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PUBLIC ART, THE VISUAL ARTISTS RIGHTS ACT OF 1990, AND THE PROBLEM OF CONSPICUOUS CONCEALMENT

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PUBLIC ART, THE VISUAL ARTISTS RIGHTS ACT OF 1990, AND THE PROBLEM OF CONSPICUOUS CONCEALMENT

Joseph G. Scapellato*

ABSTRACT

The Visual Artists Rights Act of 1990 ("VARA") has a concealment problem. While VARA grants visual artists the right to prevent the distortion, mutilation, or modification of their works of visual art, things become complicated for large works of public art. Works of public art often cannot be moved without risking their damage. And when such works fall out of favor, owners may conspicuously conceal them rather than move them to avoid risking liability under VARA. In two cases from the last twenty years—Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel *and* Kerson v. Vermont Law School, Inc.,*—the U.S. Courts of Appeals for the First and Second Circuits each held that the conspicuous concealment of a work of public art does not constitute an impermissible distortion or modification under VARA. But these concealments were highly public to their audience, placing both the works and their artists into possible disrepute.*

This Note argues that the First and Second Circuit's decisions contravene the original purpose of VARA. It begins by examining the history of the status of artists as visual authors, growing from relative anonymity into public notoriety. It then analyzes the history of the moral rights doctrines off of which VARA was based to ascertain VARA's legislative purpose. By doing so, the Note contends that the decisions of the First and Second Circuits showcase that VARA must be reformed to prevent the conspicuous concealment of public art. The Note concludes by offering two reforms that balance the interests of visual artists in the preservation of their

* University of Pittsburgh School of Law, J.D., 2025; University of Pittsburgh, B.A., History of Art & Architecture, 2022. My deep gratitude goes toward the editorial team of Volume 87 of the *University of Pittsburgh Law Review* for their meticulous edits to this Note. I also want to thank Shayna Yogman, my dear friend, and Daniel Tublin, my Student Note mentor, for their thoughtful feedback on this piece. Finally, I am deeply indebted to my immediate family—Maria, Francis, and Nicholas Scapellato—for unconditionally supporting me throughout law school.

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http://lawreview.law.pitt.edu

works against the interests of owners of public art in adapting their properties to suit changing social norms.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

Table of Contents

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

INTRODUCTION

The commission and display of a work of public art serves a purpose far beyond mere decoration.[1] Public art generally involves a conspicuous work of visual art made with the purpose of amplifying or commenting on the values of a particular audience.[2] Public art can serve as a unifier for a community, aesthetically trumpeting a message chosen by the commissioner, artist, or subject.[3] It can also aid in memorializing troubling events and helping a community reach closure.[4] While the display of public art inevitably conveys a statement, the removal of a work from the public eye can be even more consequential—especially when that work is conspicuously concealed.

One such case involves Frank Vittor's *Christopher Columbus* (1958) ("the Columbus Statue" or "the Statue"), nested in Pittsburgh's Schenley Park.[5] Vittor was an Italian immigrant and Pittsburgh-based sculptor who made statues of notable

[1] Throughout this Note, I use the terms "art," "artwork," and "work of art" to refer exclusively to visual art. I define visual art as a form of creative expression that is fixed into a mostly static medium and predominantly characterized by aesthetic qualities—such as paintings, sculptures, exhibition photographs, drawings, engravings, or prints. *See* 17 U.S.C. § 101 (defining works of visual art under copyright law). While other creative media, like theater and film, employ aesthetic means of expression, they fall outside the scope of this Note.

[2] The term "public art" is difficult to define. Hilde Hein notes that most works of art are not "private" in the sense that they are only viewable by one person, separated from the public by "walls, doors, and columns[.]" Hilde Hein, *What Is Public Art?: Time, Place, and Meaning*, 54 J. AESTHETICS & ART CRITICISM 1, 5 (1996). But according to Patricia C. Phillips, a work of visual art becomes "public" through a purposive analysis, when "it is a manifestation of art activities and strategies that take the idea of public as the genesis and subject for analysis." Patricia C. Phillips, *Temporality and Public Art*, 48 ART J. 331, 332 (1989). Using Phillips's analysis for public art, I believe that public art comprises those works of art whose subject matter and intended audience are designed to contemplate a community or a public. *See id.*

[3] *See, e.g.*, Penelope J.E. Davies, *The Politics of Perpetuation: Trajan's Column and the Art of Commemoration*, 101 AM. J. ARCHAEOLOGY 41, 41 (1997). The Column of Trajan was a funerary monument commemorating the victory of the Roman Emperor Trajan over the Dacians. *Id.* at 43. The monument consists of a large marble column with a spiraling frieze that documents the Roman military defeating the Dacians. *Id.* at 42–43. Because the frieze was circular, viewers had to circumambulate the Column to view the narrative in its entirety. *Id.* at 41. In ancient Roman funerary rituals, circumambulation played an important role in honoring deceased military figures. *Id.* at 57–58. By having the audience to circumambulate the Column, Trajan's Column literally compelled the Roman viewer to engage in a ritual honoring Trajan and his conquests. *See id.* at 58.

[4] *See, e.g.*, KIRK SAVAGE, MONUMENT WARS: WASHINGTON, D.C., THE NATIONAL MALL, AND THE TRANSFORMATION OF THE MEMORIAL LANDSCAPE 271–73 (2009) (arguing that the reflective granite chosen by artist Maya Lin in the design of the Vietnam Veterans Memorial was to create a contemplative and (quite literally) reflective space).

[5] Melissa E. Marinaro, *Columbus, All Wrapped Up?*, HEINZ HIST. CTR.: BLOG (Oct. 10, 2023), https://www.heinzhistorycenter.org/blog/columbus-all-wrapped-up/ [https://perma.cc/7ADS-L5WM].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

figures from American history.[6] In 1958, the Columbus Statue was commissioned by the Sons of Columbus and gifted to the City of Pittsburgh as a celebration of Italian heritage.[7] The Statue stands over thirty feet tall,[8] and it is comprised of a bronze sculpture of Columbus standing atop a granite pedestal.[9] Columbus is depicted with a resolute gaze as his robes billow around him, creating the impression that he stands at the bow of a ship.[10] Engraved upon the granite pedestal are the following words: CHRISTOPHER COLUMBUS | DISCOVERER OF AMERICA | OCTOBER 12, 1492.[11] The Statue is avowedly commemorative: It depicts the explorer striking a valiant pose in a public park.

But to detractors, the reality of Columbus's atrocities against the Indigenous Taíno people outweighed any commemorative intent behind the commission of the Statue.[12] In 2020, activists responding to police brutality and racism in the United States called attention to Columbus and his crew's atrocities against the Taíno, which included rape, enslavement, and murder.[13] A petition to remove the Statue amassed over fifteen thousand signatures,[14] and the Pittsburgh Art Commission voted

[6] *Frank Vittor (1888–1968)*, THE HIST. MARKER DATABASE (Feb. 2, 2023), https://www.hmdb.org/m.asp?m=40888 [https://perma.cc/3NQK-FVDL].

[7] Marinaro, *supra* note 5.

[8] Basil M. Russo, *We Must Keep Schenley Park's Statue of Columbus*, ITALIAN SONS & DAUGHTERS OF AM. (May 5, 2024), https://orderisda.org/culture/news/we-must-keep-schenley-parks-statue-of-columbus/ [https://perma.cc/TH3L-DHGW].

[9] Marinaro, *supra* note 5.

[10] *Id.*

[11] *Id.*

[12] *See* Amanda Waltz, *Pittsburgh Art Commission Unanimously Votes to Remove Christopher Columbus Statue*, PITT. CITY PAPER (Sept. 23, 2020), https://www.pghcitypaper.com/news/pittsburgh-art-commission-unanimously-votes-to-remove-christopher-columbus-statue-18051203 [https://perma.cc/FVL5-RU4V].

[13] Finn Murphy, *Remove the Christopher Columbus Statue at Schenley Park*, CHANGE.ORG (June 11, 2020), https://www.change.org/p/pittsburgh-parks-recreation-department-remove-the-christopher-columbus-statue-at-schenley-park [https://perma.cc/3DBY-KPFU]; *see also* Tink Tinker & Mark Freeland, *Thief, Slave Trader, Murderer: Christopher Columbus and Caribbean Population Decline*, 23 WICAZO SA REV. 25, 25–26 (2008) (further discussing these misdeeds). In addition to these atrocities, Columbus's arrival to Hispaniola also precipitated rapid decline of the population of the Taíno people through sickness and starvation. Noble David Cook, *Sickness, Starvation, and Death in Early Hispaniola*, 32 J. INTERDISCIPLINARY HIST. 349, 352 (2002).

[14] Murphy, *supra* note 13.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

unanimously to remove it.[15] When Mayor Bill Peduto recommended the removal, the city concealed the statue under tightly wrapped white mesh.[16]

Angered by the proposed removal of the statue, the Italian Sons and Daughters of America ("ISDA") filed suit, arguing that Pittsburgh could not remove the Statue unless it repealed an ordinance that required the city to maintain the statue in perpetuity.[17] In September 2022, the trial court dismissed the ISDA's complaint,[18] but in April 2024, the Commonwealth Court reversed the trial court's decision and remanded the case.[19] The Commonwealth Court noted that the trial court failed to issue findings of fact regarding whether the city's "actions in seeking to remove the Statue from Schenley Park violated the Charter, the Code, or the Ordinance."[20]

As a result of this litigation, the Columbus Statue remains concealed nearly five years later, wrapped tightly in coverings that barely cover its surface. To passersby, the shape of the statue is still highly recognizable. Much like Christo and Jeanne-Claude's *Wrapped Reichstag* (1995), the coverings form a plastic sheath that still "reveal[s] the essence of" the Statue but distorts its view.[21] Unlike the artful coverings used for *Wrapped Reichstag*, the plastic-covered Columbus Statue is an unsightly mass. Rather than an outcome that balances the competing interests in protecting the physical work of art and recognizing Columbus's misdeeds, the Statue remains bound in a presentational limbo. And the message the concealment sends is clear: The Statue is too disreputable to be viewed.

While the impasse between the ISDA and the city illustrates the harm from public concealment, the dispute arises out of a local ordinance in Pittsburgh, not a law designed to protect artistic integrity.[22] Because the litigation has not yet concluded, the Statue may still yet be uncovered or removed.[23] Yet, paradoxically, a federal law specifically designed to protect the reputations of artists and the integrity of visual art has led to the very outcome it seeks to prevent: the prolonged and

[15] Waltz, *supra* note 12.

[16] Marinaro, *supra* note 5.

[17] Italian Sons & Daughters of Am. v. City of Pittsburgh, 315 A.3d 217, 223, 228 (Pa. Commw. Ct. 2024).

[18] *Id.* at 224–25.

[19] *Id.* at 230.

[20] *Id.* at 229.

[21] *Wrapped Reichstag*, CHRISTO & JEANNE-CLAUDE, https://christojeanneclaude.net/artworks/wrapped-reichstag/ [https://perma.cc/H4PG-B73Y] (last visited Oct. 7, 2025).

[22] *Italian Sons & Daughters of Am.*, 315 A.3d at 229.

[23] *Id.* at 230.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

disreputable concealment of a public artwork. In August 2023, the U.S. Court of Appeals for the Second Circuit illustrated this striking irony in *Kerson v. Vermont Law School, Inc*.[24]

The Visual Artists Rights Act of 1990 ("VARA") safeguards the personal and reputational interests of visual artists by protecting the integrity of their works of art. Under VARA, visual artists retain the lifetime right to prevent the intentional distortion, mutilation, or modification of their works of visual art when that alteration would prejudice their honor or reputation.[25] And for a work "of recognized stature," the artist may prevent the intentional or grossly negligent destruction of their work altogether.[26] Notably, artists may exercise these rights *even after* the work of art is sold to another, making visual art a possible liability for future owners.[27] VARA is the United States's iteration of "moral rights" legislation.[28] The term, which derives from the French *droit moral*,[29] roughly translates to "spiritual," "personal," or "non-economic" rights.[30] These rights are "designed to protect the personal interests of authors [and visual artists] in their works,"[31] and around the world, they typically fall into four categories: "the right to claim authorship of a work (right of attribution), the right to object to modifications of a work (right of integrity), the right to decide when and how to publish a work (right of disclosure), and the right to withdraw a work after publication (right of withdrawal)."[32]

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[24] *See* 79 F.4th 257, 259–60 (2d Cir. 2023).

[25] 17 U.S.C. § 106A(a)(3)(A); *id.* § 106A(d)(1) (limiting the duration of rights to the life of the artist). The statute exempts alterations relating to "the passage of time . . . conservation, or of the public presentation, including lighting and placement," from this general prohibition. *Id.* § 106A(c)(1)–(2). However, if an alteration relating to conservation or the public presentation results from "gross negligence," that violates VARA. *Id.* § 106A(c)(2).

[26] *Id.* § 106A(a)(3)(B).

[27] *See id.* § 106A(a)(3)(A)–(b); *see also* Castillo v. G&M Realty L.P., 950 F.3d 155, 163–64, 171–72 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) (holding that a property owner was liable under VARA for destroying works of recognized stature when he whitewashed graffiti murals on his building).

[28] PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLES 239 (2014).

[29] Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMPAR. L. 67, 69 (2007).

[30] SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 584 (3d ed. 2022).

[31] Rigamonti, *supra* note 29, at 70.

[32] *Id.* at 70–71; *see also* Michael Rushton, *The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?*, 22 J. CULTURAL ECON. 15, 16 (1998) (listing the same four categories).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

On its face, VARA appears to be highly protective of both visual artists and their works of art. But in *Kerson*, the Second Circuit reached a decision undesirable to both sides of the dispute. After Vermont Law School ("VLS") concealed large murals depicting American slavery behind acoustic panels, the artist, Samuel Kerson, filed suit under VARA to enjoin the removal of the panels.[33] The Second Circuit ruled that VLS's total concealment of the murals did not constitute an impermissible distortion, mutilation, or modification under VARA because the concealment did not physically alter the murals.[34] However, the murals could not be removed from the walls without risking their destruction as works of "recognized stature,"[35] so VLS must preserve them behind the acoustic panels for the rest of Kerson's life.[36]

This Note argues that the Second Circuit's opinion interprets VARA in a strict textualist manner that contravenes the law's original purpose, possibly stifling future commissions of large public art. Part I outlines the histories of the heightened status of the visual arts and moral rights in Europe, analyzing how they influenced the development of VARA in the United States. Part II examines the two decisions that permit the conspicuous concealment of public art under VARA—*Kerson* and *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*—arguing that the courts' decisions contravene the purpose of both VARA and VARA's European predicates as applied to public art. While businesses, governmental bodies, and other institutions regularly commission large works of public art,[37] outcomes like those of *Kerson* may deter the patronage of public art. Given this conundrum, Part III suggests possible interpretive or legislative reforms that would ensure that businesses and visual artists can confidently commission, produce, and display works of public art.

I. THE HISTORY OF MORAL RIGHTS FOR VISUAL ARTISTS AND THE VISUAL ARTISTS RIGHTS ACT OF 1990

This Part traces the history of moral rights for visual artists from its foundations in continental Europe to VARA's enactment in the United States. The Part proceeds

[33] Kerson v. Vt. L. Sch., Inc., 79 F.4th 257, 261–62 (2d Cir. 2023).

[34] *Id.* at 260.

[35] *Id.* at 264 n.4. VLS conceded for the purposes of summary judgment that the murals were of "recognized stature," which may have been a strategic error. *See id.*

[36] *See id.*; 17 U.S.C. § 106A(d)(1).

[37] *See* LORI ZIMMER, ART HIDING IN NEW YORK 130–49 (2020) (documenting corporations' commissions of large works of public art in their lobbies, including the works of notable artists such as Roy Lichtenstein).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

in two sections: First, it examines the augmentation of artists' status in early modern Europe from that of anonymous craftspeople to recognized auteurs. It then outlines the development of moral rights law for literary authors in continental Europe and the eventual application of these doctrines to visual artists. It concludes by arguing that the purpose behind VARA was to protect the authorial reputation of visual artists through the physical preservation of their works.

A. The Growth of the Status of Visual Artists in Early Modern Europe: From Craftsperson to Deliberative Creator

To the modern observer, the visual arts have long been granted a "special dignity" throughout history.[38] Today, we generously patronize the arts to decorate our environments, provide a window into history, or invest in a lucrative asset.[39] Past societies conferred works of visual art with a more consequential status: They believed that works of art could possess mystical qualities and even change the course of history.[40] In Renaissance Italy, for example, legends proclaimed that images of the Madonna and Child could work miracles,[41] warding off evil and even curing the plague.[42]

We also view visual artists as contemplative creators. Michelangelo, for instance, has been accredited an almost legendary status for his ingenuity in painting

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[38] MARTIN WARNKE, THE COURT ARTIST: ON THE ANCESTRY OF THE MODERN ARTIST, at xiii (David McLintock trans., 2019) (1993).

[39] *See, e.g.*, Sarah D. McDaniel & Ferdousi Islam, *Art Resources Team (ART): Art as an Asset*, MORGAN STANLEY 1 (May 2023), https://advisor.morganstanley.com/manhattan-park-avenue/documents/field/m/ma/manhattan-park-avenue/5641400_Art_as_an_Asset_05_2023_CORE_FINAL.pdf [https://perma.cc/T8JL-MADT].

[40] *See, e.g.*, DAVID SUMMERS, REAL SPACES: WORLD ART HISTORY AND THE RISE OF WESTERN MODERNISM 45–48 (2003) (arguing that the Aztec *Coatlicue* statue exerted a godlike surveillance on the passerby of Tenochtitlan); Megan Holmes, *Miraculous Images in Renaissance Florence*, 34 ART HIST. 432, 446–47 (2011) (describing how divine entities were believed to intercede in human affairs and transfigure paintings and drawings). In the nineteenth century, the practice of "spirit photography" even believed in the camera "as 'medium' in both senses of the word, not only rendering the image of a person posing for a portrait but also materializing the impression of a ghost hovering above." Karl Schoonover, *Ectoplasms, Evanescence, and Photography*, 62 ART J. 30, 33 (2003).

[41] Holmes, *supra* note 40, at 437.

[42] One example is Guido Reni's *Pallione del Voto* (1630), which was made in response to a devastating plague in Bologna in 1630. Catherine R. Puglisi, *Guido Reni's* Pallione del Voto *and the Plague of 1630*, 77 ART BULL. 402, 402 (1995). The banner depicts the Madonna and Child blessing the patron saints of the city of Bologna. *Id.* at 403–04. The Bolognese used the banner in commemorative processions each year after the cessation of the plague, believing that the divine figures that it represented would intercede on the city's behalf should the plague come back in the future. *Id.* at 404–05.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

and sculpture.[43] While visual art—and, by extension, visual artists—have long occupied this special status, it may come as a surprise that artists used to operate in relative obscurity before the Italian Renaissance.[44] Prior to the fourteenth century, painters, sculptors, and architects operated as anonymous members of a guild of artisans.[45] Among the guilds, those involved in the visual arts were viewed as partaking in a "poor man's profession," in which participation would "degrad[e]" the families of middle-class citizens and nobles.[46] Additionally, when patrons commissioned a work of art, the cost of the work was usually assessed by the cost of materials. The patron of a fresco may have named a price based on the surface area of the walls covered, the general subject matter, or even the amount of "ultramarine" blue dye allocated to a scene.[47] Like carpenters, plasterers, and other skilled craftspeople, patrons more commonly paid artists by the volume of work they performed rather than their particular style or reputation as an artist.[48]

This sentiment changed during the Italian Renaissance when "people started to think of artworks as related to the persons who made them."[49] Much of this progress was due to technological advancements in printmaking, allowing artists to expose their styles to a larger audience. Copperplate printmaking was one such process that originated sometime in the fifteenth century,[50] which involved the scraping of a burin

[43] Peter Murray, *Michelangelo*, 124 J. ROYAL SOC'Y ARTS 163, 165 (1976) (describing the apocryphal legend of Michelangelo's painting the ceiling of the Sistine Chapel on his back).

[44] *See, e.g.*, WARNKE, *supra* note 38; Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 164 (1983).

[45] Rosen, *supra* note 44.

[46] *Id.* at 166.

[47] MICHAEL BAXANDALL, PAINTING AND EXPERIENCE IN FIFTEENTH CENTURY ITALY 3–5, 11 (2d ed. 1988) (providing records of contracts stipulating patrons' terms for the commission of frescoes).

[48] *See* CREIGHTON E. GILBERT, ITALIAN ART 1400–1500: SOURCES AND DOCUMENTS 9 (Creighton E. Gilbert ed., Northwestern U. Press 1992) (1980). To be sure, the recognition of this past sentiment for visual artists is not to say that other skilled professions engaged in manual labor, such as carpentry, are not engaged in intellectual work. For an example of how carpenters find solutions to multifactor problems, see Robert R. Sherman, *Carpentry Is Intellectual Work*, 5 CRITICAL QUESTIONS EDUC. 125, 127–29 (2014).

[49] Joost Keizer, *Style and Authorship in Early Italian Renaissance Art*, 78 ZEITSCHRIFT FÜR KUNSTGESCHICHTE 370, 370 (2015); *see also* Oscar Moro Abadía & Manuel R. González Morales, *Paleolithic Art: A Cultural History*, 21 J. ARCHAEOLOGICAL RSCH. 269, 275 (2013).

[50] EVELYN LINCOLN, THE INVENTION OF THE ITALIAN RENAISSANCE PRINTMAKER 17 (2000).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

across the surface of a copper plate.[51] Andrea Mantegna, an Italian painter active in Padua and Mantua in the mid-1400s,[52] was an early pioneer in copperplate prints.[53] Mantegna produced prints from his paintings so prolifically that they garnered international recognition, influencing artists like Raphael and Rembrandt.[54]

As printmaking became commercially popular,[55] it led some artists to assert their exclusive right to reproduce the work. In Venice, this was governed by the system of *privilegios*,[56] the exclusive right granted to an artist or a publisher for the reproduction of a work—an early form of copyright.[57] Individuals applying for a *privilegio* would supplicate the Venetian College for the sole privilege to reproduce the work, requesting an extent of time in which the *privilegio* would be active and the amount of money to be *asserted* against counterfeiters.[58] The individual's name was then recorded in the Venetian Senate under a heading titled "*Speciales Personæ*."[59]

Coextensive to the advancements in printmaking and early copyright law was princely courts' establishment of special offices to sponsor the work of individual artists, granting them prestige among the nobility.[60] Artists, buttressed by this institutional renown, gained a newfound bargaining position for greater pay based on the quality of their style rather than the cost of raw materials.[61] In turn, wealthy patrons prized their own ability to discern an artist's style.[62] Knowledge of art was not just a commercial transaction, but it signified intellect and culture.[63] These

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[51] Tony Sportiello, *The Renaissance of Etching—At the Met*, SPLASH MAGAZINES (Oct. 23, 2019), https://splashmags.com/index.php/2019/10/the-renaissance-of-etching-at-the-met/ [https://perma.cc/X98F-ALJ4].

[52] LINCOLN, *supra* note 50.

[53] *Id.*

[54] *See id.* at 20–21.

[55] CHRISTOPHER L.C.E. WITCOMBE, COPYRIGHT IN THE RENAISSANCE: PRINTS AND THE *PRIVILEGIO* IN SIXTEENTH-CENTURY VENICE AND ROME 5 (2004).

[56] *Id.* at 28–29.

[57] *Id.* at 27–28.

[58] *Id.* at 27–29.

[59] *Id.* at 28.

[60] WARNKE, *supra* note 38, at xiv.

[61] *See id.* at 9–10.

[62] *See* BAXANDALL, *supra* note 47, at 23.

[63] *See id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

developments were later reflected in contracts for commissions that specified that certain artists, in addition to certain materials, be present during the creation of a work.[64]

Historians seized on the newfound consciousness of the artist by canonizing them in an almost hagiographic sense.[65] In 1550, Giorgio Vasari, a famous painter and architect in his own right,[66] authored a pioneering historiography of the Renaissance artists named *Lives of the Most Excellent Painters, Sculptors, and Architects, from Cimabue Until Our Own Time* ("*Lives*").[67] *Lives* not only documented the artistic careers of artists like Cimabue, Titian, and Michelangelo, but it also placed the artists in a grand narrative about the history of art.[68] Vasari's *Lives* greatly influenced the idea that visual artists were "unique creator[s] of [their] works[.]"[69]

This trend of the heightened status of visual artists continued from Renaissance Italy through nineteenth-century France, developing into a conception of the artist as a contemplative author.[70] In France, the "fine arts" of painting, sculpture, and architecture were viewed as disciplines requiring an authorial mind to mold raw materials into a carefully choreographed work.[71] During the Salons of the seventeenth through nineteenth centuries, artists had a forum to flaunt these aesthetic innovations.[72] The Salon was a biennial exhibition of the works of artists from the Royal Academy of Painting and Sculpture.[73] The Academy awarded large sums of

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[64] *Id.*

[65] Sharon Gregory, *Caravaggio and Vasari's* Lives, 32 ARTIBUS ET HISTORIAE 167, 168 (2011).

[66] William M. Ivins, Jr., *Vasari's Lives*, 25 METRO. MUSEUM ART BULL. 15, 15 (1930).

[67] Gregory, *supra* note 65, at 168 & n.10.

[68] Ivins Jr., *supra* note 66, at 19.

[69] LISA PON, RAPHAEL, DÜRER, AND MARCANTONIO RAIMONDI: COPYING AND THE ITALIAN RENAISSANCE PRINT 67 (2004).

[70] Abadía & González Morales, *supra* note 49, at 274.

[71] *See id.*

[72] *See, e.g.*, C.H. STRANAHAN, A HISTORY OF FRENCH PAINTING 79–80 (1888) (describing the history of the French Salons in academic and royal society); FAITH E. BEASLEY, SALONS, HISTORY, AND THE CREATION OF SEVENTEENTH-CENTURY FRANCE 175–77 (2006) (arguing that the history of literary salons in seventeenth-century France became integral to France's identity as a nation priding itself on culture, the arts, and literature).

[73] *See* STRANAHAN, *supra* note 72, at 77, 79; *see also* Hilary Ballon, Richard Cleary, Jean-Louis Cohen, Clare Le Corbeiller, Alain Erlande-Brandenburg, Diane Farvo, Malcom Gee, Régine de Plinval del

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

cash to the artists whose works the Academy judged most meritorious.[74] These exhibitions, which were free to the public, influenced the rise of art criticism and a widespread consciousness of visual art.[75]

Jacques-Louis David, for example, was a painter individually recognized for his departure from traditional academic style in favor of his own modernism.[76] David's painting *The Oath of the Horatii* (1784) exemplifies his penchant for aesthetic adventurism.[77] Commissioned by King Louis XVI, *The Oath of the Horatii* radically broke from traditional French pictorial mores by emphasizing the human body as the "locus of expressivity and communication" rather than the face.[78] By the nineteenth century, other French artists, such as Antoine-Jean Gros, pushed the bounds of French painting by portraying nontraditional subject matter to critical acclaim.[79]

In sum, this Section argued that the status of artists grew from that of an anonymous craftsperson in the fourteenth century to a creative savant by the nineteenth century. Throughout this history, artists garnered recognition for their individual styles and aesthetic innovations. Artists were not persons engaged in manual labor, but they were directors of a visual narrative, engaged in authorial composition.

Guillebon, Sylvain Kerspern, Ewa Lajer-Burcharth, Jean-Marc Leri, Sarah Medlam, Robert Short & Nicole Willk-Brocard, *Paris*, GROVE ART ONLINE (Dec. 8, 2022), https://doi.org/10.1093/gao/9781884446054.article.T065354 [https://perma.cc/M877-WCW2].

[74] STRANAHAN, *supra* note 72, at 79–80; Ballon et al., *supra* note 73.

[75] Ballon et al., *supra* note 73.

[76] *See* F. Hamilton Hazlehurst, *The Artistic Evolution of David's Oath*, 42 ART BULL. 59, 59 (1960).

[77] *Id.*

[78] *Id.*; Dorothy Johnson, *Corporality and Communication: The Gestural Revolution of Diderot, David, and* The Oath of the Horatii, 71 ART BULL. 92, 92 (1989).

[79] *See* Darcy Grimaldo Grigsby, *Rumor, Contagion, and Colonization in Gros's* Plague-Stricken of Jaffa *(1804)*, 51 REPRESENTATIONS 1, 2–4 (1995). Gros's *Plague-Stricken of Jaffa* was widely celebrated at the Salon of 1804 for its triumphal depiction of Napoleon Bonaparte on his military campaign in the Middle East. *Id.* at 1–2. However, Grigsby describes the subject matter within the monumental work as "idiosyncratic" for a few reasons. *Id.* at 6. First, Gros portrayed the listless French men afflicted by the plague in the nude, contrasting the classical connotation of male nudity as heroic, effectively feminizing the French subjects. *Id.* at 11, 17. Second, the Arab men in the composition were not depicted as passive subjects, but as having "relative autonomy" in their coming to the aid of the vulnerable French. *Id.* at 22, 26.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

B. A History of Moral Rights and a Comparison of Moral Rights Around the World to the VARA

This Section discusses the history of moral rights doctrines from continental Europe to the United States. It then compares moral rights protections for visual artists around the world to the protections afforded under VARA. Through an analysis of this history, the Section asserts that the purpose behind moral rights for visual artists stemmed out of a desire to protect the artist's reputation as a visual author.

Moral rights doctrines originally grew out of a series of judicial decisions from continental Europe that protected the rights of literary authors.[80] Like artists, authors were viewed not just as the producer of a work but as "someone who create[d] something from nothing and [was] therefore logically entitled to the property of their invention."[81] In France, moral rights doctrines developed out of two series of judicial decisions.[82] The first involved the "right of disclosure," which protected an author against the forced disclosure of an unpublished work during bankruptcy proceedings.[83] Courts commonly held that creditors could not seize a bankrupt author's manuscript because unpublished works "did not legally exist prior to publication."[84] The second involved the rights of attribution and integrity, which encompass the rights to claim authorship of a work and to prevent its modification,[85] derived in the nineteenth century from the common law of contracts.[86] These protections trace back to an 1814 decision in France, in which a court held that "a work sold by an author to a publisher or a bookseller must bear the author's name and must be published as sold or delivered, if the author so desires, provided that there is no agreement to the contrary, except for typographical errors[.]"[87] Publishing agreements expressly reflected payment for the publication of a manuscript and implicitly for publication "as delivered by the author."[88]

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[80] *See* Rigamonti, *supra* note 29, at 70–71; *see also* RICKETSON & GINSBURG, *supra* note 30, at 587.

[81] SARAH HOOK, MORAL RIGHTS, CREATIVITY, AND COPYRIGHT LAW: THE DEATH OF THE TRANSFORMATIVE AUTHOR 15 (2024).

[82] Rigamonti, *supra* note 29, at 80–81.

[83] *Id.*

[84] *Id.* at 83–84.

[85] *Id.* at 79.

[86] *Id.* at 87.

[87] *Id.* at 85–86.

[88] *Id.* at 87.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

These decisions affording special rights for authors were later codified into statute, providing a prologue for moral rights for visual artists.[89] In 1925, fascist Italy was the first country to codify moral rights for authors.[90] Because the fascists viewed authors and artists as prospective state propagandists, they deserved special protections for their creative works.[91] Italy spearheaded the international codification of moral rights at the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). Starting in 1886 in Berne, Switzerland, the Berne Convention was "a multilateral treaty whereby certain minimum standards for the protection of literary and artistic works were rendered mandatory for all member states."[92] In 1928, Italy hosted the Rome Revision of the Berne Convention.[93] At Italy's urging, moral rights protections were added in Article 6bis of the treaty,[94] providing protections for the "patrimonial rights" of the author that include the right to prevent any "distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation."[95] The Berne Convention was later revised in 1948 and 1967, with the final revision taking place in Paris in 1971.[96] In the 1971 version of the Berne Convention, Article 6bis reads as follows:

> (1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any *distortion, mutilation, or other modification of, or other derogatory action in relation to*, the said work, which would be prejudicial to his honor or reputation.
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights,

[89] *Id.* at 89–91.

[90] BALDWIN, *supra* note 28, at 165.

[91] *See id.* at 163.

[92] Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 499 (1967).

[93] BALDWIN, *supra* note 28, at 164; *see also* Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

[94] Rushton, *supra* note 32, at 16; BALDWIN, *supra* note 28, at 165–66; Rigamonti, *supra* note 29, at 116.

[95] Berne Convention, *supra* note 93, § 1 (citing the version of the Berne Convention revised in Italy in 1928).

[96] *Berne Convention for the Protection of Literary and Artistic Works*, WIPO, https://www.wipo.int/treaties/en/ip/berne/ [https://perma.cc/C9RN-B3UC] (last visited Oct. 7, 2025).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

> and shall be exercised by persons . . . authorized by the legislation of the country where protection is claimed.[97]

The 1971 Berne Convention also explicitly included works of visual art under its protections in Article 2, stating that "'literary and artistic works' shall include . . . works of drawing, painting, architecture, sculpture, engraving . . . lithography . . . [and] works of applied art."[98]

Coextensive with these revisions to the Berne Convention, member states began to codify moral rights for visual artists into statute. Influenced by a conception of the artwork as embodying the personality of the artist, France was the first country to codify moral rights protections for visual artists in 1957.[99] Artists, as a "special class of laborers" similar to authors, deserved these special rights "even against the contract or property interests of third parties."[100] Accordingly, French law provides that (1) moral rights protect the name, quality, and physical integrity of the work, (2) they cannot be alienated by the artist while the artist is alive, and (3) they are descendible to the artist's heirs after death.[101] In 1965, Germany, the second country to codify moral rights for visual artists,[102] granted visual artists (1) the first publication of a work of art,[103] (2) the proper attribution of authorship to that work,[104] and (3) maintenance for the physical integrity of the work.[105]

The United States did not accede to the Berne Convention until 1989.[106] Before accession, the U.S. granted few copyright protections to foreign authors, enabling

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[97] Berne Convention, *supra* note 93 (emphasis added).

[98] *Id.* art. 2, § 1.

[99] *See, e.g.*, Rushton, *supra* note 32, at 17; Rigamonti, *supra* note 29, at 73. *But see* Elizabeth M. Bock, Note, *Using Public Disclosure as the Vesting Point for Moral Rights Under the Visual Artists Rights Act*, 110 MICH. L. REV. 153, 153 (2011) (arguing that moral rights in the United States should be based principally on the right against nonconsensual public disclosure); BALDWIN, *supra* note 28, at 199.

[100] Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 595 & n.366 (2006).

[101] Code de la Propriété Intellectuelle [Intellectual Property Code] art. L121-1 (Fr.).

[102] BALDWIN, *supra* note 28, at 199.

[103] Gesetz über Urheberrecht und verwandte Schutzrechte [URHG] [Act on Copyright and Related Rights] Sept. 9, 1965, BUNDESGESETZBLATT [RGBL I] at p. 1858, Division 4, Subdivision 2, § 12 (Ger.).

[104] *Id.* § 13.

[105] *Id.* § 14.

[106] David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 L. & CONTEMP. PROBS. 211, 211 (1992).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

American publishers to freely exploit international works.[107] But the lack of international protections led to reciprocal losses for U.S. copyright owners totaling billions every year.[108] In 1988, Congress began the process of amending U.S. copyright law to adhere to Berne, and in 1990, Congress enacted VARA to conform to the moral rights provisions of Article 6bis of the Berne Convention.[109]

VARA was introduced to the House of Representatives by Representative Robert Kastenmeier of Wisconsin.[110] When Representative Kastenmeier introduced the bill on the House Floor, he framed the purpose around a story involving one of his constituents.[111] William Smith, a muralist in Kastenmeier's district, had painted a renowned mural on the wall of a building.[112] When the owners of the building had the wall reconstructed, the reconstruction damaged the mural.[113] Rather than have Smith repair the mural, the owners hired another artist to conduct the repairs, diminishing the work's value.[114] VARA, Kastenmeier explained, was necessary to protect both the "integrity of [the] works [of visual artists] and *the fact of their authorship*."[115] The purpose behind VARA was that visual artists produce works in a manner akin to literary authors—a creative profession marked by a distinctive style and deliberative process.[116]

While Congress enacted VARA in light of the Berne Convention, its protections are narrower than Article 6bis in several ways. First, the rights of attribution and integrity under VARA last only for the life of the artist;[117] while under Berne the postmortem rights last "at least until the expiry of the economic rights[.]"[118] Second, Berne provides greater protections to the physical integrity of a

[107] *Id.* at 212 (listing the works of famous authors like Dickens, Trollope, and Hugo being pirated within the U.S.).

[108] *Id.* at 215.

[109] *Id.* at 217, 239; *see also* Berne Convention, *supra* note 93.

[110] 135 CONG. REC. E2199 (1989) (statement of Rep. Robert Kastenmeier).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* (emphasis added).

[116] *See id.* For a discussion on the augmentation of the status of visual artists starting during the Italian Renaissance, see discussion *supra* Section I.A.

[117] 17 U.S.C. § 106A(d)(1).

[118] Berne Convention, *supra* note 93, art. 2, § 2.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

work of art. Like VARA, the Berne Convention protects against any "distortion, mutilation, or . . . modification" of the work,[119] but it also prevents any "other derogatory action in relation to[] the said work, which would be prejudicial to his honor or reputation."[120] In contrast, VARA provides the current owner of a work of visual art with some lenience in its display. Section 106A(c)(2) states that "[t]he 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 . . . unless the modification is caused by gross negligence."[121] So while a work of visual art may not be physically distorted, mutilated, modified, or destroyed, it may be removed from public display or concealed from view.[122]

Finally, VARA only proscribes the destruction of a work of "recognized stature"; whereas Berne does not require "recognized stature" to prevent this conduct under the meaning of the terms "distortion, mutilation . . . modification, or other derogatory action."[123] Additionally, VARA allows for an owner of a work of recognized stature to destroy the work when (1) the work is incorporated into a building such that removal will cause destruction, distortion, mutilation, or modification, and (2) the owner of the building and the artist execute a written agreement specifying that installation may subject the work to "destruction, distortion, mutilation, or other modification, by reason of its removal[.]"[124]

In conclusion, this Part traced the history of moral rights doctrines as applied from authors to visual artists. As argued in Section I.A, the professional status of visual artists slowly augmented from that of relative anonymity toward recognition as a deliberative creator with a distinctive style. Like authors, visual artists exercise editorial control over their works, creating something akin to a separate instantiation

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[119] *Id.*; 17 U.S.C. § 106A(a)(3)(A).

[120] Berne Convention, *supra* note 93, art. 2, § 1. It is unclear exactly what conduct this vague portion of Article 6bis would cover. Would merely protesting aside a work of art constitute a derogatory action, or does this only apply to physical alterations of the work itself? The interpretive doctrine of *noscitur a sociis* ("it is known by its associates") provides that the meaning of an ambiguous word or phrase in a list or series should be deduced by examining the words surrounding it. *Noscitur a Sociis*, BLACK'S LAW DICTIONARY (12th ed. 2024). Analyzed through *noscitur a sociis*, the phrase "any other derogatory action" would probably only apply to physical actions in relation to the work, such as conspicuous concealments. *See* Berne Convention, *supra* note 93, art. 2, § 1.

[121] 17 U.S.C. § 106A(c)(2) (emphasis added).

[122] *See id.* § 106A(a), (c).

[123] *See* Berne Convention, *supra* note 93, art. 2, § 1.

[124] 17 U.S.C. § 113(d)(1).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

of the mind. Because of the importance imputed onto the visual arts, moral rights doctrines, including VARA, protect the reputations of visual artists in addition to their physical works. Thus, this Part contends that a key purpose behind VARA was to protect the authorial honor and reputation of the visual artist in relation to their work of art.

II. CONSPICUOUS CONCEALMENT OF PUBLIC ART: *MASSACHUSETTS MUSEUM OF CONTEMPORARY ART FOUNDATION, INC. V. BÜCHEL*, *KERSON V. VERMONT LAW SCHOOL, INC.*, AND THE CONTRAVENTION OF VARA'S ORIGINAL INTENT

VARA has a concealment problem. Over the last two decades, two decisions have held that the conspicuous concealment of public art is permissible under VARA: *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* and *Kerson v. Vermont Law School, Inc*. While the First Circuit's reasoning in *Büchel* was highly cognizant of the legislative history and purpose behind VARA, *Kerson* was not, hewing closely to VARA's text. Regardless of their interpretative method, each opinion reached the same conclusion. The salient and reputationally damaging concealment of a work of art does not violate VARA.

As proclaimed by the VARA's legislative sponsor, the visual arts meet a "special societal need," deserving "protection and preservation [for] an important public interest."[125] Public art serves that interest in particular because it has the capacity to "convey messages and teach lessons" to a broad audience.[126] However, monumental works of public art are often difficult to relocate without risking damage to the works, causing owners to incur liability under VARA. In the alternative, owners of public art may opt to conceal a work of public art when it falls into disfavor.[127] But the conspicuous and protracted concealment of public art inevitably brings these works into disrepute.[128] When courts interpret VARA to permit such concealment, they undermine VARA's crucial purpose.

[125] Kastenmeier, *supra* note 110.

[126] Mary Mothersill, *Public Monuments*, *in* "REMOVE NOT THE ANCIENT LANDMARK": PUBLIC MONUMENTS AND MORAL VALUES 53, 53 (Donald Martin Reynolds ed., 1996).

[127] *See* discussion *supra* Introduction.

[128] *See id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

A. Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel *and the Avoidance of a Difficult Ruling Under VARA*

This Section contends that *Büchel*, an opinion mindful of VARA's history and purpose, sidestepped ruling that the concealment of public art violated VARA out of practicability concerns, violating VARA's purpose. Sometime around 2006, the Massachusetts Museum of Contemporary Art ("MASS MoCA") commissioned artist Christoph Büchel to create a larger-than-life installation at the museum entitled *Training Ground for Democracy* ("*Training Ground*").[129] Among other large features, *Training Ground* contained a full-sized police car, a mobile home hoisted by a crane, and a carnival ride around which viewers could traverse.[130] MASS MoCA and Büchel never executed a written agreement delimiting the extent of the project, and over the course of *Training Ground*'s construction, their relationship quickly deteriorated.[131] Büchel objected to how the museum employees installed certain elements of *Training Ground*, while MASS MoCA grew concerned over ballooning expenses.[132] Büchel left *Training Ground* unfinished, but to his disdain, MASS MoCA continued to work on the installation.[133] In preparation for litigation, the museum concealed the work under yellow tarps.[134] One observer remarked that the concealment of *Training Ground* was akin to "hiding an elephant behind a napkin."[135]

In 2007, MASS MoCA filed suit against Büchel in the U.S. District Court for the District of Massachusetts, seeking a declaratory injunction that the public presentation of his unfinished work did not violate VARA.[136] Büchel counterclaimed, arguing that MASS MoCA intentionally distorted and modified *Training Ground* by allowing the public to view the unfinished work under tarps.[137]

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[129] Randy Kennedy, *The Show Will Go On, but the Art Will Be Shielded*, N.Y. TIMES (May 22, 2007), https://www.nytimes.com/2007/05/22/arts/design/22muse.html [https://perma.cc/9VQN-4T8E].

[130] *Id.*; *see also* Mass. Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38, 59 (1st Cir. 2010).

[131] *Büchel*, 593 F.3d at 44–45.

[132] *Id.*

[133] *Id.* at 45.

[134] *Id.*

[135] *Id.* (citing Charles Giuliano, *Christoph Buchel's Tarp Art at Mass MoCA*, BERKSHIRE FINE ARTS (July 31, 2007), https://berkshirefinearts.com/07-31-2007_christoph-buchel-s-tarp-art-at-mass-moca.htm [https://perma.cc/R3ZG-7P6W].

[136] *Id.*

[137] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

On cross-motions for summary judgment, the district court sided with MASS MoCA, holding that VARA did not protect unfinished works of art.[138] Büchel appealed.[139]

The U.S. Court of Appeals for the First Circuit reversed, ruling that VARA protects both complete and incomplete works of visual art.[140] To reach this conclusion, the First Circuit began with the definition of "fixed" within § 101 of the Copyright Act.[141] To be "fixed in [a] tangible medium of expression," a work must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[142] Because unfinished works may be formed "by or under the authority of the author" in a manner that is "sufficiently permanent," they, too, may receive protection under both copyright law and VARA.[143] The First Circuit referenced the personality theory of moral rights in support of this holding,[144] reasoning that "[m]oral rights protect the personality and creative energy that an artist contributes to his or her work."[145]

Paradoxically, though, the court then held that MASS MoCA's public concealment of the work under yellow tarps did not constitute an impermissible distortion, mutilation, or modification that would prejudice Büchel's honor or reputation.[146] Drawing from VARA's legislative history, the court reasoned that the phrase "honor or reputation" should focus on "the artistic or professional honor or reputation of the individual as embodied in the work that is protected."[147] When examining a modification, courts should consider "the way in which a work has been modified and the professional reputation of the author of the work."[148]

Regarding MASS MoCA's continued work on *Training Ground*, the First Circuit held that Büchel raised a genuine issue of material fact as to whether this

[138] *Id.*

[139] *Id.* at 47.

[140] *Id.* at 50–51.

[141] *Id.* at 51 (citing 17 U.S.C. § 101).

[142] *Id.* at 48, 51 (citing 17 U.S.C. § 101, 102(a)).

[143] *Id.* at 51.

[144] *See supra* note 99 and accompanying text.

[145] *Büchel*, 593 F.3d at 51. For a discussion of the theoretical underpinnings of VARA, see *supra* Part I.

[146] *Büchel*, 593 F.3d at 61.

[147] *Id.* at 54 (citing House Report).

[148] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

conduct qualified as an impermissible distortion or modification.[149] So far so good. Regarding the covering of *Training Ground* under yellow tarps, however, the court concluded that "although the installation unquestionably looked different with the tarpaulins partially covering it," the concealment did not amount to an impermissible distortion or modification.[150] Further, the "partial covering of [*Training Ground*] may have been *intended to highlight, rather than hide*, the failed collaboration," but to side with Büchel would "stretch VARA beyond sensible boundaries."[151] Such a ruling, the court claimed, could subject museums to VARA claims when an unfinished work is concealed prior to its formal exhibition.[152] But this would not be the case. Carefully covering a work of art before it is revealed to the public heightens anticipation and preserves the artist's vision; it does not prejudice the artist's "honor or reputation" as proscribed by VARA.[153]

The First Circuit's reasoning is remarkable. The court understood the history of VARA, granted *Training Ground* both copyright and moral rights protections, but nevertheless ignored its own observation that the tarps drew attention to the dispute.[154] While VARA and moral rights doctrine are intended to protect the authorial status of visual artists, the court instead sidestepped a difficult ruling due to concerns about practicability—even though that ruling would have fulfilled VARA's purpose and text.

B. Kerson v. Vermont Law School, Inc.*: A Textualist Interpretation of VARA Leading to the Conspicuous Concealment of Public Art*

Unlike *Büchel*, the U.S. Court of Appeals for the Second Circuit did not critically engage with VARA's history and purpose in *Kerson v. Vermont Law School, Inc.* Rather, the court interpreted VARA's prohibitions on distortions, mutilations, and modifications in a strict textualist manner.[155] Textualism is a method of statutory interpretation that emphasizes "the linguistic meaning of a legal text, defined as what an ordinary person would understand that text to mean, [rather]

[149] *Id.* at 59–60.

[150] *Id.* at 61.

[151] *Id.* at 62 (emphasis added).

[152] *Id.* at 61.

[153] *Id.* at 61, 65.

[154] *See* 17 U.S.C. § 106A(a)(3)(A).

[155] *See* Kerson v. Vt. L. Sch., Inc., 79 F.4th 257, 268 (2d Cir. 2023).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

than . . . putting interpretive weight upon purposes, consequences, or values."[156] Although the First and Second Circuit's interpretative methods differed, the concealment permitted under *Kerson* also places artists and their works in salient disrepute—another violation of the VARA's original purpose.

Three years after Congress enacted VARA, Vermont Law School ("VLS") commissioned Samuel Kerson to paint two large murals entitled *The Underground Railroad, Vermont, and the Fugitive Slave* (1993) ("Murals").[157] The Murals are situated in the upper level of the Chase Community Center, a space used by VLS students and community members alike.[158] Kerson, whose work focuses on themes of social justice,[159] intended the murals to illustrate "the path toward liberation for enslaved people and Vermont's role in that story[.]"[160] Painted in the style of muralist José Clemente Orozco, the Murals depict harrowing scenes of the Transatlantic Slave Trade alongside Vermont's efforts aiding the Underground Railroad.[161] After their completion, students expressed discontent with the Murals' depiction of Black figures, but Shirley Jefferson, an administrator at VLS, told the students to ignore them.[162] Jefferson, who personally fought to integrate her high school in Selma, Alabama, commonly retorted that "[y]ou all did not come here to fight over a mural, you came to get educated[.]"[163]

But after nationwide protests in 2020 responding to racism and police brutality, Jefferson and VLS decided that the Murals had "got to go."[164] There was one problem, though. Carpenters determined that the Murals could not be separated from

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[156] Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717, 720–21 (2025); *see, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006) (arguing that a feature of textualism is the belief that the Constitution mandates adherence to the text even when the text "fits poorly" with the statute's purpose).

[157] *Kerson*, 79 F.4th at 259.

[158] *Id.* at 260.

[159] *Id.*

[160] Margaret Grayson, *Artist Sues Vermont Law School over Planned Removal of His Slavery-Themed Mural*, SEVEN DAYS (Mar. 16, 2021), https://www.sevendaysvt.com/arts-culture/artist-sues-vermont-law-school-over-planned-removal-of-his-slavery-themed-mural-32505960 [https://perma.cc/5YZH-6525].

[161] Jenna Russell, *In Vermont, a School and Artist Fight Over Murals of Slavery*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2023/02/21/us/vermont-law-art-slavery.html [https://perma.cc/R5N4-XCCG].

[162] *Id.*

[163] *Id.*

[164] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

the sheetrock walls of the Chase Community Center without being destroyed, which would risk liability under VARA.[165] To solve this problem, VLS permanently concealed the murals behind fabric-cushioned acoustic panels that did not physically touch the works.[166]

Angered by the plan to cover his murals, Kerson filed suit in the U.S. District Court for the District of Vermont, seeking a permanent injunction against the obscuration.[167] Because the works were immovable, Kerson argued, the panels placed in front of them constituted an impermissible "destruction" of his work "of recognized stature."[168] He further contended that the panels improperly distorted, mutilated, and modified the Murals under VARA.[169] The district court disagreed, rejecting his motions for a preliminary injunction and summary judgment, and Kerson appealed.[170]

1. The Concealment of the Murals Was Not a "Destruction" Under VARA

The Second Circuit affirmed using hornbook methods of statutory interpretation.[171] First, the court held that the concealment behind acoustic panels did not amount to a "destruction" of the Murals.[172] The term "destroy" is unambiguous, meaning to damage "(something) so thoroughly as to make unusable, unrepairable, or nonexistent; to ruin."[173] Because the Murals remained physically intact underneath

[165] Kerson v. Vt. L. Sch. Inc., 79 F.4th 257, 261 (2d Cir. 2023). Sheetrock is just the name of a registered trademark of a certain brand of drywall. USG Team, *The Origins of USG Sheetrock® Brand*, USG (Oct. 31, 2022), https://www.usg.com/content/usgcom/en/blog/usg-sheetrock-brand-history.html [https://perma.cc/P89K-B55V].

[166] *Kerson*, 79 F.4th at 261. The panels were elaborate, consisting of "three layered components: (1) a thin wooden frame affixed to the wall surrounding the Murals, bordering, but not touching Kerson's work; (2) a wooden overlay frame constructed of thin wooden boards fastened to the outer frame to act as a surface for the acoustic panels, sitting approximately one inch from the face of the Murals; and (3) a series of cushioned acoustic panels mounted to the overlay frame." *Id.*

[167] *Id.* at 261–62.

[168] *Id.* at 262. VLS conceded for the purpose of summary judgment that the murals qualified as of recognized stature under 17 U.S.C. § 106A(a)(3)(B). *Id.* at 264 n.4.

[169] *Id.* at 262.

[170] *Id.*

[171] *Id.* at 265–66.

[172] *Id.* at 266; 17 U.S.C. § 106A(a)(3)(B).

[173] *Kerson*, 79 F.4th at 266 (citing *Destroy*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

the acoustic panels, they were not destroyed under VARA.[174] The court also rejected Kerson's argument that the concealment would subject the Murals to "toxic environmental conditions" that would *later* cause an actionable "destruction" under VARA.[175] While Kerson's expert testified that the environmental conditions under the acoustic panels may not be "ideal," the court held that VARA permits unintentional alterations to a work of art that are attributable to "the passage of time or the inherent nature of the materials[.]"[176]

2. The Concealment of the Murals Was Not a "Modification" Under VARA

Kerson argued for a more expansive meaning of the term "modification," encompassing any alteration on or around a work of art that harmed the artist's "honor or reputation."[177] The Second Circuit disagreed, ruling that a "'modification' . . . [must] adulterate[] the viewing experience, presupposing that at least some portion of the work remains visible, albeit in altered form."[178] Relying on Merriam Webster's definition, a modification requires some "limited change" to the underlying work itself.[179] For a work of visual art, "an additional brush stroke, erasure of content, or reorganization of a movable component" may constitute a modification.[180] Notably, the Second Circuit reasoned that "'modify' does not ordinarily 'describe moving an object to a location where it cannot be seen,' and 'no conventional use of the word includes "concealment" as a synonym.'"[181]

The court supported this reading of "modification" under the statutory canon of *ejusdem generis*.[182] *Ejusdem generis* (meaning "of the same kind or class") provides that when a general term follows a list of more specific terms, courts should

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[174] *Id.*

[175] *Id.* at 271.

[176] *Id.* at 271–72; 17 U.S.C. § 106A(c)(1).

[177] *Kerson*, 79 F.4th at 266; 17 U.S.C. § 106A(a)(3)(A) ("[T]he author of a work of visual art . . . shall have the right . . . to prevent any intentional . . . modification of that work which would be prejudicial to his or her honor or reputation[.]").

[178] *Kerson*, 79 F.4th at 267.

[179] *Id.* (citing *Modification*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/modification [https://perma.cc/4NVU-MFQK] (last visited Oct. 7, 2025)).

[180] *Id.*

[181] *Id.*

[182] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

cabin the meaning of the general term in light of the "class" of more specific terms.[183] Under § 106A(a)(3)(A) of VARA, the term "modification" should be limited to the class of meanings encompassed by "distortion" or "mutilation."[184] The court reasoned that distort, which means "to alter to give a false or unnatural picture or account,"[185] and mutilate, which means "[t]o severely and violently damage,"[186] alter "how [a work of visual art] is perceived."[187] Because no portion of the Murals remains visible from behind the panels, the concealment did not distort, mutilate, nor modify them.[188]

Finally, the court cited *Büchel* as persuasive authority, which also held that the concealment of a work of art did not constitute a modification under VARA.[189] However, in dicta, the Second Circuit remarked that the covering of *Training Ground* involved a stronger claim of unauthorized modification or distortion because *Training Ground* was partially, not fully, covered, which altered the viewing experience of the work.[190]

While the Second Circuit contended that the panels left "no portion" of the murals exposed, their concealment is still obvious.[191] The panels protrude awkwardly from the walls of the Chase Community Center forming a pyramidal structure.[192] Because the panels are, presumedly, not usable as a whiteboard, any visitor of the Chase Community Center will likely inquire about them, quickly learning of the Murals' hidden presence. Much like the concealment of *Training Ground*—and the Columbus Statue in Schenley Park—the salience of concealment invites viewers to pry into the cause. And after such an inquiry, the work, and its artist, may quickly have their "honor or reputation" fall into disrepute. Regardless, the Second Circuit

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[183] *Ejusdem Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[184] *Kerson*, 79 F.4th at 267.

[185] *Id.* at 267–68 (quoting *Distort*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/distort)) [https://perma.cc/Z3GH-LJ6B] (last visited Oct. 7, 2025)).

[186] *Id.* (quoting *Mutilate*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

[187] *Id.*

[188] *Id.*

[189] *Id.* at 270.

[190] *Id.*

[191] *See* Russell, *supra* note 161.

[192] Richard Beaven, Photograph of covered murals in the Chase Community Center at Vermont Law School, *in Vermont Law School Can Hide a Controversial Mural Depicting Slavery, Court Rules*, CNN STYLE (Aug. 26, 2023), https://www.cnn.com/style/vermont-law-school-slavery-mural-lawsuit/index.html [https://perma.cc/29QD-48VW].

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

ruled that the acoustic panels neither distorted, mutilated, nor modified the Murals, mandating an undesirable result for both parties. While Kerson must have his Murals concealed, VLS must also preserve them for the rest of his life.[193]

As a textualist opinion, *Kerson* adheres closely to VARA's text by interpreting the statute's plain meaning, yet it ultimately arrives at the same conclusion as *Büchel*. Even though *Büchel* was conscious of VARA's history and purpose, the courts nevertheless held that the conspicuous concealment of a work of public art did not violate VARA. Rather than preserving the artists' reputation and authorial vision, these decisions legitimize the harmful concealment of public art.

III. POSSIBLE REFORMS TO VARA THAT BALANCE AN ARTIST'S INTENT WITH AN OWNER'S CONTROL OVER PROPERTY

There are better ways to remove works of art from public display than the concealments in *Büchel* and *Kerson*, and rarely do these removals entail reputational damage. Some museums, for instance, only exhibit around five percent of their permanent collections at any given time, moving works of art from display to change exhibitions, save space, or engage in restoration work.[194] No one could reasonably argue that the exhibition-related decision to move a work into storage damages the reputation of its artist.[195] Museums also permanently remove works from their collections in a process known as "deaccessioning."[196] A museum may choose to deaccession a work of art when (1) the authenticity of the work is determined to be fraudulent, (2) the physical condition of the work is so poor such that restoration would be impractical, or (3) the work is a duplicate that does not possess value as part of a series.[197] When a museum makes the decision to deaccession a work, it may sell that work to another public institution, auction the work through a reputable art dealer, or, in the case of a living artist, exchange that work with the artist for

[193] *See* 17 U.S.C. § 106A(d)(1).

[194] Kimberly Bradley, *Why Museums Hide Masterpieces Away*, BBC (Jan. 23, 2015), https://www.bbc.com/culture/article/20150123-7-masterpieces-you-cant-see [https://perma.cc/7AWQ-REYU].

[195] Indeed, VARA specifically provides that a distortion, mutilation, or modification relating to "conservation, or of the public presentation" is permissible unless it arises out of "gross negligence." 17 U.S.C. § 106A(c)(2).

[196] ASS'N OF ART MUSEUM DIRS., AAMD POLICY ON DEACCESSIONING 1 (2015), https://cms.aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf [https://perma.cc/U97E-QSQ4].

[197] *Id.* at 4–5.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

consideration.[198] None of these practices brings the work into immediate contempt. And unlike the concealment of the Columbus Statue, *Training Ground*, or the Murals, deaccessioning involves a *truly total* removal of a work from the public eye.

Additionally, property owners may think twice before commissioning large works of public art with the knowledge that they may carry liability under VARA. In Wilkinsburg, Pennsylvania, a borough just outside of Pittsburgh, a lawsuit filed by a muralist under VARA prevented a property owner from performing structurally necessary renovations to her building.[199] The muralist, Kyle Holbrook, asserted that his mural was a work of "recognized stature" under VARA, preventing the property owner, Erica Givner, from renovating her building during the litigation.[200]

This Part proposes two reforms to VARA to better serve visual artists, their works of art, and owners of public art. The reforms both cohere to the original intent behind VARA, while the second reform strikes a balance between the rights of property owners and visual artists.

A. An Artist-Friendly Reform: Congress May Codify the "Derogatory Action" Prohibition of the Berne Convention

One amendment that would prevent conspicuous concealment arising out of VARA would be to add the Berne Convention's language proscribing any "other derogatory action in relation to[] the said work, which would be prejudicial to [the artist's] honor or reputation" to § 106A(a)(3)(A).[201] Because the protracted concealment of public art is often a derogatory action,[202] this reform would likely prevent outcomes like those in *Büchel* and *Kerson*.

However, it is possible that this reform could run afoul of the First Amendment regarding protections for expressive conduct.[203] Indeed, the statutory notes added by VARA to 17 U.S.C. § 101 state that the law should not "authorize any governmental entity to take any action or enforce restrictions prohibited by the First Amendment

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[198] *Id.* at 7–8.

[199] Betul Tuncer, *Public Art vs. Property Rights: Artist and Property Owner Face Off over a Mural in Wilkinsburg*, PUBLICSOURCE (Mar. 16, 2023), https://www.publicsource.org/wilkinsburg-mural-kyle-holbrook-vara-vision-towards-peace-mind/ [https://perma.cc/7KH8-4922].

[200] *Id.*

[201] Berne Convention, *supra* note 93, art. 2, § 1; *see* 17 U.S.C. § 106A(a)(3)(A).

[202] *See supra* Introduction; *see also supra* Sections II.A, II.B.

[203] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–78 (1968); Texas v. Johnson, 491 U.S. 397, 420 (1989).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

to the United States Constitution."[204] For this reform, it would be prudent to qualify that a derogatory action must make physical contact with the work. A protest near a work of visual art, or biting art criticism of that work, can be reputationally damaging. But this conduct is integral to a free interchange of ideas around the arts, a concern central to First Amendment jurisprudence.[205] Conduct that makes physical contact with the work of art but does not actually change the underlying composition—such as coverings placed atop the work to publicly conceal it—would be prevented under this reform.

B. A Compromise Using an Analogy to the Law of Restrictive Covenants: Removal of a Work upon a Showing of Substantial Change Since the Commission of the Work

A helpful analogy to understanding VARA can be found in the law of restrictive covenants. A restrictive covenant is a "covenant restricting or regulating the use of real property or the kind, character, and location of buildings or other structures that may be erected thereon, usually created by a condition, covenant, reservation, or exception in a deed[.]"[206] Like VARA, restrictive covenants enable the previous owner of property to dictate the terms of the property's use even after it has been sold to another.[207] Unlike VARA, courts may decline to enforce a restrictive covenant when the defendant shows that conditions have changed so fundamentally since the creation of the covenant that it is impossible to secure the benefit originally intended from the adherence to the covenant.[208]

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[204] Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5132 § 609.

[205] *E.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1388–89 (1984) (discussing the influence of the dissent of Justice Oliver Wendell Holmes, Jr., in Abrams on the development of free speech jurisprudence).

[206] *Restrictive Covenant*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[207] *E.g.*, Malley v. Hanna, 480 N.E.2d 1068, 1069–70, 1071 (N.Y. 1985) (holding that a restrictive covenant attached to the defendants' property was enforceable and could prevent them from constructing a two-family home on their land even though the covenant was attached to the land by the previous owner nearly eighty years prior).

[208] *See, e.g.*, 9 POWELL ON REAL PROPERTY § 60.10 (2024) (citing RESTATEMENT (FIRST) OF PROP. § 564 (AM. L. INST. 1936)) ("Injunctive relief against the violation of the obligations arising out of a covenant cannot be secured 'if conditions have so changed since the making of the promise as to make it impossible longer to secure in a substantial degree the benefits intended to be secured by the performance of the promise.'"); Dumbarton Improvement Ass'n v. Druid Ridge Cemetery Co., 73 A.3d 224, 238–239 (Md. 2013).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

In *Hess v. Country Club Park*, the California Supreme Court invalidated a restrictive covenant that had restricted the use of a plot of land near Country Club Park to only residential purposes.[209] When the covenant was formed, the land surrounding Country Club Park had not been developed; however, at the time of litigation, other plots around the club were developed for business purposes unburdened by restrictive covenants.[210] Because the neighborhood's character had so fundamentally changed, the court declined to enforce the covenant on the defendant's land.[211]

In addition to the reform in Section III.A, Congress could adapt the defense of changed conditions for restrictive covenants to VARA by adding the following language:

> The owner of a work of visual art may risk incidental destruction, distortion, mutilation, or modification to that work to remove that work from the public display when (1) the destruction, distortion, mutilation, or modification necessarily results from moving that work from its current placement, and (2) circumstances have changed so fundamentally since the commission and installation of that work as to make it impossible for the owner to derive a substantial degree of the benefits of ownership or display of that work.

This reform would achieve a careful balance between the reputational integrity of the artist with the interests of property owners. First, the reform only allows destruction or damage to a work of art when such damage necessarily results from the removal of that work. These situations typically arise with large works of public art, such as in *Büchel* and *Kerson*.

The reform also restricts owners of visual art from flippantly destroying or otherwise modifying their public works. An owner must prove that the continued display of the work prevents them from deriving a substantial degree of the benefits of ownership or display. In *Büchel*, MASS MoCA may have been able to establish this condition given the intractable cost of *Training Ground*'s installation. In *Kerson*, VLS may have been able to establish this condition given the widespread unease caused by the Murals or the school's inability to sell them. But when an owner of a work of art cannot demonstrate such a level of substantial change that deprives them of the benefits of ownership, the work must continue to be publicly displayed. This

[209] 2 P.2d 782, 785 (Cal. 1931).

[210] *Id.* at 783–84.

[211] *Id.* at 785.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2025.1134
http://lawreview.law.pitt.edu

reform would avoid the protracted harm of public concealment while also dissuading litigation. And litigation, whether justified or not, often entails reputational injury.[212]

CONCLUSION

In many ways, VARA represents a compromise. VARA was key to the process for the U.S. to accede to the Berne Convention, but its protections are significantly narrower. VARA also protects physical works of art from destruction, but it does so only when those works are of "recognized stature."[213] Finally, VARA prevents the intentional distortion, mutilation, or other modification of a work of visual art, but it does not prevent those conditions when they result from conspicuous concealment.

Any reform to VARA that aims to prevent the prolonged concealment of public art should also represent a compromise. Both visual artists and our communities deserve better than a plastic-wrapped statue, an unfinished yet partially covered installation, or panel-covered murals. At the same time, owners of works of public art should also not have to display irksome works in perpetuity. An audience's reception to a work of art invariably changes over time, often necessitating the removal of such works. A reform to VARA should be responsive to these concerns, respecting the integrity of the visual artist while recognizing that social circumstances often change. Only then may VARA live up to the highest ideals of protecting visual art, placing works of art in "an enforceable constructive trust, for the benefit of the public."[214]

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[212] *E.g.*, Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes 2ehavior by Producing Information*, 91 WASH. L. REV. 1193, 1211 (2016) (analyzing how the legal system itself shapes public opinion about the parties involved in litigation); *see also* Russell, *supra* note 161 ("[Students] criticized the artist for pushing back in court. 'If someone is saying to you, "How you're depicting me is racist," for you to live in your own ignorance, and further aggravate the situation—now you're showing us who you are,' said Yanni DeCastro, a second-year student [at VLS].").

[213] 17 U.S.C. § 106A(a)(3)(B).

[214] James Beck, *A Bill of Rights for Works of Art*, *in* "REMOVE NOT THE ANCIENT LANDMARK": PUBLIC MONUMENTS AND MORAL VALUES 65, 71 (Donald Martin Reynolds ed., 1996).

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