

## AS GOOD AS NEW: CONSERVING ARTWORK AND THE DESTRUCTION OF MORAL RIGHTS ♦

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## INTRODUCTION

In 2004, advertising magnate and art collector Charles Saatchi sold Damien Hirst's sculpture, *The Physical Impossibility of Death in the Mind of Someone Living*, 1991,<sup>1</sup> to American hedge fund billionaire Steven Cohen for \$8,000,000.<sup>2</sup> The sale was one of the most celebrated art-world demonstrations of pre-recession opulence, and the media frenzy surrounding Cohen's acquisition was due in part to the astronomical sum. But perhaps even more fantastic than its sale price was what the sculpture actually *was*: a fourteen-foot tiger shark, suspended in gaping attack in a vitrine of formaldehyde, weighing in at more than twenty tons.<sup>3</sup> The work was a sensation when Saatchi originally commissioned its execution thirteen years earlier,<sup>4</sup> but it did not age gracefully, forcing art conservators to resort to experimental and drastic measures in order to maintain the work, even going so far as adding bleach to the formaldehyde and ultimately skinning the shark and re-stretching its hide over a fiberglass skeleton to stem its rapid decay.<sup>5</sup> The 2004 sale returned the sculpture to the spotlight as one of the world's foremost pieces of contemporary art, and as Hirst's own gaze refocused on his masterpiece, he discovered that the work's macabre components had deteriorated: the shark's skin disintegrating and the preservative fluid becoming cloudy.<sup>6</sup> Displeased, Hirst volunteered to refresh the work as it entered Cohen's collection by replacing most of its parts: a new shark freighted in from Australia, and 4,360 fresh gallons of formaldehyde.<sup>7</sup>

Hirst's decision to replace the component pieces of one of his aging works intuitively may seem all-around beneficial, especially having secured the blessings of the work's new owner.<sup>8</sup> However,

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<sup>1</sup> Hereinafter *Physical Impossibility of Death*.

<sup>2</sup> Landon Thomas, Jr. & Carol Vogel, *A New Prince of Wall Street Buys Up Art*, N.Y. TIMES, Mar. 3, 2005, available at <http://www.nytimes.com/2005/03/03/business/03hedge.html>.

<sup>3</sup> Carol Vogel, *Swimming With Famous Dead Sharks*, N.Y. TIMES, Oct. 1, 2006, <http://www.nytimes.com/2006/10/01/arts/design/01voege.html> [hereinafter Vogel, *Swimming*].

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> Petra Lange-Berndt, *Replication and Decay in Damien Hirst's Natural History*, TATE PAPERS (Autumn 2007), <http://www.tate.org.uk/research/tateresearch/tatepapers/07autumn/lange-berndt.htm>; Vogel, *Swimming*, *supra* note 3.

<sup>7</sup> See Roberta Smith, *Just When You Thought It Was Safe*, N.Y. TIMES, Oct. 16, 2007, <http://www.nytimes.com/2007/10/16/arts/design/16muse.html> [hereinafter Smith, *Just When You Thought*].

<sup>8</sup> Cohen not only allowed Hirst to replace the shark and formaldehyde, but also financed the project, including a more extensive embalming measure than had been afforded the

American legal protections afforded to artists with respect to their own works are so narrowly focused, and the statutory language so loosely defined, that it is not clear whether certain measures to conserve artworks may have the counterintuitive, adverse effects of depriving artists of the protections contemplated in the Visual Artists Rights Act of 1990 (VARA).<sup>9</sup> This Note explores problem areas in the nexus of conserving works of art and VARA jurisprudence, arguing that the statute's narrow scope confers inconsistent and unpredictable protections over artworks such that the ever-evolving best practices of arts professionals—those who work to conserve artworks or otherwise play a stewardship role for artists' creations—may indiscriminately jeopardize artists' rights in their works.<sup>10</sup>

Part I presents an overview of VARA from a practical perspective, contrasting the expansive scope of visual artistic media over the last one hundred years with the restrictive designations of moral rights protections, demonstrating a philosophical gap between the statute and the artworks it was designed to protect. Part II addresses the statute's case law, which casts a divide between VARA's application and the practical scenarios that arts professionals encounter in preserving artworks, examining two cases: *Flack v. Friends of Queen Catherine*<sup>11</sup> and *Board of Managers of SoHo International Arts Condominium v. City of New York (Board IV)*.<sup>12</sup> Lastly, Part III suggests an amendment to VARA in order to effectuate its purpose when applied to common conservation practices and puts forward a set of guidelines for arts professionals to reduce the likelihood that conserving an artwork could jeopardize artist rights in it or otherwise run afoul of VARA's protections.

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first shark. In all, the work done to *Physical Impossibility of Death* surrounding its 2004 sale likely eclipsed the cost of its original execution in 1991. See Vogel, *Swimming*, *supra* note 3. <sup>9</sup> 17 U.S.C. § 106A (2006).

<sup>10</sup> This Note relies on the basic assumption that those who are entrusted with the care of an artwork, whether to address it for conservation purposes or to safeguard and display it as part of a collection, do so because they recognize the artwork's intrinsic value, imbued therein by its creator, the artist. The approach here taken views arts professionals in this sort of role as motivated, at least in part, by caring for the artist's vision and desiring to preserve that which the artist created, including whatever intellectual property rights may stem from the creative act.

<sup>11</sup> 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

<sup>12</sup> Four separate decisions comprise this litigation: Bd. of Managers of SoHo Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2003 WL 21403333 (S.D.N.Y. June 17, 2003) (order denying in part and granting in part cross-motions for summary judgment) [hereinafter *Board I*]; Bd. of Managers of SoHo Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2003 WL 21767653 (S.D.N.Y. July 31, 2003) (order denying motions to reconsider cross-motions for summary judgment) [hereinafter *Board II*]; Bd. of Managers of SoHo Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2004 WL 1982520 (S.D.N.Y. Sept. 8, 2004) (order denying cross-motions for summary judgment) [hereinafter *Board III*]; Bd. of Managers of SoHo Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2005 WL 1153752 (S.D.N.Y. May 13, 2005) [hereinafter *Board IV*].

## I. LIMITED PROTECTIONS IN THE REALM OF BOUNDLESS INNOVATION

Damien Hirst is an heir apparent of about one hundred years of artistic revolutionaries, who expanded the vocabulary of visual media. Departing from a long history confined to familiar materials—such as bronze, marble, and oil paints, canonized, in part, for their abilities to endure the tests of time—the twentieth century produced a succession of artistic innovators, each in turn pushing expressive norms to their limits and beyond. Today, descriptive tags on museum walls list rope, cigarette butts, newsprint, taxidermic animals, latex, fluorescent lamps, flowering plants and, yes, a tiger shark among the visual materials constituting our cultural heritage.<sup>13</sup> As they begin to age—or (perhaps more accurately) to decompose—these materials present increasing challenges for conservators, who evermore frequently must find ways to maintain nontraditional, unstable, and often ephemeral media.<sup>14</sup> In responding to these needs, museums, collectors, and conservators have become creative, resorting to solutions that range from nonintervention<sup>15</sup> to executing exhibition copies in order to spare delicate works from the hazards of public presentation, mitigating the urgency for conserving works in the first place.<sup>16</sup>

Conservation is critical to preserving an artwork's value for

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<sup>13</sup> See Dan Flavin, *Untitled (fondly to Margo)*, 1986, Los Angeles County Museum of Art (fluorescent lamps); Eva Hesse, *Untitled (Rope Piece)*, 1969-70, Whitney Museum of American Art, New York (latex); Jasper Johns, *White Flag*, 1955, Metropolitan Museum of Art, New York (newsprint); Jeff Koons, *Puppy*, 1992, Guggenheim Bilbao Museum (flowering plants); Pablo Picasso, *Still Life with Chair Caning*, 1912, Musée Picasso, Paris (rope); Jackson Pollack, *Full Fathom Five*, 1947, Museum of Modern Art, New York (cigarette butts); Robert Rauschenberg, *Canyon*, 1959, Sonnabend Collection, New York (stuffed American bald eagle). *Physical Impossibility of Death* was the centerpiece of the Metropolitan Museum of Art's contemporary galleries from 2007 to 2010. See Smith, *Just When You Thought*, *supra* note 7.

<sup>14</sup> See, e.g., Randy Kennedy, *Giving the Artists a Voice in Preserving Their Work*, N.Y. TIMES, Jun. 29, 2006, <http://www.nytimes.com/2006/06/29/arts/design/29cons.html>. For a discussion on the problems of moral rights legislation and the proliferation of New Media, which is specifically excepted from VARA and not addressed in this Note, see Brooke Oliver, *The Artist's Perspective in the Acquisition, Exhibition, and Preservation of New Media Works*, SK061 ALL-ABA 161 (2005).

<sup>15</sup> There are times when the very nature of the artwork is its own decomposition. See, e.g., Dieter Roth, *Gartenzwerg*, 1972, Kunstmuseum Stuttgart (consisting of a plastic garden gnome encased in chocolate, which decays over time, revealing the plastic figure within). Controversial questions arise when asking whether museums, acting as stewards for the preservation of culture, should stem such works' decay and to what degree. For a discussion on the problems associated with conservation of objects that are intended to decompose over time, see Heide Skowranek, *Should We Reproduce the Beauty of Decay? A Museumsleben in the work of Dieter Roth*, TATE PAPERS (Autumn 2007), <http://www.tate.org.uk/research/tateresearch/tatepapers/07autumn/skowranek.htm>.

<sup>16</sup> Exhibition copies are replicas of works created specifically for presentation purposes. See *Better Than the Real Thing?* NEWSWEEK, June 5, 2008, <http://www.newsweek.com/2008/06/04/better-than-the-real-thing.html>; Kennedy, *supra* note 14; Leon Neyfakh, *Copy That! Wait Don't. Whitney Ponders Problem of Replication in Modern Art*, N.Y. OBSERVER, Nov. 23, 2009, <http://www.observer.com/2009/culture/copy-wait-dont-whitney-ponders-problem-replication-modern-art>; Skowranek, *supra* note 15.

those who have an interest in it. The interests that adhere in artworks vary based upon distinct classes of stakeholders, among them owners—those who purchase or retain artworks within the notions of traditional property law regimes—and non-owners, including the creators of artworks, who relinquish physical possession of their works through sale, commission, or gift. Artists have a unique relationship with the objects or concepts they create because those are the blocks they use to build livelihoods, amassing reputations based upon their personal creativity and esthetic propensities.<sup>17</sup> Each work becomes a part of the *oeuvre* that defines the artist as a professional and/or intellectual.

Today, it is widely accepted that some groups of non-owners are real stakeholders in cultural production and that their respective interests may be afforded some degree of legal protection.<sup>18</sup> However, most legal systems do not have longstanding traditions of protecting the non-economic interests of non-owners,<sup>19</sup> including artists, who necessarily constitute a special class of non-owners because an artwork is thought to embody a “personality” element of its creator.<sup>20</sup> Until the 1928 addition of Article 6*bis* to the Berne Convention, “the [world’s] dominant multilateral system of copyright norms”<sup>21</sup> did not contain provisions to safeguard artists’ interests in their own works once they entered commerce.<sup>22</sup> The rights contained in Article 6*bis* are commonly called “moral rights” because they “are a constellation of rights that ensure an ongoing relationship

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<sup>17</sup> See H.R. REP. NO. 101-514, at 7 (1990) (quoting testimony of Weltzin Blix) (“The Visual Artists Rights Act is of the utmost importance to professional artists who build their future on the integrity and authenticity of . . . [art] in public and private collections. . . .” (first alteration in original)).

<sup>18</sup> The idea of cultural patrimony is rooted in public non-ownership interests, and there are many legal systems that limit rights of ownership, especially in transporting certain artworks abroad or selling to foreign entities. See, e.g., John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51, 51-52 (2001); Nancy C. Wilkie, *Public Opinion Regarding Cultural Property Policy*, 19 CARDOZO ARTS & ENT. L.J. 97 (2001). Rights of general non-owners continue to be a topic of scholarly debate. See, e.g., Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 928 (1999) (“Although we have no reliable empirical evidence on the varied interests of non-owners, there is good reason to think that the utility derived by passive non-owners from the stability of propertized cultural objects is greater than the utility that would accrue to non-owners who want to [manipulate the meanings and contexts of] cultural objects so much that those non-owners need to be freed from existing legal constraints.”); Sarah Botha, Note, *Art Conservation: Problems Encountered in an Unregulated Industry*, 26 COLUM. J.L. & ARTS 251 (2003) (arguing in favor of government oversight of art conservation in order to safeguard an American cultural patrimony).

<sup>19</sup> Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 2007 UTAH L. REV. 659, 663 (2007) [hereinafter Hughes, *American Moral Rights*].

<sup>20</sup> See, e.g., H.R. REP. NO. 101-514, at 12 (1990).

<sup>21</sup> Hughes, *American Moral Rights*, *supra* note 19, at 659.

<sup>22</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No 99-27 (1986).

between the author and the creative work outside economic issues.”<sup>23</sup> Chief among these moral rights are the right of “attribution”—ensuring that the artist(s) who created the work exclusively may continue to be associated with its creation—and the right of “integrity”—allowing an artist to prevent changes to her work that would affect her honor or reputation negatively.<sup>24</sup> These rights aim to protect the way an artist’s work represents her vision, meaning, and message to the public.<sup>25</sup>

One of the most challenging hurdles for the United States in joining the Berne Convention in 1988 was the problem of shoehorning the Article 6*bis* moral rights obligations into the American legal system.<sup>26</sup> Fearing that the existing intellectual property traditions and other causes of action available to artists did not quite cover every base, Congress passed VARA with the express purpose of satisfying those obligations.<sup>27</sup> Specifically, VARA provides artists of works falling within the statute’s protection with the ability to enforce the rights of attribution and integrity.<sup>28</sup> If a work is modified in a way that does not reflect the artist’s vision, she may take equitable action based on her right to

<sup>23</sup> Hughes, *American Moral Rights*, *supra* note 19, at 660.

<sup>24</sup> See H.R. REP. NO. 101-514, at 6.

<sup>25</sup> See Roberta Rosenthal Kwall, *Authors In Disguise: Why the Visual Artists Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 743-44 (2007) [hereinafter Kwall, *Authors In Disguise*].

<sup>26</sup> H.R. REP. NO. 101-514, at 8 (“After almost 100 years of debate, the United States joined the Berne Convention, effective in March 1989. While the Convention is the premier international copyright convention, consensus over United States adherence was slow to develop in large part because of debate over the requirements of Article 6*bis*.”). See also Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible*, 38 VAND. L. REV. 1 (1985).

<sup>27</sup> H.R. REP. NO. 101-514, at 6-8 (1990). See also Hughes, *American Moral Rights*, *supra* note 19, at 660-671.

<sup>28</sup> 17 U.S.C. § 106A(a) (2006). The rights are specifically codified, as follows:

(a) Rights of attribution and integrity.—Subject to section 107 and independent of the exclusive rights

provided in section 106, 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 reputation; and

(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 any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

*Id.*

attribution so as not to be associated with it further.<sup>29</sup> The right of attribution also allows the artist to claim authorship of her works and to stop the use of her name in association with a work she did not create.<sup>30</sup> She may enforce her right of integrity in order to enjoin another from acts distorting, mutilating, or destroying a work if it would harm the artist's honor or reputation, or if the artwork is of "recognized stature."<sup>31</sup> Finally, VARA allows artists to take legal action after such a work has been so distorted, mutilated, or destroyed.<sup>32</sup>

An imperfect solution to the problem,<sup>33</sup> VARA sits within the copyright code, at odds with surrounding provisions that are aimed at protecting rights of authorship insofar as they protect economic interests (as opposed to associative value) for the originator.<sup>34</sup> Therefore, the rights conferred to artists through VARA, such that they create a lasting legal relationship with articles in commerce independent of ownership, were drafted very narrowly - for fear that those rights might hamper commerce or unduly impose upon other property-ownership rights.<sup>35</sup>

First, VARA applies only to "work[s] of visual art," defined by

<sup>29</sup> 17 U.S.C. § 106A(a)(2). The statute leaves open the question of whether a right to use a pseudonym or to remain anonymous may be enforced through the right of attribution. See Kwall, *Authors In Disguise*, *supra* note 25.

<sup>30</sup> 17 U.S.C. § 106A(a)(1).

<sup>31</sup> 17 U.S.C. § 106A(a)(3). For an insightful discussion of the rarity of the "recognized stature" provision and its interpretation as a nod toward public non-ownership rights in cultural production, see Christopher J. Robinson, Note, *The "Recognized Stature" Provision in the Visual Artist Rights Act*, 68 FORDHAM L. REV. 1935 (2000). Robinson points out,

[t]he 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.

*Id.* at 1937.

<sup>32</sup> 17 U.S.C. § 106A(a)(3).

<sup>33</sup> See Hughes, *American Moral Rights*, *supra* note 19, at 671-677 (analyzing VARA's shortcomings in addressing the Article 6*bis* mandates); Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355 (2006) ("[I]f the goal was to increase the overall protection of authors, it was a step in the wrong direction for the common law countries to adopt the civil law concept of moral rights, because the statutory moral rights regimes that were enacted in the United States and the United Kingdom have likely reduced rather than increased the aggregate level of authorial protection.").

<sup>34</sup> See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 55-56 (2010) [hereinafter KWALL, *SOUL OF CREATIVITY*]; Rigamonti, *supra* note 33, at 404-07.

<sup>35</sup> H.R. REP. NO. 101-514, at 9-10 (1990):

"The definition of a work of visual art is a critical underpinning of the limited scope of the bill. As Representative Markey testified, 'I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered . . . [T]his legislation covers only a very select group of artists . . . .'"

*Id.* at 10. Even so, the House's version of VARA ultimately was amended to limit its protections still further before it was signed into law. Compare H.R. REP. NO. 101-514, at 2, with 17 U.S.C. § 106A(d) (in which provisions extending moral rights to successors for fifty years after the artist's death were eliminated before enactment).

a two-pronged statutory test.<sup>36</sup> The affirmative prong grants specific categories of artworks protection based upon criteria relating to the method of creation and the number constituting an edition of the work, if produced in multiples.<sup>37</sup> Thus, VARA only applies to:

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 . . . 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.<sup>38</sup>

From this class of works, the negative prong then excepts from VARA's scope those visual materials commonly created with commercial aims, disallowing moral rights to adhere in:

- (A)(i) 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;
- (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
- (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire;<sup>39</sup> or
- (C) any work not subject to copyright protection under this

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<sup>36</sup> See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995).

<sup>37</sup> Congress limited the number of multiples to distinguish pieces that are created for primarily commercial purposes. While there is no justification provided for extending protection to the first 200 specifically, the reasoning adopted by Congress was expressed by Professor Jane Ginsburg in her testimony before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, stating, "The original or few copies with which the artist was most in contact embody the artist's 'personality' far more closely than subsequent mass produced images." H.R. REP. NO. 101-514, at 12. However, Professor Roberta Rosenthal Kwall objects to this limitation because "'limited edition' and 'exhibition purposes' requirements . . . bear no relationship to the level of originality of the underlying work, which [she sees] as the operative issue in connection with the scope of coverage for moral rights." Kwall, *SOUL OF CREATIVITY*, *supra* note 34, at 75.

<sup>38</sup> 17 U.S.C. § 101 (2006).

<sup>39</sup> A "work made for hire" is defined, in part, as:

- (1) a work prepared by an employee within the scope of his or her employment;
- or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . .

*Id.*



title.<sup>40</sup>

It is worth pausing at this point to consider the difficulty of how these two defining prongs apply to works of art in general. Their interaction is far from seamless. Take a simple example: Fritz Koenig's *The Sphere*, 1971, which used to sit in Austin Tobin Plaza at New York's World Trade Center.<sup>41</sup> It is a sculpture existing in a single copy, but as "a spherical representation of the earth," it falls within the common definition of a globe.<sup>42</sup> Is this unique piece of public artwork, created by a world-renowned artist, the type of visual material that Congress meant to except from VARA?

Questions about which artworks fit into the statute's definition become more difficult to answer when we move away from simple dictionary definitions and begin to face the proliferation of modern and contemporary art forms. For example, Andy Warhol's works often relied on commercial activity as their intellectual premises, blurring the line between "high art" and mundane American life through the use of a grocery-store visual vocabulary. Does Warhol's recreation of a bulk ketchup box exclude it from VARA as a packaging container?<sup>43</sup> The version of this ketchup box that sits in the Museum of Modern Art was Warhol's prototype, made with the intention of fabricating more boxes identical to it; would that qualify it as a model, precluding VARA eligibility?<sup>44</sup>

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<sup>40</sup> *Id.* A work qualifies for copyright protection as follows:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102 (2006).

<sup>41</sup> *The Sphere* was rechristened as a memorial after the 2001 terrorist attacks in Lower Manhattan and relocated to Battery Park.

<sup>42</sup> MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 461 (2006).

<sup>43</sup> Andy Warhol, *Heinz Tomato Ketchup Box [Prototype]*, 1963-64, collection of the Museum of Modern Art, New York.

<sup>44</sup> The dictionary defines "model" as, *i.a.*, "an example for imitation or emulation." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 681-82 (2006). Warhol was a Pop Art pioneer in part because of his focus on elevating the mundane commercialism of post-1950s America to the echelons of high art. THE STAFF OF THE ANDY WARHOL MUSEUM,

Perhaps the most problematic application of VARA's visual artwork definition is that to a class of artworks flowing from the Dadaists, who redefined art to include whatever the artist says is art.<sup>45</sup> Marcel Duchamp purchased a bottle dryer from a Parisian dry goods vendor, signed it, and called it a sculpture.<sup>46</sup> In this case, the artwork actually *is* a merchandising item, and because of that fact, *Bottlerack* represents one of twentieth-century art's most significant conceptual leaps. Should the artist claiming it as his artistic vision be denied moral rights in it?<sup>47</sup>

Anticipating the difficulty that courts would encounter in applying the narrow statutory definition to the vast proliferation of art forms, Congress punted, suggesting, "The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition."<sup>48</sup> This nebulous mandate seems to invite confusion, directing courts to examine unwritten standards

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ANDY WARHOL, 365 TAKES: THE ANDY WARHOL MUSEUM COLLECTION 33-39 (Deborah Aaronson ed., 2004). That concept still generates compelling artwork, and Warhol's Pop heirs have continued to blur the distinctions between artworks and commercial goods. A notable example is Japanese artist Takashi Murakami, whose notoriety soared throughout contemporary art circles in the 1990s. In 2003, Murakami began collaborating with designer Marc Jacobs to create a line of hugely popular handbags for Louis Vuitton. See Carol Vogel, *Watch Out, Warhol, Here's Japanese Shock Pop*, N.Y. TIMES, Apr. 2, 2008, <http://www.nytimes.com/2008/04/02/arts/design/02mura.html>. Murakami's most recent American retrospective, ©Murakami, included a Louis Vuitton boutique within the exhibition spaces at the Museum of Contemporary Art in Los Angeles, and at the Brooklyn Museum in New York. *Id.* Reviewing ©Murakami for The New York Times, critic Roberta Smith pointed out that even though the boutique was a visual high point of the exhibition:

Guardians of museum purity were outraged by the Murakami-Vuitton boutique when the show made its debut . . . . The shop has been criticized for blurring the already fuzzed line between seemingly functional and nonfunctional luxury goods (i.e., art).

But actually it's an ingenious key to the Pandora's box of Mr. Murakami's art and stuffed with questions of art and commerce, high and low, public brand and private expression, mass production and exquisite craft. None of these, it turns out, are ever mutually exclusive. Fuzzing is the point.

Roberta Smith, *Art With Baggage in Tow*, N.Y. TIMES, Apr. 4, 2008, <http://www.nytimes.com/2008/04/04/arts/design/04mura.html>.

<sup>45</sup> The post-World War I Dada movement, one of the foundations from which Pop and Conceptual Art would develop, sought to redefine the fundamental notions of what could constitute a work of art, nihilistic in the movement's efforts to destroy tradition and constructive in challenging people to consider the role of chance and imagination into the conceptualization of what constitutes art. See H.W. JANSON & ANTHONY F. JANSON, HISTORY OF ART 806 (Julia Moore project director, Joanne Greenspun, et al., eds., Harry N. Abrams, Inc. 5th ed. 1997). From this conceptual basis, artists were liberated to consider practically every object or experience they happened upon to embody the opportunity for artistic expression and enjoyment. *Cf. id.* ("In [Dada's] calculated irrationality there was also liberation, a voyage into the unknown provinces of the creative mind.")

<sup>46</sup> Marcel Duchamp, *Bottlerack*, 1961 (replica of 1914 original), Philadelphia Museum of Art.

<sup>47</sup> Under VARA, *Bottlerack* would be ineligible for copyright protection because its creation did not depend at all on Duchamp's creativity. The conceptual leap that the work represents for art historians goes unrecognized by the statute.

<sup>48</sup> H.R. REP. NO. 101-514, at 11 (1990).

of an undefined group of people in order to decide whether VARA applies to any given piece of art. However, courtroom struggles are not limited to the legal definition of artworks, and VARA further imposes a series of exceptions and qualifications to the exercise of moral rights.

A work that is incorporated into a building in a way that it cannot be removed without destroying the work—such would be the case of a mural—is not protected if created before VARA’s enactment on June 1, 1991.<sup>49</sup> However, if the work can be removed intact, then the owner at least must make a good-faith attempt to notify the artist so that she can rescue her work before it is mutilated, distorted, or destroyed.<sup>50</sup> This provision is commonly referred to as the “building exception.” Additionally, moral rights are coterminous with the life of the artist, with rare exceptions,<sup>51</sup> and are inalienable and cannot be transferred *inter vivos*, but they may be waived.<sup>52</sup>

VARA does not protect “any reproduction, depiction, portrayal, or other use of a work in [a way that would be excepted from coverage under the negative prong set forth above],” which means that snapshots taken for personal use, as well as posters, framed prints, and other merchandise found in museum stores, are unencumbered by artists’ non-economic interests.<sup>53</sup> Therefore, while artists may retain cognizable rights described elsewhere in the copyright code, moral rights do not adhere in even exact copies of their artworks. Artists cannot resort to VARA in order to enjoin a party from defacing, destroying, or modifying replicas of their works or from attributing them to other people, and they are unable to disclaim authorship of the replica.<sup>54</sup> Similarly, in the absence of gross negligence or willful harm, the

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<sup>49</sup> 17 U.S.C. § 113(d) (2006). For an analysis of the legal questions arising from VARA in the case of mural conservation (especially in California), see Ann Garfinkle, *The Legal and Ethical Consideration of Mural Conservation: Issues and Debates* (The Getty Conservation Inst., Compilation of Papers, 2003), available at [http://www.getty.edu/conservation/publications/pdf\\_publications/garfinkle.pdf](http://www.getty.edu/conservation/publications/pdf_publications/garfinkle.pdf) [hereinafter Garfinkle, *Mural Conservation*].

<sup>50</sup> 17 U.S.C. § 113(d).

<sup>51</sup> 17 U.S.C. §§ 106A(d), 302, 303 (2006). See also Hughes, *American Moral Rights*, *supra* note 19, at 671 n.72 (“Section 106A(d)(2) actually provides for *longer* moral rights for a work that was created before VARA where the artist still holds the copyright to that work. For those works, the moral rights are coterminous with the § 106 rights.”).

<sup>52</sup> See Rigamonti, *supra* note 33, at 361. In the rare cases in which they extend past the life of the artist, VARA rights may be devised, or transferred by intestate succession. *Id.*

<sup>53</sup> 17 U.S.C. § 106A(c)(3).

<sup>54</sup> A notable example of such a use is Duchamp’s *L.H.O.O.Q.*, 1918, of which he produced many copies and versions throughout his career. Primarily consisting of cheap postcard reproductions of da Vinci’s *Mona Lisa*, Duchamp drew a Dalí moustache above the famous smile and at bottom inked the work’s eponymous letters, which resemble “*Elle a chaud au cul*” when spoken. Under the VARA regime (and imagining both artists to be living), the old master would be powerless to enjoin the Dadaist from so notoriously appropriating, defacing, and deriding his masterpiece because Duchamp did so on a postcard, not on the original.

statute does not grant a cause of action pursuant to changes in the artwork resulting from acts of conservation or attributable to the way in which the work is displayed.<sup>55</sup> These—referred to as the “conservation exception” and the “public presentation exception”—grant a sphere of heightened impunity to collectors and institutions so they may take appropriate action to maintain and exhibit their collections.<sup>56</sup> Given these exceptions, as Professor Jane Ginsburg put it, “VARA would only reach the slasher.”<sup>57</sup>

Finally, an additional VARA limitation has developed through litigation over the last twenty years, pertaining to artworks that incorporate their surroundings. Paralleling the building exception, site-specific works—those that cannot exist without their specific surroundings—are largely denied VARA protection.<sup>58</sup> This does not mean that works created for a particular environment *per se* fall outside of VARA, for there are times when a work intended for a specific place may continue to exist when removed from that place.<sup>59</sup> Balancing these two principles presents some difficulty, for deciding when an integrative artwork is destroyed, merely modified, or unaffected when removed from its intended location is a question with inherently subjective answers. For this reason, different circuits may interpret VARA’s application to such artworks with varying degrees of permissiveness.<sup>60</sup>

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<sup>55</sup> 17 U.S.C. § 106A(c)(2).

<sup>56</sup> *Id.* It should be noted again here that VARA was intended to supplement causes of action that were available to artists under the preexisting common law regimes, including the states’ traditions concerning rights of publicity, unfair competition, fraud and misrepresentation, and defamation, as well as moral rights laws adopted in a handful of states. See Hughes, *American Moral Rights*, *supra* note 19, at 665-668. However, some fear that VARA’s passage has actually had the opposite effect:

[I]t invites the argument that since Congress intended to limit moral rights protection to a small subset of authors and works, it must have intended *not* to provide such protection to artists and works not covered by the statute. This argument . . . can be used to cut back moral rights protection that already exists under alternative doctrines.

Rigamonti, *supra* note 33, at 407-408.

<sup>57</sup> Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 11 (2001). Professor Justin Hughes interprets this use of “slasher” to mean “someone who distorts the *original* of the work of fine art.” Hughes, *American Moral Rights*, *supra* note 19, at 673.

<sup>58</sup> See *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006); *Board IV*, *supra* note 12. For a compelling analysis of the questionable logic courts have deployed in precluding moral rights from attaching to site-specific installations, see Virginia M. Cascio, Comment, *Hardly a Walk in the Park: Courts’ Hostile Treatment of Site-Specific Works Under VARA*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 167 (2009).

<sup>59</sup> See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84-85 (2d Cir. 1995) (arguing that if every work designed for specific surroundings were exempted from VARA protection, then the provisions regarding works incorporated into buildings would be extraneous).

<sup>60</sup> Compare *id.* (in which the Second Circuit found that a corporate lobby design with elements embedded into the walls and floor could exist outside of its intended space) with *Phillips*, 459 F.3d at 142 (in which the First Circuit declined to recognize moral rights in any site-specific artwork for fear of hampering real property traditions).

To summarize, VARA extends protections only to certain artworks, qualification subject to a definition that relies not on artistic terms, but economic notions of the use of visual materials in commerce. Rights are personal to the artist and can be waived, but they cannot be transferred, except in some specific cases when the artist is dead and the work was created before VARA went into effect. Even though moral rights are supposed to safeguard the reputation of the artist vis-à-vis her creations, artists have no protection under VARA to assert claims against the mistreatment of reproductions, limited recourse when artworks involve buildings, and the right of integrity may be asserted to save an artwork from destruction only if it is of “recognized stature” or would harm the artist’s reputation. Curatorial and conservation acts are immune to liability, unless they are grossly negligent or willfully harmful, and asserting moral rights for works that incorporate their surroundings meets varying degrees of resistance in courtrooms.

Considering this statute in its totality and from the perspective of arts professionals, the limited swath of artwork and activity that falls within VARA’s protections does not naturally overlap with the understandings, methods, and materials common in today’s art world. For example, two of the star contributions to the 2004 Whitney Biennial were Elizabeth Peyton’s intimate paintings and Yayoi Kusama’s installation, *Fireflies on the Water*, 2002: a silent, darkened room with mirrored walls and a platform extending over the water-covered floor to the room’s center, dimly lit by dozens of tiny, colored lights suspended at various heights from the ceiling.<sup>61</sup> Both of these artists’ contributions met wide acclaim and were embraced by the artistic community and viewing public.<sup>62</sup> In order to mount the exhibition, the curatorial department, registrar’s office, and conservation team worked together in transporting, installing, and storing the artworks, and their different media did not bring to bear on the level of consideration and care that was paid to them. However, VARA likely would protect Peyton’s works while Kusama would not enjoy the same rights.<sup>63</sup> One court ruminated on this dichotomy while struggling with VARA’s application to site-specific artwork,<sup>64</sup>

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<sup>61</sup> Collection of the Whitney Museum of American Art, New York.

<sup>62</sup> Michael Kimmelman, *Touching All Bases at the Biennial*, N.Y. TIMES, Mar. 12, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9405EEDD133EF931A25750C0A9629C8B63>.

<sup>63</sup> Kusama’s installation is not a painting, drawing, print, or photograph, nor does “sculpture” describe it intuitively.

<sup>64</sup> The question of VARA’s treatment of site-specificity is the subject of scholarly debate. One early examination of the question of how to reconcile moral rights and site-specific works, in a scenario involving site-specific sculpture on public land, suggests that VARA should be amended to “include a limited waiver of moral rights when an artist agrees with

observing:

There is a tension between the law and the evolution of ideas in modern or avant garde art; the former requires legislatures to taxonomize artistic creations, whereas the latter is occupied with expanding the definition of what we accept to be art. While Andy Warhol's suggestion that "art is whatever you can get away with" is too nihilistic for the law to accommodate, neither should VARA be read so narrowly as to protect only the most revered work of the Old Masters. In other words, the "plain and ordinary" meanings of words describing modern art are still slippery.<sup>65</sup>

Furthermore, even though Peyton's paintings obviously fall within the VARA definition of a work of visual art, if one of them were damaged non-negligently while in the care of the Museum's conservators, registrar, and curators, it is not entirely clear whether the Whitney would be exposed to liability or be sheltered by the public presentation and conservation exceptions.<sup>66</sup> Thus, in mounting an exhibition in accordance with industry standards, VARA applies inconsistently and elusively, largely depending on the nature of the artworks involved. Such is the Act Congress passed, and in the two decades that have elapsed since its

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a government entity to install a work in a public space." Francesca Garson, Note, *Before that Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J. L. & PUB. POL'Y 203, 206 (2001). Another more recent proposal suggests that the scope of VARA's preemption over state laws should be reduced, only to fill in the areas where state laws are lacking in their abilities to enforce minimal standards of the rights of integrity and attribution—thereby giving local property regimes dominance over artwork installed on real property—and that site-specific works should be addressed in another statute entirely as a matter of public value rather than of artist rights. See Carrie Jones, Note, *Site-Specific Art Parks on Moral Grounds: Distilling Old Whine in New Battles Over the Visual Artists Rights Act*, 9 COMPUTER L. REV. & TECH. J. 355 (2005). One final discussion of VARA jurisprudence's shortcomings in the field of site-specific art recommended appending language to the end of 17 U.S.C. § 106A(c)(2) (the section containing the conservation and public presentation exceptions) to provide recourse under VARA for modifications arising "from the destruction, distortion, mutilation or other modification of a work of site-specific art that has not been commissioned by or sold to another person, governmental entity, or business of any kind." Anna Belle Wilder Norton, Comment, *Site-Specific Art Gets a Bum Wrap: Illustrating the Limitations of the Visual Artists Rights Act of 1990 Through a Study of Christo and Jeanne-Claude's Unique Art*, 39 CUMB. L. REV. 749, 784 (2009).

<sup>65</sup> *Kelley v. Chic. Park Dist.*, No. 04-C-07715, 2008 WL 4449886, at \*4 (N.D. Ill. Sept. 29, 2008).

<sup>66</sup> This portion of the statute reads, "The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." 17 U.S.C. § 106A(c)(2) (2006). The congressional record further explains that this provision would exclude from liability actions like decorating a sculpture with festive trappings for the holiday season, but would not protect actions like those taken by Australian entrepreneurs, who chopped up a Picasso into hundreds of pieces and tried to sell each as an artist's original. See H.R. REP. NO. 101-514, at 16 (1990). Setting aside the fact that chopping up a Picasso to increase sales revenues obviously would exceed gross negligence, between these two extremes, there is no guidance as to what acts the public presentation and conservation exceptions exclude from VARA liability.

implementation, the courts have grappled with applying its limitations.

## II. EXISTING JURISPRUDENCE: CONSERVATION CONFOUNDING COURTROOMS

Since VARA's enactment, there have been fewer than one hundred cases decided in state and federal court that even mention the statute.<sup>67</sup> The paucity of case law presents very little guidance for arts professionals and collectors to consider whether moral rights could be found to adhere in an artwork, or whether acting upon an artwork could be found to be grossly negligent or willfully harmful. Where decisions have issued on the subject of conservation, they have been rife with conceptual inconsistencies, further clouding consideration of these questions. Without clear, consistent, or even logical precedential authority articulating VARA's protections, parties to moral rights controversies are left with few options other than to undertake the expense of extensive litigation or to swallow the bitter pill of status quo. While a period of confusion may be an unavoidable consequence whenever legislation addresses a previously unregulated area, contemporary art is so diverse, conceptual, and often ephemeral that courts continually struggle with VARA's most basic provisions.

VARA's structure suggests that when a court encounters a claim, it first should proceed along a three-step analysis to determine whether the artist's moral rights adhere in the artwork, asking: (1) whether the work in question is subject to copyright protection; (2) whether the work qualifies as "a work of visual art" under the narrow, two-pronged definition; and (3) whether any of the statutory exceptions apply.<sup>68</sup> If the work passes all three criteria and is qualified for VARA protections, then the court should determine whether there is a violation of or threat to the rights of attribution and/or integrity, determine the extent of damages resulting from the violation, and appropriate equitable relief to prevent further harm to the artist's reputation or the artwork. While these analytical steps may seem straightforward, they are neither consistently followed nor applied uniformly in practice.<sup>69</sup> This section considers two instances when courts have confronted art conservation—a practice so integral to the artistic community that it warrants its own exception in VARA—yielding confounding results.

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<sup>67</sup> A Westlaw search on February 5, 2011, requesting state and federal cases that included the terms "Visual Artist Rights Act" or "Visual Artists Rights Act" returned eighty decisions.

<sup>68</sup> *Cf. Cascio*, *supra* note 58, at 173.

<sup>69</sup> *See infra* Part II.A-B.

A. *The Gross Negligence of Arts Professionals: Queen Catherine of Braganza*

In a leading case regarding the conservation exception, *Flack v. Friends of Queen Catherine, Inc.*,<sup>70</sup> the United States District Court for the Southern District of New York reviewed the fits and starts of a politically controversial statue of Queen Catherine of Braganza, for whom New York's Queens County was named.<sup>71</sup> A nonprofit organization selected the established sculptor Audrey Flack to create a monument for a redevelopment project, and the plan was to execute a series of scaled bronze maquettes from clay models, increasing in size—twenty-two inches, forty-four inches, and ten feet—culminating in the execution of the thirty-five foot sculpture.<sup>72</sup> After nearly eighteen months of work, Flack had completed the clay model for the thirty-five-foot finished product, and all parties authorized the final casting in bronze.<sup>73</sup> However, public outcry over Queen Catherine's purported profits from the slave trade in the seventeenth century and the propriety of memorializing her life because of these dealings thwarted the project, and the clay model was placed in the bronze foundry's garbage dump.<sup>74</sup> Two years passed before Flack learned that the nonprofit organization had entered into a new agreement with the foundry to complete the work, but the model's head had been damaged by the elements since the project was abandoned, rendering it unsuitable for the final casting.<sup>75</sup> Although Flack offered to return to the project to fix the model, the nonprofit organization instead hired her assistant, David Simon, to make the repairs before casting the final sculpture.<sup>76</sup>

Flack sued the nonprofit organization and the foundry, complaining that Simon's work had resulted in a distorted and mutilated model, in which the nostrils, eyes, and lips were the wrong size and uneven.<sup>77</sup> Invoking VARA, Flack alleged: (1) partial destruction of her work of recognized stature, due to its placement in the foundry refuse pile; (2) the impropriety of hiring Simon to repair the clay model; and (3) authorizing the final casting without the artist's approval.<sup>78</sup> Ruling on the defendants' motion to dismiss, the court rejected the contention that VARA can only apply to the finished bronze, stating,

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<sup>70</sup> 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

<sup>71</sup> *Flack*, 139 F. Supp. 2d at 529.

<sup>72</sup> *Id.* In executing a maquette, Flack sculpted a clay model from which a foundry would then create a wax mold to use in casting the bronze. *Id.*

<sup>73</sup> *Id.* at 529-30.

<sup>74</sup> *Id.* at 530.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 531-32.



“regardless of its status as an impermanent or intermediate stage in the creation of the 35’ bronze, the 35’ clay sculpture falls under VARA’s protection if it meets the statutory definition of ‘a work of visual art.’”<sup>79</sup> The court subsequently reviewed the statutory exception for “models” and found that the artistic community considered models like the one at issue works of art in their own rights, and that, therefore, VARA applied to the clay model at hand.<sup>80</sup> While Flack’s first and third claims ultimately were dismissed, the court sent the second claim to a discovery phase, finding:

Flack’s complaint contains sufficient allegations that, if proven, could support an inference that the hiring of Simon was grossly negligent. Flack avers that Simon was a mere “assistant” who was not trained in conservation, was not competent to perform work without her supervision, had not previously undertaken unsupervised work, and had little knowledge or experience in creating a monumental sculpture that would be viewed from the ground. The result of his repair work was a “distorted, mutilated” model.<sup>81</sup>

Thus the court found that the repair work was an act of conservation within the meaning of VARA and that hiring a professional sculptor, who had participated in executing the original artwork in question, could amount to gross negligence.<sup>82</sup>

This determination raises important questions about how courts may review the practice of conservation in VARA suits when determining gross negligence. For instance, as an initial matter,

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<sup>79</sup> *Id.* at 532.

<sup>80</sup> *Id.* at 532-34. The *Flack* court’s finding that a clay model satisfied the definition of a work of visual art for VARA purposes, relying on the prevailing standards of the artistic community, presents an interesting question. Models undoubtedly occupy a good deal of space in museum galleries, including those at the Musée Rodin, which often feature plaster and baked clay precursors to consummated masterpieces. But in this case, Flack’s model served a utilitarian purpose: to create one or more bronzes that would be considered the ultimate artwork(s). Considering that VARA only protects the first 200 artworks of any series, 17 U.S.C. § 101 (2006), what would be the result of casting 201 bronzes from the model? The court’s logic suggests the model may be protected under VARA even though the ultimate artworks are not.

<sup>81</sup> *Flack*, 139 F. Supp. 2d at 535 (internal citations omitted).

<sup>82</sup> “Gross negligence” is defined as:

1. A lack of slight diligence or care. . . . 2. A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages. . . . “*Gross Negligence*. As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous . . . have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof . . . . But it is still true that most courts consider that ‘gross negligence’ falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind.”

BLACK’S LAW DICTIONARY 1062-63 (9th ed. 2009) (quoting PROSSER AND KEETON ON TORTS § 34, at 211–12 (W. Page Keeton ed., 5th ed. 1984)).

what constitutes an act of conservation? In *Flack*, the court did not review ameliorations to a finished artwork, but rather the repair of a clay model to be used in creating the ultimate artwork. It is not clear whether Congress intended “conservation” to encompass such an act, for nowhere in the legislative record is the conservation exception expounded, and no subsequent cases have grappled with the issue.<sup>83</sup> Second, what legal threshold distinguishes a sculptor from a conservator, and when would the selection of a sculptor to repair a sculpture be a grossly negligent selection? As with so many other VARA questions, these remain unanswered. Flack’s suit, after proceeding from the motion to dismiss stage, ultimately settled before the court articulated any possible standards and before these questions were confronted and resolved.<sup>84</sup>

It is not entirely clear how a legal analysis would apply to the allegations in *Flack*. The plaintiff called the defendants’ selection of Simon grossly negligent on two bases: first, that the assistant was not trained in conservation; and second, that in Flack’s estimation, he was not qualified as a sculptor to repair the work alone, even though he had helped to create the work in the first place.<sup>85</sup> The implication of Flack’s allegations is that she, as the artist, was more qualified than Simon to repair her sculpture, and therefore, she should have been chosen before Simon to repair the work. However, that argument applies evenly to any arts professional that might have been selected to do the work, not only to Simon. The conservation exception exists to shield arts professionals other than the artist from liability for seeking to maintain or repair a work.<sup>86</sup> Flack’s argument was based on the selection of a person to address an artwork, not whether this was an act of conservation. The court’s endorsement of this reasoning seems to invite litigation whenever repair work does not satisfy the artist, which calls into question the very utility of the conservation exception.

Were we to assume that Flack had not been among the choices available to the defendants to make repairs to the clay model,<sup>87</sup> the tenability of finding gross negligence from Simon’s

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<sup>83</sup> See H.R. REP. NO. 101-514, at 13 (1990) (devoting all discussion of the conservation and presentation exceptions to the application of the latter). There is no discussion on the meaning of “conservation” for VARA’s purposes or what acts may fall within that exception except for its gross negligence limitation. *See id.*

<sup>84</sup> Stipulation and Order of Dismissal With Prejudice and Without Costs to Any Party, *Flack v. Friends of Queen Catherine*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001) (No. 99-CV-09930).

<sup>85</sup> *Flack*, 139 F. Supp. 2d at 535.

<sup>86</sup> Recall that absent extraordinary circumstances, the rights articulated in VARA pertain only to the artist and only an artist can enforce them. *See* 17 U.S.C. § 106A(e) (2006).

<sup>87</sup> Given the political turmoil surrounding the statue and the fact that the project had lost so many supporters, it is possible that engaging Flack to repair the work no longer was

selection is far from obvious. If the basis for a claim of gross negligence in conservation is that Simon was not trained specifically as a conservator, then must all art be addressed by conservators in order for VARA's conservation exception to apply? If Simon was not qualified enough to make the repairs himself, then who would have been qualified, and by what credentials would that have been determined? More importantly, where is the question of fact as to whether there was an absence of even "slight diligence or care" or a "reckless disregard of a legal duty" to Flack?<sup>88</sup> After all, the defendants did not hire just anyone to repair the clay model or undertake to do so themselves; Simon was the artist's assistant, and arguably there were very few other arts professionals as intimately familiar with the work, the medium, and the message that the artist sought to convey through the statue.

Perhaps the conservation exception's application is unclear because its terms, including "conservation," are precisely defined neither in VARA's text nor in the legislative history surrounding it.<sup>89</sup> Without that guidance, it is not clear which standards should control an analysis of the conservation exception. Seeking to define "conservation" in a dictionary yields "a careful preservation and protection of something," which does nothing to clear up the confusion about what constitutes the standard of care at the center of the *Flack* controversy.<sup>90</sup>

Absent additional litigation, perhaps the closest we may come to finding answers is by returning to Congress's suggestion that courts look to the standards of the artistic community in determining VARA's application.<sup>91</sup> The American Institute for Conservation of Historic and Artistic Works (AIC), the leading national membership organization for conservation professionals,<sup>92</sup> sets forth a series of best practices, ethical guidelines, and professional standards for the field. The AIC defines a conservator, in large part, as follows:

A professional whose primary occupation is the practice of conservation and who, through specialized education, knowledge, training, and experience, formulates and

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within the realm of economic possibilities for the nonprofit defendant, after already having paid her a fee of as much as \$300,000. See *Flack*, 139 F. Supp. 2d at 529. Cf. Tina Kelley, *Following Up: Not a Face to Launch Many Ships at All*, N.Y. TIMES, June 4, 2000, available at <http://www.nytimes.com/2000/06/04/nyregion/following-up.html>.

<sup>88</sup> See definition of gross negligence, BLACK'S LAW DICTIONARY, *supra* note 82.

<sup>89</sup> See 17 U.S.C. §§ 101, 106A, 113 (2006); H.R. REP. NO. 101-514, at 11 (1990).

<sup>90</sup> MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 221 (2006).

<sup>91</sup> H.R. REP. NO. 101-514, at 11 (1990).

<sup>92</sup> Cf. Botha, *supra* note 18 at 264; Karen M. Corr, Comment, *Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U. L. REV. 855, 861 n.43 (1989).

implements all the activities of conservation in accordance with an ethical code . . . .

In practical terms, this definition requires that the conservator possess the expertise to preserve cultural heritage in a way that retains the integrity of the object . . . and aesthetic or visual aspects.<sup>93</sup>

Additionally, the AIC defines the term “conservation” to mean “[t]he profession devoted to the preservation of cultural property for the future. Conservation activities include examination, documentation, treatment, and preventive care, supported by research and education.”<sup>94</sup>

If a court were to give these definitions legal effect, then VARA’s conservation exception may rely on determining whether the modification to the work of visual art was the result of “activities [such as] examination, documentation, treatment, and preventive care, supported by research and education.” If the answer is yes, then the exception applies. Even so, subsumed into this question’s inclusion of “research and education” is a certain qualification level of the person seeking to repair or conserve an artwork, which is expounded in the AIC’s definition of “conservator.” Following these industry standards as guideposts for VARA analyses would encourage responsible training and selection of those who seek to revitalize works of art. Perhaps setting this benchmark would permit a presumption of reasonableness in selecting an AIC-qualified conservator enough to preclude submitting the question of gross negligence in making that selection to a jury.

However, even when resorting to the AIC’s standards, it is not obvious that merely selecting someone who is not a trained conservator to repair a clay model opens the door for a gross negligence inquiry. Resorting to definitions does not make sense in every case, and there are far more factors that may be considered in a reasonableness inquiry. For example, in *Flack*—where the artist’s master plan was thwarted and Simon was hired to address an item that had been languishing in a garbage dump for years—an important question may be whether the value of the

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<sup>93</sup> *Defining the Conservator: Essential Competencies*, AM. INST. FOR CONSERVATION OF HISTORIC & ARTISTIC WORKS, 45 (May 20, 2003), [http://www.conservation-us.org/\\_data/n\\_0001/resources/live/definingcon.pdf](http://www.conservation-us.org/_data/n_0001/resources/live/definingcon.pdf).

<sup>94</sup> *Definitions of Conservation Terminology*, AM. INST. FOR CONSERVATION OF HISTORIC & ARTISTIC WORKS, <http://www.conservation-us.org/index.cfm?fuseaction=page.viewpage&pageid=620>. Additionally, the AIC defines “treatment” as “[t]he deliberate alteration of the chemical and/or physical aspects of cultural property, aimed primarily at prolonging its existence. Treatment may consist of stabilization and/or restoration;” and “restoration” as “[t]reatment procedures intended to return cultural property to a known or assumed state, often through the addition of nonoriginal material.” *Id.*

work at issue has an effect on what constitutes a reasonable selection. Surely what constitutes reasonableness in conserving something like Alberto Giacometti's 1961 masterpiece *Walking Man I*—which sold at Sotheby's in 2010 for \$104.4 million<sup>95</sup>—differs from the reasonableness in conserving an item retrieved from the refuse pile. Where it clearly may be unreasonable for a novice like Simon to address the former, the same may not hold true for the latter, especially since he helped create it in the first place.

Turning briefly to one of Flack's other two unsuccessful claims, VARA's application to this case becomes still murkier. In response to the assertion that placing the model in the foundry's refuse pile was tantamount to its partial destruction—a violation of the right of integrity—the court relied on a provision that denies VARA liability for modifications to an artwork due to the passage of time.<sup>96</sup> Following this argument to its logical extension, those who merely place an artwork outdoors and permit it to decay should not be held liable for the adverse modifications caused by the elements. Coupled with the *Flack* court's willingness to consider liability for those who tried (albeit with limited success) to resurrect the discarded artwork, this thread of reasoning seems to promote non-intervention in cases where works are neglected to an extent that they may not be easily salvaged. Not only is this conclusion inimical to the very purpose of VARA and its conservation exception, but it controverts general conceptions of art stewardship, as well, providing a disincentive for addressing works in danger of destruction by exposure.<sup>97</sup>

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<sup>95</sup> See Carol Vogel, *At London Sale, a Giacometti Sets a Record*, N.Y. TIMES, Feb. 4, 2010, <http://www.nytimes.com/2010/02/04/arts/design/04giacometti.html>.

<sup>96</sup> *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526, 534-35 (S.D.N.Y. 2001) (citing 17 U.S.C. § 106A(c)(1) (2006)). The basis for this argument was in the redaction of an element of intent from that specific clause between the time VARA left the House of Representatives and its enactment. *Flack*, 139 F. Supp. 2d at 534. The court basically found that it did not matter what the defendants' intent was in placing the work in the refuse pile, even though that act allowed it to decay from exposure to the elements. *Id.*

<sup>97</sup> The other unsuccessful claim also sought to enforce the right of integrity, but unlike the other two claims, this one pertained to the unrealized finished product, arguing that VARA compels commissioning parties to execute an unfinished artwork in accordance with the artist's vision. *Flack*, 139 F. Supp. 2d at 535. The court focused on the question of whether VARA compelled the creation of an artwork, and deciding it did not, dismissed the claim. *Id.* (relying on trial-court findings from *Carter v. Helmsley-Spear, Inc.* 861 F. Supp. 303, 329 (S.D.N.Y. 1994), *aff'd in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995)). This reasoning is flawed, for in *Flack*, the question was not whether the commissioning party may or may not execute the finished work. The question was really about whether in executing an unfinished artwork, the commissioning party need adhere to the artist's vision, or whether it be permissible to modify the resulting artwork during the execution process. An equally plausible method of dismissing this claim, and one grounded more in VARA's provisions, would be to have acknowledged that this was a work made for hire, excluding it from VARA's definition of a work of visual art. See 17 U.S.C. § 101 (2006). This also would apply to the rest of the claims. See *Carter*, 71 F.3d 77 (holding that the commissioning document made the work at issue one made for hire, falling outside of VARA entirely).

In light of *Flack*, selecting a sculptor to repair the work of another sculptor working in a common medium legally may be a grossly negligent selection, even though best-practice standards do not reflect the obviousness of such a finding. A conservator or museum counsel seeking to uphold their duties to the artists, for whose works they assume a stewardship role, may not have any way of knowing whether the work would be protected under VARA, or predicting whether inexperience with conserving certain materials may lead to a finding of gross negligence. The uncertainty compounds when working with materials that never have required conservation as art before: what constitutes gross negligence vis-à-vis those materials is not a clear-cut determination. Because *Flack* proceeded beyond the motion to dismiss but was not resolved on the merits, it is unclear whether even such a considered appointment to execute repairs will amount to gross negligence. What confidence, then, can arts professionals muster in selecting anyone other than the artist to address an artwork without the threat of litigation? After *Flack*, the only practical answer to this question appears to hinge on how litigious the artist may be.

Treating artworks with the intention of preserving the artist's vision rarely results in litigation.<sup>98</sup> Of course, conservators have been sued for damaging works under other doctrines, like breach of contract,<sup>99</sup> but a suit under VARA will provide the artist with all remedies available to claimants relying on the rest of the copyright code, including legal fees, costs, and statutory penalties of up to \$150,000 in addition to whatever other damages the artist may prove at trial.<sup>100</sup> Moreover, equitable relief may be more easily obtained when suing for a violation of VARA than under other theories of liability.

Until 2010, no artist had sued a conservator under VARA for repairing an aging work.<sup>101</sup> However, the very first VARA suit initiated by an artist against another artist pursuant to allegedly grossly negligent conservation recently was filed in the U.S. District Court for the Middle District of Pennsylvania. In July 2010, sculptor David Ascalon sued the Jewish Federation of Greater Harrisburg and local sculptor David Grindle for their

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<sup>98</sup> Cf. Garfinkle, *Mural Conservation*, *supra* note 49, at 16. Until now, there had been only one other case of an artist suing for grossly negligent stewardship of art. The sculptor Judy Pfaff sued the Denver Art Museum under VARA after one of her large sculptures was damaged when it was dismantled inconsistently with a set of disassembly instructions the artist left with the museum; that dispute ultimately was not resolved in the courts. See *Pfaff v. Denver Art Museum*, No. 94 Civ. 92711996, WL 373489 (S.D.N.Y. June 22, 1995).

<sup>99</sup> See Hughes, *American Moral Rights*, *supra* note 19, at 666.

<sup>100</sup> 17 U.S.C. § 504(c) (2006). See also *Carter*, 71 F.3d at 83; Ann M. Garfinkle, Janet Fries, Daniel Lopez & Laura Possessky, *Art Conservation and the Legal Obligation to Preserve Artistic Intent*, 36 J. AM. INST. CONSERVATION 165, 171 (1997).

<sup>101</sup> In Audrey Flack's case, the sculptor sued the nonprofit organization and the foundry, not her former assistant, David Simon. *Flack*, 139 F. Supp. 2d 526.

repair work to the Holocaust memorial the Federation commissioned from Ascalon in 1994,<sup>102</sup> alleging violation of the right of integrity for replacing certain oxidized metal components with stainless steel, when the artist specifically selected oxidized metal to be reminiscent of barbed wire.<sup>103</sup> Ascalon also sought to enforce his right of attribution, claiming that those who restored the memorial grinded his name off of it and misattributed the monument to Grindle.<sup>104</sup> Ascalon sought injunctive relief to repair the monument consistent with his original vision, statutory damages, and litigation costs and fees.<sup>105</sup> The case settled in November 2010 before any dispositive motions were submitted.<sup>106</sup>

While there is no instance of litigation arising against a conservator for treatment of an uncommon medium, at one point or another, it will happen.<sup>107</sup> In straightforward situations, conservators and other art stewards may be able to work with artists in order to contract out of VARA liability rather easily. However, the next question we must ask is whether an arts professional while acting in complete accord with the artist—or even the artist himself—could be considered “the slasher” when intervening in the artwork’s natural aging process.

#### B. *The Artist as Slasher: The Wall, 1973 / 2007*

Reviewing the allegations that Audrey Flack leveled against her Queen Catherine collaborators, a fundamental belief that led to that lawsuit appears to be that the artist is uniquely positioned to address her own artwork, whether during creation or in making subsequent modifications to it. This assumption aligns with how the House of Representatives explained the underpinning of VARA’s moral rights:

As John Koegel testified[,] [“]An artist’s professional and personal identity is embodied in each work created by that artist. Each work is a part of his/her reputation. Each work is a form of personal expression (oftentimes painstakingly and earnestly recorded). It is a rebuke to the dignity of the visual artist that our copyright law allows distortion, modification and even outright permanent destruction of such efforts.[”]<sup>108</sup>

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<sup>102</sup> Complaint, *Ascalon v. Dep’t of Parks & Recreation*, No. 10-CV-01544 (M.D.P.A. July 26, 2010).

<sup>103</sup> *Id.* at ¶ 85.

<sup>104</sup> *Id.* at ¶¶ 86, 89-90.

<sup>105</sup> *Id.* at ¶¶ 113(a)-(g).

<sup>106</sup> Order dismissing case without costs and without prejudice to the right of either party, upon good cause shown within sixty (60) days, to reinstate the action if settlement is not consummated, *Ascalon v. Dep’t of Parks & Recreation*, No. 10-CV-01544 (M.D.P.A. November 30, 2010).

<sup>107</sup> Cf. Garfinkle, *Mural Conservation*, *supra* note 49, at 16.

<sup>108</sup> H.R. REP. NO. 101-514, at 14 (1990).

VARA's structure further underscores the plausibility of Flack's assumption, in that the artist alone is vested with the power to seek recourse when her moral rights are endangered or compromised.<sup>109</sup> Similarly, it seems logical that enforcing VARA should lead to the protection of the artist's vision, even if the artist decides to change the artwork after it initially has been unveiled to the public. However, the U.S. District Court for the Southern District of New York, during a decade-long struggle over one of New York City's most prominent public artworks, came to the opposite conclusion in *Board of Managers of SoHo International Arts Condominium v. City of New York*.<sup>110</sup>

When New York City's Houston Street was widened in the 1940s, the destruction of the building on the southwest corner of Houston and Broadway exposed the north wall of 599 Broadway.<sup>111</sup> Never meant to be a corner building in the block dominated by flatiron façades, the new exposure sported unfinished bricks and laid bare a matrix of floor joists, part of the building's structural system.<sup>112</sup> The twelve-story building then became a sentinel at the entrance to New York's SoHo district.<sup>113</sup> Over the course of the next few decades, a citywide movement to beautify public spaces gained traction, and SoHo became a locus of luminaries working in the visual arts.<sup>114</sup>

In 1972, the building's owner selected artist Forrest Myers to install an artwork on the exposed north face of 599 Broadway, and after gaining approvals from City agencies, Myers installed *The Wall* in the fall of 1973.<sup>115</sup> The artwork consisted of forty-two identical sculptural elements, which invoke an architectural vocabulary and resemble braces, installed over the joists that were exposed decades prior, projecting out over the sidewalk below.<sup>116</sup> The braces were painted blue, and a portion of the wall—constituting a rectangular field directly behind the braces—was painted gray.<sup>117</sup>

Over the course of the next eight years, *The Wall* became widely recognized as "The Gateway to SoHo."<sup>118</sup> In December 1980, 599 Broadway was sold to the current owners (the Board),<sup>119</sup>

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<sup>109</sup> 17 U.S.C. 106A(b) (2006). For this reason, VARA liability may be circumvented by collaborating and contracting with the artist to address an artwork.

<sup>110</sup> *Board IV*, *supra* note 12, at \*3 n.7.

<sup>111</sup> *Board I*, *supra* note 12, at \*2.

<sup>112</sup> *Board III*, *supra* note 12, at \*1.

<sup>113</sup> *Board I*, *supra* note 12, at \*2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*2-3.

<sup>116</sup> *Id.* at \*2.

<sup>117</sup> Telephone interview with Deborah Arch Myers (Nov. 9, 2010).

<sup>118</sup> See Anthony Ramirez, *Art Returning to SoHo Wall, With Room for Commerce*, N.Y. TIMES, Apr. 25, 2007, <http://www.nytimes.com/2007/04/25/nyregion/25wall.html>.

<sup>119</sup> *Board III*, *supra* note 12, at \*1 n.1.



who shortly thereafter petitioned to have the work removed in order to make repairs to the building's north wall.<sup>120</sup> In the face of public outcry in opposition, the Board relented and decided to accomplish the repairs while continuing to display the work on the side of their building.<sup>121</sup> In order to help mollify the new owners, Myers agreed to adjust the work's color scheme in 1981,<sup>122</sup> repainting it to represent two shades of blue: the underlying field a cornflower hue, rather than gray, and the projecting braces a bright, nearly Tiffany blue.<sup>123</sup>

In 1987, the Board again sought to make repairs to 599 Broadway's north wall and petitioned the City of New York Landmarks Preservation Commission for permission to remove *The Wall* from the building.<sup>124</sup> When the Commission responded that a public hearing would be needed because the work was integral to a building in an historic district, the Board, the Public Art Fund, and Myers entered into an agreement to effectuate the repairs while allowing the work to remain in place.<sup>125</sup>

In 1997, the Board again sought to repair the north wall, and the Landmarks Preservation Commission granted permission for the temporary removal of the artwork's sculptural elements to execute needed upgrades to the building's masonry and structural system.<sup>126</sup> However, rather than reinstalling *The Wall* upon completing the repairs, the Board decided instead to petition the City for the permanent removal of the artwork, noting that an exposed wall with that sort of visibility could realize significant advertising revenue as a billboard location.<sup>127</sup> After three years of public hearings and debate—galvanizing opposition from world-renowned artists, art critics, elected officials, local residents, celebrities, gallery owners, museum directors, and historians<sup>128</sup>—the Landmarks Preservation Commission denied the Board's request for the artwork's permanent removal in November 2000.<sup>129</sup> Shortly thereafter, the Board filed suit against the City, the Landmarks Preservation Commission, and Myers.<sup>130</sup>

After a three-day bench trial considering VARA claims and counterclaims,<sup>131</sup> the court found that *The Wall* satisfied two requirements needed to trigger the buildings exception,

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<sup>120</sup> *Id.* at \*2.

<sup>121</sup> *Board I, supra* note 12, at \*4.

<sup>122</sup> Telephone interview with Deborah Arch Myers (Nov. 9, 2010).

<sup>123</sup> *See Board IV, supra* note 12, at \*3.

<sup>124</sup> *Board I, supra* note 12, at \*4-5.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at \*5.

<sup>127</sup> *Id.* at \*6; Telephone interview with Deborah Arch Myers (Nov. 9, 2010).

<sup>128</sup> *See Board I, supra* note 12, at \*6.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Board III, supra* note 12, at \*29.

precluding VARA protection: (1) the artwork cannot be removed from 599 Broadway without being destroyed, a finding substantiated by expert testimony and Myers's own statements; and (2) the work in question was installed before June 1, 1991.<sup>132</sup> Therefore, Myers could not avail himself of the statute to protect his work against permanent removal from the building.<sup>133</sup> Further substantiating the applicability of the buildings exception, the court went on to make two additional determinations with far more troubling implications for the field of art conservation.

First, Myers urged the court to consider the possibility that while an artwork may cease to exist when dismantled temporarily, it may come back into existence as the original artwork, eligible for VARA protection, when reinstalled at a later date.<sup>134</sup> Examining VARA's wording, the court disagreed, reasoning:

Congress, in enacting VARA, made a distinction between "removal" and "destruction" and how either "removal" or "destruction" affects the rights of an artist under VARA. The statute does not formally define "removal" and "destruction" and instead relies on the common, everyday meaning of these words. The Court defined the meaning of "remove" in [ruling on a prior motion for summary judgment] as "[t]o move from a position occupied . . . [t]o convey from one place to another." The word "destroy" is defined as "to tear down or break up." The definition of "remove" implies that the object being removed has retained its physical integrity; a "destroyed" object clearly has not.<sup>135</sup>

Thus, Myers's argument—that while dismantling an artwork may destroy it, the same work may again exist as the original when recomposed—was deemed logically inconsistent with VARA's wording because it would negate the differentiation between "destruction" and "removal" for purposes of the statute.<sup>136</sup>

This determination presents somewhat of an impasse for the field of art conservation. For an anecdotal example, take Robert Morris's 1964 masterpiece *Rope Piece*, which consists only of rope draped between two painted wooden elements, one hung on the wall and the other on the gallery floor. Imagine that while strolling through a permanent collection gallery at the Museum of Modern Art in New York, Morris happened upon the work and noticed that the painted wood had acquired an unwanted patina over time, so he called the conservation department and asked

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<sup>132</sup> *Board IV*, *supra* note 12, at \*4.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at \*2.

<sup>135</sup> *Id.* at \*3 (internal citations omitted).

<sup>136</sup> *Id.*

that the wooden elements be removed from the rope and repainted. This is a type of artwork that is destroyed when disassembled, but disassembly is required to conserve the work consistently with the artist's vision. Does the reasoning from the *Board IV* decision suggest that disassembling and then reassembling *Rope Piece's* three components would amount to the creation of a new artwork, distinct from the original? Would Morris's moral rights in *Rope Piece* be intact, or would his desire to maintain the artwork in such a fashion amount to a waiver of those rights?

*Rope Piece* is a simple example, but how does this logic extrapolate out to other artworks? Does Damien Hirst's new shark for *Physical Impossibility of Death* also amount to the legal possibility of death to his moral rights protection? After all, it requires no stretch of the imagination to argue that without the shark, the work would be destroyed. But it is absurd to argue that Steven Cohen, in paying several hundred thousand dollars in embalming a fresh tiger shark, actually destroyed the work, laying waste to his \$8,000,000 investment in *Physical Impossibility of Death*. These conundrums defy practical answers. Some artworks must be disassembled in order to preserve their value and ensure their continued existence. The *Board IV* decision flouts this basic tenet that is at the heart of artwork conservation.

Furthermore, if the *Board IV* court's logic is correct and an artwork that is destroyed when dismantled and cannot return to existence when reassembled, then why did the case come before the court in the first place? A large contingent of the artistic and broader cultural community believed in the artwork's persistent value, even while it was dismantled, so much so that the City would not agree to its permanent removal. The assertion that the work was destroyed time and again by voluntary acts of the artist defies all practicality. Specifically, this decision overlooks the possibility that the question of whether dismantling a sculpture results in "destruction," rather than mere "removal," could turn on matters of intent and permanence. There is a difference between dismantling the sculpture never to recompose it, and dismantling a sculpture intending to put it back together once a part of it has been fixed. Had the court resorted to understandings of the broader artistic community, rather than the dictionary definitions of "remove" and "destroy," it may have arrived at a conclusion with more realistic applicability for arts professionals.

Second, the *Board IV* court found that Myers had destroyed his own work by offering to repaint it with an updated color scheme when the Board originally acquired 599 Broadway. This belief led the court to hold that:

The Work has metamorphosed from its original form as visualized and conceptualized by Defendant Myers, from the time it was first installed, to its incarnation if it were to be reinstalled, so that it would not be the original Work if it were to be put back on the wall of any building, including that of 599 Broadway.<sup>137</sup>

This finding suggests that even were the building exception not applicable—i.e. even if *The Wall* were able to exist when removed from the northern face of 599 Broadway—it would not be subject to VARA protection because it is not an original work of art. A footnote to that paragraph further explained:

The 1981 repainting of the Work with a new color scheme would seem to be the first “destruction” of the Work. There is no question that Thomas Gainsborough’s painting *The Blue Boy* would not be the same painting if later the boy’s clothes were painted red. The 1997 permanent removal of the easternmost braces [to survey the structural integrity of the underlying matrix of joists] would also seem to be a “destruction” of the Work . . . .

[T]he two changes to the Work, repainting, and the removal of the braces, were not the result of conservation, nor did they come about because of any public presentation of the Work. The repainting of the Work had nothing to do with its conservation, or with the lighting or placement of the Work. The second change, the 1997 removal of the braces, involved the functional role of the building wall as support for the building. The braces were removed not to protect the Work or preserve the artistic integrity of the Work, but to preserve the stability of the building wall itself.<sup>138</sup>

Put plainly, by (1) repainting the wall and braces, and (2) agreeing to remove the braces temporarily to fix the wall supporting them, the artist did not conserve his artwork, but rather destroyed it—twice.

Focusing on this finding insofar as it involves *The Wall*’s 1981 repainting, we encounter an unmanageable application of the copyright code. For clarity, VARA’s buildings exception that the court sought to invoke in order to preclude moral rights protection asks whether the work can exist if it is removed from the building. Here, however, the court went well beyond answering that question and found that since the artwork was repainted, the original artwork was destroyed. In order to

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<sup>137</sup> *Id.* at \*3.

<sup>138</sup> *Id.* at \*3 n.7.

preclude VARA's applicability based on this finding, there is an additional logical step omitted from the court's discussion that must be addressed: *The Wall*, even in repainted form, still surely would satisfy VARA's definition of a "work of visual art." Then it is not clear why VARA should not apply to the repainted work as much as it would have to the original. The court's focus on originality, suggesting that a repainted work lacks originality such that it is not eligible for any copyright protection, is inconsistent with copyright doctrine. Even conceding that repainting an artwork destroys the original, and even if the repainting created a new work, it nonetheless would fall within the copyright code's protection as a derivative work.<sup>139</sup>

Furthermore, if the northern face of the building were an integral component of *The Wall*, such that removing the braces from it amounted to the work's destruction, then why should addressing the decaying masonry and support system not be considered an act of conservation? 599 Broadway's northern wall played a dual role, one structural, and one as a component of a work of visual art. However, the court refused to recognize that the repair work could be considered conservation of *The Wall* in addition to preservation of the structure.<sup>140</sup>

If an artist cannot revisit her own creation and make changes to it without sacrificing her moral rights under VARA, then considerable doubts arise as to the statute's practical utility. Why should the conservation exception allow an artwork to be subjected to repair in order to preserve the artist's original vision, but an artist may not revisit her own work in order to adjust the way that work represents her vision?<sup>141</sup> Returning to the purpose that Congress set forth in passing the legislation, moral rights exist primarily to safeguard the artist's ability to allow her work to represent her personal and professional identity.<sup>142</sup> If VARA supports the conclusion that an artwork no longer is original when the artist alters it after it is originally unveiled to the public, then the statute seems to stand as a limitation to its own primary objective, admonishing artists against revisiting their works lest they jeopardize their moral rights in them.

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<sup>139</sup> See 17 U.S.C. § 101 (2006) ("A 'derivative work' is a work based upon one or more preexisting works, such as a[n] . . . art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."); 17 U.S.C. § 103 (2006) (explicitly protecting derivative works).

<sup>140</sup> *Board IV*, *supra* note 12.

<sup>141</sup> Recall that the *Board IV* court found that *The Wall's* 1981 repainting was a destructive act because the underlying motivation was not related to conservation. *Id.* It is not without irony to point out that when the artwork ultimately was reinstalled in 2007, the original braces showed signs of deterioration, so Myers supervised the installation of newly fabricated braces onto the side of 599 Broadway. Ramirez, *supra* note 118.

<sup>142</sup> H.R. REP. NO. 101-514, at 14 (1990).

Despite many years of litigating this case, arts professionals are left with few helpful lessons from Myers's long battle with the Board of 599 Broadway. If a conservator or museum counsel were to internalize the conclusions of the *Board IV* decision, little would be left of moral rights protections in practical fields. If a change to an artwork, even with the artist's blessing or at her behest, may result in its destruction for VARA purposes unless the underlying motivation was conservation, then the definition of "conservation" again becomes the crux of any analysis of whether moral rights may be disturbed or destroyed. In the absence of such a definition, any conclusion regarding the effect of a modification to the work on the moral rights of the artist rests only upon speculative grounds.

Again, these questions remain unresolved, for Myers and the other defendants did not pursue an appeal. Instead of further litigation, the Board and the artist came to an agreement, allowing Myers to reinstall *The Wall* on the north side of 599 Broadway. The compromise this time is that the protruding beams have been shifted vertically upward in order to allow the Board to monetize the lower section of the north wall through advertising sales.<sup>143</sup> In return, *The Wall* is to remain intact in perpetuity.<sup>144</sup>

### III. SUGGESTIONS FOR PRACTITIONERS AND FOR VARA'S ENHANCED PRACTICAL APPLICABILITY

Seeking resolution to the practical conundrums that have resulted from VARA litigation, it is unlikely that clarity will issue from the judicial system in the foreseeable future, especially given the infrequency with which such cases arise and that the great expense associated with long court battles may be particularly prohibitive for artists and nonprofit groups. The cases of Audrey Flack and Forrest Myers settled before their troubled outcomes could be submitted to additional review. When an artwork

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<sup>143</sup> Telephone interview with Deborah Arch Myers, (Nov. 9, 2010); Ramirez, *supra* note 118.

<sup>144</sup> Telephone interview with Deborah Arch Myers, (Nov. 9, 2010). Given the *Board IV* decision, Myers accepts that *The Wall* is not subject to VARA protections, given the buildings exception. *Id.* However, the artist disagrees with the court's understanding of *The Wall's* evolution. *Id.* Despite replacing the projections and shifting their positions upward, the artist considers the artwork currently in place at the corner of Houston and Broadway to be the same artwork that originally was installed in 1973. *Id.* The work's proportions, colors, and spacing, all are the same today as they were before the masonry and steel repair was undertaken. *Id.* Even the repainting in 1981, while changing the esthetic significantly, did not transform *The Wall* into a new artwork, in Myers' estimation. *Id.* Nevertheless, in order to memorialize the significant events leading to *The Wall's* latest incarnation, Myers refers to it with a hybrid date designation "1973 / 2007." *Id.* See also Forrest Myers, [www.forrestmyers.com](http://www.forrestmyers.com) (last visited May 5, 2011) (artist's website). It is unlikely that this symbolic recognition of the work's evolution would permit VARA's moral rights to reattach, given the *Board IV* court's finding that, ignoring the buildings exception, *The Wall* would not be protected by VARA for lack of originality.

requires attention, how should conservators go about meeting its needs while preserving the artist's rights and complying with VARA?

Ideally, this guidance should come from Congress. "Conservation," within the meaning of VARA's conservation exception, remains undefined. There is no articulated scope of activities that constitutes conservation of artwork from a legal standpoint. The *Flack* case demonstrates that conservation may include repair work, but such a specific instance cannot hope to prove helpful in the wide array of conservation activities that are carried out across the multiplicity of materials and forms that constitute the visual arts today.

Earlier in this Note, it was suggested that the AIC's standards may provide some guidance for courts seeking to apply the conservation exception.<sup>145</sup> While that may be one available option, it should be recognized that Congress's suggestion that courts employ "common sense and generally accepted standards of the artistic community" was limited to the determination of whether an artwork fell within the definition of a "work of visual art," not whether the conduct at issue could be considered an act of conservation.<sup>146</sup> Courts are free to use whatever sources they deem appropriate in deciding whether an intervention in an artwork's aging process qualifies as an act of conservation, and this invites possibility for circuits to disagree, presenting the artistic community with multiple definitions for the term "conservation." Apart from dictionary definitions or industry standards, even within the realm of cultural preservation, the understanding of what conservation means varies.<sup>147</sup> Which should weigh more in courtroom inquests: the opinions of art experts as to whether an effort to address an artwork is a reasonable conservation act, or the opinion of the litigious artist, who is uniquely able to describe the features and goals of the artwork, but who also may have the most at stake in the litigation? While credibility determinations

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<sup>145</sup> See *supra* Part II.B.

<sup>146</sup> H.R. REP. NO. 101-514, at 11 (1990).

<sup>147</sup> See, e.g., Erica Avrami, Randall Mason, Marta de la Torre, *Values and Heritage Conservation*, Research Report, The Getty Conservation Inst. (2000), available at [http://getty.edu/conservation/publications/pdf\\_publications/valuesrpt.pdf](http://getty.edu/conservation/publications/pdf_publications/valuesrpt.pdf). ("[H]ow conservation is approached and undertaken varies from culture to culture. The term *conservation* itself has varied meanings and connotations. In certain contexts, 'conservation' has broad meaning, signifying the entire field or realm of cultural heritage preservation, from academic inquiry and historical research to policy making to planning to technical intervention (this meaning is akin to the American notion of 'historic preservation'). At the same time, 'conservation' is used to indicate physical intervention or treatment specifically. This definition of conservation refers to the more technically oriented functions of the broader field. But the broader definition refers more widely to conservation as a complex, diverse, and even divergent social practice—and it is this definition that needs to be foregrounded.").

are quotidian courtroom exercises, without an articulated legal definition of what constitutes a baseline of reasonable art conservation, deciding what is reasonable is ultimately a tautological conclusion no matter how many facts or opinions are recited.

Similarly, much clarity could be provided by addressing claims like the one alleged in *Flack*, that while the defective repair itself may not have risen to the level of gross negligence on the part of the person who actually undertook the repair, the selection of that person to undertake the repair could constitute gross negligence, such that those who made the selection could be the proximate cause of the resulting distortion or mutilation. Otherwise stated, what credentials must an arts professional possess such that she may be selected to address an artwork without running afoul of VARA? A related problem that may be addressed through concurrent legislation is demonstrated in the *Board IV* decision, in which the court arrived at the counterintuitive determination that Forrest Myers had destroyed his own work by changing *The Wall's* color scheme.

Fashioning an appropriate definition in this instance may be impossible to accomplish with any precision through legislation, given that ideas of what “conservation” means changes across contexts and times.<sup>148</sup> Nevertheless, Congress may provide significant guidance to courts and arts professionals by directing an analysis that is specific to the artistic community, rather than leaving the realm of possible definitions unchecked. A modest proposal for such legislation could be to modify 17 U.S.C. § 101 to include the following definition:

“Conservation” is the work of a qualified individual addressing a work of visual art with the purpose of preserving its cultural value and/or furthering the vision of the author of the work of visual art. Conservation activities include examination, documentation, treatment, and preventive care of a work of visual art.

(1) An individual who is the author of the work of visual art, or who is acting under the supervision of the author of the work of visual art, or who is acting in accordance with the express written consent of the author of the work of visual art is a qualified individual to engage in the conservation of that work of art.

(2) Whether an individual other than those qualified under clause (1) is qualified shall be determined through the consideration of that individual’s education, knowledge, training, and experience, in accordance with the prevailing

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<sup>148</sup> See *supra* text accompanying note 147.



standards of the relevant professional communities.

(3) A modification to a work of art resulting from the actions of an individual who is the author of the work of visual art, or who is acting under the supervision of the author of the work of visual art, or who is acting in accordance with the express written consent of the author of the work of visual art shall be treated as a modification resulting from conservation of the work of visual art, and not as a destruction of the work of visual art.

So defined, courts would be given a number of guideposts that would bring greater consistency to the way the conservation exception is applied, and it would memorialize the notion that an artist is uniquely qualified to address her own artwork with impunity, consistent with the fundamental values of moral rights. A definition such as this would enable arts professionals to rely upon the best practices and standards of the artistic community in addressing works of art with greater confidence in how their actions would be reviewed by a court considering a VARA challenge. This definition may encourage parties seeking to repair an artist's work to seek out conservators more consistently in accord with prevailing conservation standards, potentially increasing the likelihood of favorable results, thereby reducing litigation, rather than inviting it as the *Flack* court's order seems to suggest.<sup>149</sup> Tangentially, conservators would be encouraged to seek out training that conforms to the artistic community's prevailing best practices. Finally, this definition does not sacrifice the availability of actions for gross negligence in conservation, for even though it uniformly categorizes the acts of an artist's agent as conservation acts, it does nothing to reduce or remove the standard of care currently required for VARA's conservation exception to apply.

Unfortunately, it seems that the other conundrums that issued from the *Board IV* decision—namely, those surrounding the question of whether a sculpture ceases to exist when it is dismantled temporarily—are less susceptible to correction through legislation. For answers to these particularly bothersome questions, we likely must await further review of the arguments that led to them, whether through the appeals process or other future controversies.

Realistically, the infrequency with which VARA claims arise makes the likelihood of congressional attention to these issues rather remote.<sup>150</sup> Instead, conservators and arts professionals may

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<sup>149</sup> See *supra* Part II.A.

<sup>150</sup> See Hughes, *American Moral Rights*, *supra* note 19, at 699 n.224 (observing that the

take a number of steps to promote artist moral rights in addressing an aging artwork while avoiding liability. First, a lesson may be taken from *Flack*: err on the side of collaboration with the artist. Involving the artist with caring for the artwork may generate options in order to identify a conservator or class of conservators that might be most appropriate to address the work, to promote the artist's vision as closely as possible in conserving the work, and to yield outcomes that satisfy the artist, reducing the likelihood of a lawsuit. Certainly there are varying degrees to which an artist may participate in conserving an artwork, ranging from informed consent to close observation or supervision. As a creative example, the conservation team at the Whitney Museum of American Art has undertaken an effort to conduct video-recorded interviews of the living artists whose works are represented in the Museum's collection so that their visions may be promoted through conservation efforts, both near- and long-term.<sup>151</sup> Close collaboration of this kind may have avoided the actions that led to David Ascalon's lawsuit for the flawed repairs of the Holocaust memorial in Harrisburg, Pennsylvania, as the restoration team would have had a clearer understanding of the materials that the artist used and what they were intended to represent.

Second, since VARA rights are personal to the artist, obtaining a written waiver of those rights for the scope of the conservation can shield the conservator and others involved from liability.<sup>152</sup> Indeed, because VARA is only one option among a constellation of legal theories that may subject a conservator to liability in the event of less-than-ideal conservation results,<sup>153</sup> contracting with the artist and with the artwork's owner could be considered an essential step in preparing to address a work of art.<sup>154</sup> Contracting may memorialize the expectations and roles of the parties involved and bring clarity to conservation endeavors that may reduce the scope, expense, and pitfalls of litigating VARA claims. Recall the troubled findings in the *Board IV* decision, partially based in the court's belief that removing *The Wall* from 599 Broadway had nothing to do with conservation, thereby destroying the artwork. Perhaps when an artwork needs to be dismantled to undergo conservation, a contract could memorialize

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extent to which such problems permeate society has a bearing on whether mounting a campaign for corrective legislation may be an exercise in futility) (quoting David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 50 (2004)).

<sup>151</sup> See Neyfakh, *supra* note 16.

<sup>152</sup> 17 U.S.C. 106A(e) (2006).

<sup>153</sup> Cf. Hughes, *American Moral Rights*, *supra* note 19, at 666.

<sup>154</sup> See Garfinkle et al., *supra* note 100, at 177.

the parties' anticipation of a temporary disassembly that should not be considered destroying the artwork. Drafting a provision such as this may prevent another courtroom struggle like the one Forest Myer endured, and it could help to distinguish the factual scenario from *Board IV* so that it may not be relied upon as precedent in the event of a lawsuit.

Finally, another lesson from the *Flack* case is that conservators and those who hire them should adhere to external standards of professional conduct and ethics, like those the AIC promulgates.<sup>155</sup> Absent a legal definition for "conservation" or what may be reasonable in addressing an aging artwork, the ability to refer to a rigorously created, ever evolving, peer-reviewed body of best practices may lend support to reasonableness arguments enough to preclude findings of gross negligence in art conservation. The AIC's guidelines encourage education, experience, research, documentation, and prudence from a conservation project's inception to culmination.<sup>156</sup> Had the *Flack* defendants adhered to values such as these in selecting the arts professional to resurrect Queen Catherine from the refuse pile, it is possible that they would have had better arguments to move forward to a summary judgment phase with greater confidence, rather than agreeing to settle.

#### CONCLUSION

*Physical Impossibility of Death* got a new shark in the most hospitable of circumstances. The new owner was passionate and moneyed enough to fulfill Damien Hirst's every request in arriving at the artwork's newest incarnation, and three years hence, it does not appear that Hirst will look to enforce his VARA rights as a result of the overhaul that he and Cohen accomplished. However, imagining litigation to arise because of these events, the current case law does not provide any concrete guidance for how a court might apply VARA to that work of art. In light of the *Board IV* court's view of works that are disassembled and reassembled, it is not clear that moral rights would still adhere in the work, since the original shark and formaldehyde were removed. Depending upon who was hired to prepare and install the new shark, a court might refuse to apply the conservation exception and empanel a jury to review the level of care used in making that selection, as the *Flack* court seemed to have thought appropriate. Does it matter that Hirst oversaw the whole conservation process, or did his decision to get a new shark, rather than to remain committed to the

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<sup>155</sup> *See id.*

<sup>156</sup> *Defining the Conservator, supra* note 93.

original shark, jeopardize his moral rights ever from reattaching to *Physical Impossibility of Death*, which may be an analogous outcome to the *Board IV* case?

The fundamental differences between a legal system steeped in economic traditions and an artistic heritage that defies boundaries make VARA a particularly challenging statute to understand and apply practically, leading to outcomes that are difficult to predict. Congress could provide more guidance to courts in order to bring the statute's practical effect more in line with the artistic community's standards of excellence. However, absent more legislative action, conservators and other art stewards should rely on industry best practices and take advantage of the ability to obtain waivers and memorialize intentions and understandings in contracts so that the practical realities of the artistic community may translate more seamlessly into the courtroom.

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