feet by thirty feet long and depicted a group of people of

75. *Id.*

76. *Id.* at 103.

77. *Id.*

78. *Id.*

79. *Id.*

80. E-mail from Andrew D. Epstein, Attorney, Barker, Epstein & Loscocco, to Natalia Thurston, Law Student, University of California at Berkeley, School of Law (Boalt Hall) (Nov. 15, 2004) (on file with author) (e-mail from attorney for Phillips) [hereinafter E-mail from Phillips' Attorney].

81. *Pollara v. Seymour*, 344 F.3d 265, 265 92d Cir. 2003).

82. *Id.* at 266.

83. *Id.*

different ethnicities engaged in an effort to obtain legal services.⁸⁴ After completion, the banner was erected and left unattended in the plaza.⁸⁵

Pollara's moral rights claim resulted from Gideon's failure to obtain a valid permit for Pollara to install the banner and leave it overnight.⁸⁶ Casey, the manager of the Empire State Plaza, had his workers remove the banner because of the absence of a permit.⁸⁷ In the process of removal, the banner was torn into three parts and left crumpled up in Casey's office.⁸⁸

After learning of the banner's destruction, Pollara sued Casey and his supervisor, asserting claims under VARA and 42 U.S.C. § 1983 for violation of First Amendment rights. Pollara asserted that the defendants acted deliberately, willfully, wantonly, intentionally, and/or with gross negligence in destroying the banner.⁸⁹ Under 17 U.S.C. § 106A(a)(3)(B), a work of recognized stature is protected from "any intentional or grossly negligent destruction."⁹⁰ After a bench trial, the district court held that the banner was not a work of art as defined under VARA because it was promotional material, which is one of the types of works excluded from protection under VARA.⁹¹ Pollara appealed this ruling.

In analyzing Pollara's claim under VARA, the Second Circuit denied the work protection because the work fell into one of the statutory exceptions to works of visual art.⁹² The court reasoned that Pollara's work is not of the type to be protected under VARA because VARA only protects works of "recognized stature" or works of an artist whose "honor or reputation" would be damaged by removal, modification, or destruction of their works.⁹³ Furthermore, VARA does not protect works that advertise or promote.⁹⁴ The court turned to the work's objective and purpose to determine whether the work fell within a protected category.⁹⁵

In its analysis, the Second Circuit concluded that the objective and purpose of the banner was to promote and draw attention to Gideon, the

84. *Id.*

85. *Id.*

86. *Id.* at 267.

87. *Id.*

88. *Id.*

89. *Id.*

90. 17 U.S.C. § 106A(a)(3)(B) (2000). The statute is not meant to protect works that are altered, modified or destroyed from acts of negligence, such as improper storage or handling. *See* 3 NIMMER & NIMMER, *supra* note 12, § 8D.06[C][1].

91. 344 F.3d at 268.

92. *Id.* at 271.

93. *Id.* at 269.

94. *Id.*

95. *Id.*

political advocacy group, and therefore constituted advertising material under 17 U.S.C. § 101.⁹⁶ Pollara argued that although her work was commissioned by a political group, she used traditional painting and drawing materials and that the text on the banner did not denigrate the artistic merit of her work.⁹⁷ In rejecting this argument, the Second Circuit pointed out that while the banner was “visually appealing and demonstrated a great deal of artistic viability and creativity,” it was not within the purview of the court to judge artistic merit, but rather to determine whether the work fell within one of VARA’s protected categories.⁹⁸ The Second Circuit therefore held that because the purpose of the work was to draw attention to the lobbying efforts of Gideon, the work was inherently promotional in nature and not protected under VARA.⁹⁹

III. DISCUSSION

At first glance, the introduction of moral rights under VARA appears to grant protection for existing artistic works and promote the creation of new works. According to VARA’s legislative history, moral rights “result in a climate of artistic worth and honor that encourages the author in the arduous act of creation . . . [and] . . . are consistent with the purpose behind copyright laws and the Constitutional provision they implement: ‘To promote the Progress of Science and useful Arts.’”¹⁰⁰

In theory, moral rights should protect valuable works and spur creation of new works. However, in practice, VARA may in fact inhibit creation of new works and provide minimal protection for existing works. As demonstrated in *Phillips* and *Pollara*, the narrow scope of protection provided under VARA indicates that many visual works will not receive protection because they fall outside the limited definitions of a work of visual art under VARA, or are not considered works of recognized stature.¹⁰¹

96. *Id.* at 270.

97. *Id.* at 269.

98. *Id.* at 271.

99. *Id.* at 270. In a concurring opinion, Judge Gleeson asserted that Pollara’s work was not protected because it was not work of recognized stature that had been displayed in a gallery or museum. *Id.* at 272 (Gleeson, J., concurring).

100. See VAWA House Report, *supra* note 27, reprinted in 1990 U.S.C.C.A.N. at 6915 (quoting *Hearings on H.R. 2690 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong. 3 (1989) (statement of the Honorable Ralph Oman, Register of Copyrights), and U.S. CONST. art. I, § 8, cl. 8) (internal quotation marks and footnote omitted).

101. *Pollara*, 344 F.3d at 265; *Phillips v. Pembroke Real Estate*, 288 F. Supp. 2d 89, 89 (D. Mass. 2003).

VARA's broader implications extend beyond its limited scope to issues that affect the artist, the property holder, and the public. Under VARA, art is protected if it is accepted by the public, as only works of recognized stature are protected. Often, art anticipates future intellectual discoveries, and therefore acceptance of a work may only occur years after the artist has passed away. Therefore, emerging artists and artists whose work falls outside the limited definition of a work of art may suffer from lack of protection under VARA. Great works could be destroyed that do not meet VARA's definition, and the general public will never benefit from art that could have contributed to our understanding of culture. On the other hand, VARA potentially curtails the public and property owner's right to control public spaces and could lead to the diminution of property values if an owner is forced to preserve a work for an artist's lifetime. An artist's assertion of moral rights may also impact purchasers of art, who may negotiate prices downward if artists seek to assert their moral rights. This could lead to artists automatically waiving their moral rights, thereby creating inefficient transactions. VARA's unexpected consequences and impact on the artist, the property holder, and the public are discussed in the following sections.

A. Lack of Protection for Emerging Artists

One major issue confronting an artist seeking protection under VARA is whether the work falls into one of the definitions provided for in VARA.¹⁰² VARA limits protection of a work of visual art to include a "painting, drawing, print or sculpture."¹⁰³ Photographs, a popular medium of expression, are protected only if "produced for exhibition purposes."¹⁰⁴ A court's interpretation of what categories of work are to be protected under VARA is the first hurdle an artist must overcome in successfully litigating a case under VARA. This can be a difficult hurdle, as evidenced by the denial of protection under VARA for artists Phillips and Pollara based on the fact that their works did not meet all of VARA's definitional requirements.¹⁰⁵

Once an artist has established that her work falls under a category to be protected under VARA, next she has the burden of establishing that her

102. See *Pollara*, 344 F.3d at 266; *Phillips*, 288 F. Supp. 2d at 94; Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226 (DAB), 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. June 17, 2003); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd in part, vacated in part, aff'd in part*, 71 F.3d 77 (2d Cir. 1995); *Wojnarowicz v. Am. Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990).

103. 17 U.S.C. § 101 (2000).

104. *Id.*

105. *Pollara*, 344 F.3d at 266; *Phillips*, 288 F. Supp. at 100.

work is of recognized stature. Case law indicates that whether or not a work is protected is left to the discretion of the judge in determining whether to admit evidence supporting a plaintiff's claim that their work is of recognized stature.¹⁰⁶ The admission of evidence to support a finding that a work is of recognized stature is decided on a case-by-case basis.

Most courts require expert testimony from members of the art community. In *Martin v. City of Indianapolis*, however, letters and newspapers were enough to establish that the artist's work was of recognized stature.¹⁰⁷ Since no bright-line rule exists for establishing works of recognized stature, emerging artists may suffer from a lack of standing in the artistic community because their work's merit may only be recognized years later. Although *Martin* was successful in establishing that his work was of recognized stature, the dissenting judge in *Martin* declared the newspaper articles and letters as hearsay, and warned "those who are purchasers or donees of art had best beware. To avoid being the perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster, the recipient must obtain at the outset a waiver of the artist's rights under VARA."¹⁰⁸

B. Waivers and Associated Transaction Costs

In enacting VARA, the legislative history suggests that Congress was concerned that artists would necessarily seek waivers of their moral rights—obviating the purpose of the Act.¹⁰⁹ In practice, negotiating waivers for art is complicated because an original work of art is a unique commodity that is imbued not only with economic value, but also carries a deeper meaning for the artist, the owner, and the public. It is difficult to calculate the pecuniary value of a work of art without taking into account the artist's larger body of work and reputation in the art community. In essence, each work an artist creates serves as an advertisement for his other works, and damage to one work affects the value of the artist's other works.¹¹⁰ Therefore, it is difficult to quantify the value artists and potential buyers will assign a waiver of moral rights since destruction or alteration of a work has associated external costs.

106. See *Carter*, 861 F. Supp. at 325 (establishing a two-prong test for works of recognized stature).

107. 192 F.3d 608, 610 (7th Cir. 1999).

108. *Id.* at 616 (Manion, J., dissenting).

109. See VARA House Report, *supra* note 27, reprinted in 1990 U.S.C.C.A.N. at 6928-29.

110. See LANDES & POSNER, *supra* note 30, at 275.

The pecuniary impact of reputational externalities associated with the assertion of moral rights extend beyond the artist's pocketbook. Prior to the enactment of VARA, mutilation or destruction of a work imposed a cost on the artist. For example, the owners of a mobile in the Pittsburgh airport created by the renowned artist Calder repainted the black and white sculpture to match the colors of Allegheny County.¹¹¹ While this was an isolated incident, professors Hansmann and Santilli point out that "if all of Calder's work were altered and painted in such a fashion, that work—and hence the Calder name—would be less famous and the prices Calder could charge for subsequent work would fall."¹¹² Under VARA, this cost is now imposed on the owner who has not obtained a waiver.

Destruction or mutilation of a work has several implications for an owner. Because an original work of art is a scarce commodity, destruction of one work may actually increase the value of the other works, due to a decrease in the total number of the artist's original works. On the other hand, if damage or alteration of a work negatively affects the artist's reputation, this may in turn decrease the value of the other works.¹¹³

Professors Hansmann and Santilli posit that the transactional costs associated with obtaining waivers of moral rights decrease the value of an artist's work.¹¹⁴ Moral rights create divided property interests. The right itself functions as a dominant tenement attached to property, such as an easement, that could potentially decrease the overall value of the work.¹¹⁵ Additionally, there are inefficiencies associated with providing notice of waivers for works purchased by subsequent owners.¹¹⁶

While artists normally internalize the costs and benefits of their decision to retain or waive moral rights, Hansmann and Santilli assert that this decision affects "reputational externalities" which have associated costs and benefits.¹¹⁷ If an artist waives his moral right of integrity and a work is damaged, because each piece is an advertisement for others, such damage may affect an artist's reputation and ability to sell future works.

Of further concern is the relatively weak bargaining position of artists in relation to those seeking to purchase or commission their works, de-

111. *Id.* at 281, n.28.

112. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 104-05 (1997).

113. *Id.* at 104-05.

114. *Id.* at 125.

115. *Id.* at 100.

116. *Id.* at 125.

117. *Id.* at 104, 110.

pending on their status as an artist.¹¹⁸ Because rights under VARA are waivable, an artist might gain some consideration for waiving these rights. On the other hand, moral rights may not provide an artist with significant leverage because VARA's scope of protection is so limited.¹¹⁹ For example, in the *Phillips* case, the artist could benefit financially from waiving his moral rights in future contracts because his work is of recognized stature and he could use his stature as leverage in negotiating waivers. On the other hand, the threat of future litigation could deter business as well. In Pollara's case, because her work was not protected under VARA, she had no bargaining position with respect to a waiver of moral rights. The difficulty in predicting whether or not a work will qualify for protection under VARA creates risks and associated inefficiencies in the bargaining process because of the uncertainty associated with a court's evaluation of a work of art.

In their study of the economic impact of moral rights, Landes and Posner see little benefit to the artist in obtaining waivers. Instead, they argue that the cost of obtaining waivers for artists is greater than the associated benefits.¹²⁰ Landes and Posner hypothesize that the adoption of moral rights is economically inefficient and actually does more harm for the artist than good. In an attempt to buttress their assertion that moral rights are in fact harmful to artists, Landes and Posner conducted a statistical study of the effects of moral rights laws passed in nine states prior to the passage of VARA.¹²¹ Although their findings for the most part produced no statistically significant results, they reached the interesting conclusion that artists value moral rights despite their finding that moral rights laws reduce demand for art and thereby decrease an artist's earnings.¹²²

Why then do artists value moral rights? Landes and Posner found that "larger, richer states with more highly educated populations have relatively more artists and are more likely to enact moral rights laws."¹²³ A state's adoption of moral rights infers that "art is a highly valued social enterprise" within that community.¹²⁴ Regardless of whether moral rights increase or decrease an artist's income, the 7.3% increase in the number of artists moving to a state with moral rights reflects the importance of such

118. See VerSteeg, *supra* note 23, at 858.

119. *Id.*

120. See LANDES & POSNER, *supra* note 30, at 278.

121. *Id.* at 287.

122. *Id.* at 289.

123. *Id.* at 288.

124. *Id.* at 291.

an environment in supporting the honor and reputation of artists.¹²⁵ According to Landes and Posner, the socially desirable environment offsets any decrease in earnings an artist may experience in asserting their moral rights.¹²⁶

Landes and Posner's findings go back to the premise that moral rights are a reflection of personhood and the value of moral rights lies in the protection of the artist's reputation, so a purely economic analysis falls short of appreciating the intrinsic value of art. This could explain why both Polara and Phillips filed claims to protect their moral rights even though the prospect of obtaining pecuniary damages was limited and the benefits of securing moral rights to their future income questionable. Professor Ong asserts that economic analysis of moral rights ignores the non-pecuniary value of moral rights, that of "respect for, and recognition of, the artistic contributions of the artist."¹²⁷ Moral rights cannot be boiled down to the associated costs and benefits because moral rights extend beyond the scope of economic value and protect "the intrinsic worth of such artistic contributions to the cultural landscape."¹²⁸ Furthermore, art cannot be compared to other commodities because of its unique nature. A commodity such as a consumer product can usually be replaced if destroyed. An original work of art—imbued with the artist's "highly individualized expression of . . . aesthetic sensibilities"—if destroyed, can never be replaced.¹²⁹

It is arguable whether an artist's assertion of moral rights actually increases transaction costs in negotiating waivers. Some scholars argue that moral rights actually increase an artist's bargaining power.¹³⁰ In fact, the attorney for Phillips suggested that moral rights do more to level the negotiating playing field, and both the artist and the buyer benefit if they know where they stand with regard to display and removal of the work.¹³¹ Consequently, one solution to avoiding litigation under the limited scope of VARA is to ensure that the rights granted under VARA are fairly negotiated in the contract between the artist and the buyer. For example, notice provisions can be included in the contract to ensure that the artist has fair warning if the buyer intends to remove or alter the work. Additionally, the

125. *Id.* at 292.

126. *Id.* at 291.

127. See Ong, *supra* note 16, at 298.

128. *Id.* at 304.

129. *Id.* at 307.

130. See, e.g., VerSteege, *supra* note 23, at 844.

131. E-mail from Phillips' Attorney, *supra* note 80.

artist can negotiate the number of years the buyer must preserve the work, which would reduce the possibility of confusion over property rights.

C. Public versus Private Art

When a private art collector buys a work, artists have no right of display. In other words, the owner can put a sheet on the painting and put it in their closet without facing liability under VARA. However, when art is displayed publicly, an owner of such work may face increased liability.¹³² Developers and building owners have been the primary defendants in the suits brought under VARA to date.¹³³ Public works, such as murals, outdoor sculptures, and site-specific works created for public display are often incorporated into the site and removing the work would necessarily result in its destruction or alteration. Additionally, removal or destruction of a work displayed publicly may affect the artist's reputation more than a private owner choosing not to display a work, since the public will have knowledge that the work has been destroyed or removed.

Landes and Posner suggest that an artist's assertion of moral rights will deter real estate developers from commissioning works for installation in lobbies, open spaces, and buildings.¹³⁴ A building owner might be deterred from investing in the commission of a public work if there is a risk he could become a perpetual curator of unwanted art, face monetary damages for removal of the work, or experience a decrease in the value of the property because of the work.

To illustrate, the district court judge in *Carter v. Helmsley-Spear, Inc.* insisted that the sculptural installation in the building should have no negative impact on the value of the property.¹³⁵ One wonders, however, whether a commercial property owner should have to maintain in perpetuity a sculpture made from recycled parts including "a giant hand fashioned from an old school bus, [and] a face made of automobile parts . . ." ¹³⁶ An informal survey of attorneys for real estate developers in Massachusetts surfaced little data about developers' desire to commission artworks in the

132. In the VARA litigation to date, the majority of cases have involved disputes over large-scale, public sculptural installations or site-specific works. See LANDES & POSNER, *supra* note 30, at 281.

133. *Id.* at 280-87.

134. *Id.* at 286.

135. 861 F. Supp. 303, 328 (S.D.N.Y. 1994), *rev'd in part, vacated in part, aff'd in part*, 71 F.3d 77 (2d Cir. 1995).

136. See *Carter*, 71 F.3d at 80.

aftermath of the *Phillips* decision.¹³⁷ Most of the attorneys had not dealt with the issue and therefore had no comment. In all likelihood this suggests that since few cases have been litigated successfully under VARA, moral rights pose no immediate threat to future commissions.

In enacting VARA, Congress intended the public, not just the artist and property holder, to benefit from preservation of art works.¹³⁸ The residual effects of destroying a work of art are two-fold. Not only is the public denied access to the work, but also future works created in response to the work may be thwarted.¹³⁹ On the other hand, certain works may be rejected by the public or members of the community who no longer wish to view the work.

In a pre-VARA case, *Serra v. United States*, artist Richard Serra, raised a First Amendment argument in pursuing a claim against the government for removal of the sculpture "Tilted Arc," commissioned from Serra and located in the Federal Plaza in Manhattan.¹⁴⁰ The Second Circuit rejected Serra's First Amendment claims. Interestingly, Serra's due process claim was also denied because the government held a hearing at which many of the employees who worked in the building where the sculpture was located objected to the presence of the sculpture because it blocked too much of the open space in front of the building.¹⁴¹ As Professor Sax aptly points out:

As for the rights of artists, they would have to be stretched pretty far to include a right to compel unwilling people to experience their work far into the indefinite future, which would be the practical result if a large sculpture (like Serra's *Tilted Arc*) must remain in a public unavoidably frequented place.¹⁴²

IV. CONCLUSION

Undoubtedly, in commissioning the work of Rivera, the Rockefellers failed to anticipate the message in the medium. Rivera's body of work reflected his mastery of the craft, and the Rockefeller's destruction of his work raised an outcry among artists. Rivera's public denouncement of the

137. E-mail from Sarah Hunt Broughel, Attorney, Choate, Hall & Stewart, to Natalia Thurston, Law Student, University of California at Berkeley, School of Law (Boalt Hall) (Nov. 15, 2004) (on file with author).

138. See VARA House Report, *supra* note 27, reprinted in 1990 U.S.C.C.A.N. at 6916-17.

139. See Hansmann & Santilli, *supra* note 112, at 106.

140. *Serra v. U.S. Gen. Serv. Admin.*, 847 F.2d 1045 (2d Cir. 1988).

141. *Id.* at 1052.

142. See SAX, *supra* note 1, at 27.

Rockefellers surely impacted the desire of other financiers to commission his work; however, Rivera had no recourse under the law to pursue a claim against them. On the other hand, why should Rivera be able to force the Rockefellers to endorse a message at their headquarters that was the antithesis of their values as capitalists and that subjected them to public ridicule? The Rivera-Rockefeller dispute illustrates the competing interests of the artist, the property holder, and the public in deciding when art should live and when art should die.

VARA was enacted to protect the moral rights of artists—a right artists have proven to value. Although the exercise of moral rights may be inefficient, the value artists place on them is more than just pecuniary in nature, and reflects an artist's desire to protect work that is a product of personal expression. In creating a work, an artist develops a unique and intimate relationship to that work that survives beyond physical ownership of the work. Furthermore, an artist has a vested interest in protecting her works, as each work serves as an advertisement for future works and an artist's reputation is built upon her entire body of work.

While Congress intended VARA to protect existing work and promote the creation of new works, it remains to be seen whether VARA has actually dampened the artistic climate. Art collectors and real estate developers may be reluctant to invest in art because of the bargaining inefficiencies associated with waivers, the threat of litigation associated with VARA, and the fear of becoming perpetual curators of unwanted art. On the other hand, in the case of Rivera, perhaps the Rockefellers made a bad business decision in destroying the mural because had the mural survived, it would be worth much more than their original investment because of Rivera's standing as an artist. The future pecuniary value of art is difficult to predict precisely because art has more than monetary value. Art has the ability to shape and influence society—consequences reaching far beyond the limitations of traditional property values.

