Thème et VARAations: Why the Visual Artists Rights Act Should Not Protect Works-In-Progress

Nathan Murphy*

I. INTRODUCTION

The centerpiece of my living room is a large, colorful oil painting. I was excited to come across it a few years ago in a local antique store—the artist once lived in my area, but had become fairly well-known throughout the United States. I thought it was quite a find and, as the first piece of art I had ever purchased, I was especially proud to own it. But what will happen if someday my tastes change and I get tired of it? I can sell it, of course, but can I burn it in my fireplace? Can I throw it in the trash? Can I paint over it completely? Can I buy oil paints and add some "improvements"? Can I erase the author's signature in the bottom corner? Can I add my own name instead? Because it is my property, may I use it as I want?

Historically, a defining difference between American and European law was how each regime answered those questions. Continental law, and particularly civil law, has long given artists robust "moral rights," which the creator of my painting could invoke to keep me from doing any of the activities described above.[1] Until very recently, American law would have produced the opposite result, treating my painting the same way as a canvas and a set of paintbrushes—as chattel I could use (or dispose of) as I wished—and leaving the artist with no remedy.

That relationship changed in 1990, when Congress passed the Visual Artists Rights Act (VARA).[2] For the first time, and more than a century after their European counterparts, American artists had "moral rights" in their works. These rights, which artists retain after their

---

* J.D., University of Connecticut School of Law, 2010.

[1] *See infra* Section II.A (describing the historical differences between European and American moral rights law).

[2] *See infra* notes 17–26 (chronicling VARA's passage).

artworks have been sold, guarantee that their work's authorship is acknowledged and that it cannot be modified without their permission.[3] At the time it was passed, VARA's new protections were hailed by members of Congress, academic commentators and art critics alike.[4] Yet VARA has had a troubled history in American courts. The statute's unclear language has left judges puzzled about how to enforce it. Artists' VARA claims have been remarkably unsuccessful.[5] Most commentators have responded by advocating for more artist rights, either through legislative changes to the statute or through more liberal judicial interpretations of it.[6] Others retort that the enforcement problems are evidence that the whole idea of "moral rights" is misguided and VARA should be abandoned.[7]

Amidst this academic maelstrom, one question that has received virtually no attention is whether VARA applies to unfinished works of art. To return to our hypothetical (and my living room), if, instead of buying my oil painting at the antique store, I had commissioned it from the artist, how would VARA restrict me while he was creating his masterpiece? The lack of academic interest in this question is surprising because it has been central in some of the most well-known decisions in the nascent VARA case law.[8] But if scholars have neglected the question, so have the courts. Until very recently, those opinions that could have weighed in on the issue have sidestepped it by

---

[3] Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2006).

[4] *See, e.g.*, 135 CONG. REC. E2199 (daily ed. June 20, 1989) (statement of Rep. Kastenmeier) (asserting that "[t]he Visual Artists Rights Act is . . . a pragmatic response to a real problem" which "meet[s] a special societal need, and . . . serve[s] an important public interest."); Jill R. Applebaum, Comment, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 183, 201 (1992) ("The Visual Artists Rights Act serves as an important first step towards protection of moral rights.").

[5] *See infra* note 156 and accompanying text (pointing out the paucity of successful VARA suits).

[6] *See, e.g.*, Robert C. Bird, Moral Rights: Diagnosis and Rehabilitation 2 (Nov. 27, 2007) (unpublished manuscript, on file at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033021) (noting the "emergent scholarly commentary recommending the adopting of stronger protection of artist rights in the United States"); Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 5 (2001) (providing references to the "[m]any articles [which] have lamented the absence of adequate moral rights protection in the United States").

[7] *See, e.g.*, Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 270 (2009) (arguing that "contemporary art, to the extent that we care about it, is distinctly ill served by the present moral rights regime" and concluding that "[e]liminating moral rights and treating artworks like ordinary objects would solve some of the problems I describe").

[8] *See infra* Section III.A (discussing the major unfinished-works cases).

declining to apply VARA on other grounds.[9] However, given how often the issue arises, courts could not avoid it forever, and in January of 2010, the United States Court of Appeals for the First Circuit decided in *Massachusetts Museum of Contemporary Art v. Büchel* that VARA fully applies to works-in-progress, from the first stroke of the artist's brush or the first cut of her chisel onward.[10]

Without taking a position in broader debates about moral rights, this paper argues that VARA does not (and should not) apply to *any* works-in-progress, regardless of whether the works would (or should) be protected in finished form. Although the implication of this conclusion is that *Mass MoCA* was wrongly decided, this paper's argument is much broader because the issues are far more complex than that case recognizes. In Part II, I will briefly review the rudiments of VARA's protections and the history of its enactment, these topics having been extensively treated elsewhere.[11] Part III will sharpen our focus by specifically analyzing the VARA cases involving unfinished works. Whether one believes that VARA should apply to works-in-progress or that it should not, a survey of cases reveals that opinions to date have been logically inconsistent with *either* position. The law must evolve to reflect a more tenable view.

In Part IV, I argue that the best understanding of VARA is that it does not protect works-in-progress because this view is most consistent with VARA's statutory history, contemporary art theory, and the economic underpinning of the unique American moral-rights framework. I conclude that excluding works-in-progress from VARA's protections is most consistent with the statute's aim to protect artists' moral rights. Unlike completed artwork, artists' "moral rights" in unfinished works are already protected by legal theories such as tort and contract. Extending VARA to protect these same rights would not be merely superfluous. Instead, because VARA's protections are more limited than the legal theories that already cover works-in-progress, such an extension would harm artists rather than protecting them.

II. THE HISTORY OF THE VISUAL ARTISTS RIGHTS ACT

For such an important change in American law, VARA's language is unusually ambiguous. The law protects some of the moral rights that

---

[9] *Id.*

[10] Mass. MoCA Found., Inc. v. Büchel, 593 F.3d 38, 51-52 (1st Cir. 2010).

[11] *See infra* note 14 (providing a partial list of sources that discuss VARA's history).

European artists historically enjoyed, but not all of them.[12] And although there are multiple views on *why* VARA was enacted, its legislative history is in many ways inconclusive.[13] VARA's differences vis-à-vis European law, as well as the statute's ambiguous legislative history, have been extensively discussed elsewhere, but merit a short review here because these aspects of VARA help illuminate the problems with applying the statute to works-in-progress.[14]

A. VARA's Enactment

Although VARA was passed in 1990, the impetus for some sort of federal moral rights protection began many years earlier. In Europe, moral rights have been recognized since the nineteenth century.[15] During that time, and in response to the work of the German philosophers Kant and Hegel and to the "individualist philosophies" of the French Revolution, French law began to protect artists' emotional

---

[12] *See infra* Section II.B (describing the difference).

[13] The House Judiciary Committee's report on the Visual Artists Rights Act, for example, alternates between exceedingly expansive and exceedingly narrow descriptions of VARA. *Compare* H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916 ("Witnesses at the Subcommittee's hearings were united in their support for H.R. 2690 because of its benefit not only to individual visual artists, but also to the American culture to which these artists make such a significant contribution.") *and* H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6920 (asserting that "H.R. 2690 brings U.S. law into greater harmony with laws of other Berne countries" and that "[e]nactment of moral rights legislation serves another important Berne objective—that of harmonizing national copyright laws") *with* H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921 ("[W]e have gone to extreme lengths to very narrowly define the works of art that will be covered.").

[14] For more thorough treatments, see generally, e.g., Keshawn M. Harry, Note, *A Shattered Visage: The Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990*, 9 J. INTELL. PROP. L. 193, 195–97 (2001); Richard J. Hawkins, Comment, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause*, 55 UCLA L. REV. 1437, 1445–48 (2008); James J. Mastroianni, Casenote, *The Work Made for Hire Exception to the Visual Artists Rights Act of 1990 (VARA):* Carter v. Helmsley-Spear, Inc., 4 VILL. SPORTS & ENT. L.J. 417, 419–30 (1997); Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1938–48 (2000); Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 380–413 (1995); Cambra E. Stern, Comment, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 853–68 (2004); Rebecca Stuart, Comment, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 654–59 (2007); Natalia Thurston, Note, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 703–08 (2005).

[15] Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 555 (1940).

investment in their artworks by forbidding mutilation of those works without the artist's consent.[16] Other European countries followed suit, and by 1928 the concept of moral rights had gained enough acceptance to be added to the text of the Berne Convention of 1886, an international treaty designed to reconcile and coordinate international copyright protection.[17] Article 6*bis* provides:

> Independently of the author's economic rights, and even after 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 shall be prejudicial to his honor or reputation.[18]

The right to claim or disclaim authorship is commonly called the "right of attribution" or the "right of paternity," and the different rights protecting against physical modifications are typically grouped into a single "right of integrity."[19] Many European countries, most notably France, protect two additional rights: the "right of disclosure," which permits artists to "refuse to expose [their] work to the public before [they] feel it is satisfactory," and the "right of withdrawal," which gives artists the right to withdraw their work from the public, even after it has been sold.[20] Recognizing the latter two rights, however, is not a prerequisite for joining Berne.[21]

---

[16] Robinson, *supra* note 14, at 1938. Although initially the result of developing case law, many of these moral rights are now protected by statute. For the original French law, see Law No. 57-298 of Mar. 11, 1957, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 14, 1957, p. 2723, *available at* http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19570314&numTexte=&pageDebut=02723&pageFin=. For similar laws from other countries, see generally the sources cited in Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1, 15 n.57 (1985).

[17] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886. 827 U.N.T.S. 3; *see also* Harry, *supra* note 14, at 195.

[18] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6*bis*, 827 U.N.T.S. 3. The original text of Article 6 read as follows: "(1) Independently of the author's copyright . . . and even after the transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation. (2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed." Sherman, *supra* note 14, at 384 n.61.

[19] Sherman, *supra* note 14, at 381.

[20] Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95–96 (1997). *See also* Sherman, *supra* note 14, at 381–82 (defining the various rights and how they are protected in Europe); Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 359 (2006) (reporting that the right of disclosure is protected in Italy, Germany and France).

[21] Sherman, *supra* note 14, at 382.

Despite their popularity in Europe, moral rights developed much more hesitantly in the United States. For much of the twentieth century, American artists had essentially no moral rights in their work.[22] Slowly, however, resentment over the advantages moral rights laws gave their European counterparts energized American artists to demand similar rights, and from the 1970s onward, the artists' voices gradually grew stronger and more effective.[23] Indeed, although some authors portray VARA's 1990 enactment as a watershed moment before which American artists had no moral rights,[24] by 1990 several states had already acceded to artists' demands and had enacted some form of statutory protection.[25] Yet it is fair to say that the question of moral rights only took center stage on a national level during the debate over the United States' accession to the Berne Convention.

In 1988, nearly a full century after its inception, and after decades of American intransigence, the United States signed the Berne Convention. This about-face was largely precipitated by changes in American concerns about copyright, such as increased emphasis on combating piracy and protecting U.S. copyright holders abroad.[26] Surprisingly, however, although increasing moral rights protection was often cited as an additional motivating factor for adopting Berne, in the end, artists had no more moral rights after Berne than they had had before.[27] For many years, one of the roadblocks to American adoption of the Berne Convention had been the moral rights embodied in Article 6*bis*. There was thus a reasonable assumption that the U.S. accession to Berne would be accompanied by a new moral rights regime. That did not happen: Congress instead concluded that the few protections artists' moral rights had under federal copyright and state statutes

---

[22] Cassandra Spangler, Comment, *The Integrity Right of an Mp3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1306 (2009). American artists occasionally managed to vindicate some moral rights using traditional legal theories such as tort and contract, however. *Infra* Section IV.D.i.

[23] Robinson, *supra* note 14, at 1941; Mastroianni, *supra* note 14, at 424–25.

[24] *E.g.*, Stuart, *supra* note 14, at 652 ("Until VARA was passed in 1990, there was no real legal protection for the moral rights of artists.").

[25] Stern, *supra* note 14, at n.31 (mentioning California, New York, Massachusetts, Pennsylvania, Louisiana, Connecticut, Maine, New Jersey, Rhode Island and New Mexico).

[26] Stuart, *supra* note 14, at 648.

[27] *See, e.g.*, Hawkins, *supra* note 14, at 1444 (citing the view that American accession to Berne had "marked the country's first formal recognition of an artist's moral rights independent of his economic rights"); Stern, *supra* note 14, at 857 (noting that the changes in U.S. law accompanying Berne's passage "did not include any reference to or addition of moral rights").

sufficed to comply with Article 6*bis*.[28] The long-awaited "moral rights" reform had once again been thwarted.[29]

American reluctance to embrace moral rights was partly because of constitutional concerns, for Congress's power to regulate copyright "has as its principal aim the interests of society as a whole . . . [r]ather than protecting some natural right."[30] Moral rights also encountered resistance because they undercut traditional economic property rights, which American law has traditionally protected very strongly.[31] Other, more critical commentators blame "the United States' focus on exploiting its natural wealth rather that its cultural wealth" and the motion picture industry lobby's influence.[32] But despite these barriers, and although the legislation adopting the Berne Convention had failed to secure any new moral rights, disappointed moral rights advocates did not have to wait long. The debate surrounding the adoption had heightened awareness of moral rights issues among legislators, academics and the public.[33] Contemporaneously with the debate about Berne adherence, Senator Edward Kennedy introduced the Visual Artists Rights Act as a standalone moral rights law.[34] The Senate held hearings on Kennedy's bill in December of 1987.[35] That bill failed, but new VARA bills were introduced less than two years later in both the Senate and House.[36] Citing its desire to encourage artistic expression, to standardize a "patchwork" of state laws and to enhance American artists' competitiveness abroad—and clearly influenced by the Berne Convention—Congress finally acquiesced.[37] On October 27, 1990, as

---

[28] Robinson, *supra* note 14, at 1944.

[29] *See* H.R. Rep. No. 101-514, at 8 (1990) (concluding that joining Berne "did not end the debate about whether the United States should adopt artists' rights laws").

[30] Robinson, *supra* note 14, at 1940.

[31] *Id.*

[32] *See* Hawkins, *supra* note 14, at, 1443–44 (noting these as theories for the slow U.S. recognition of moral rights). The House Judiciary Committee's report implicitly acknowledges the film industry's influence by explaining, at length, why VARA does not apply to films. H.R. Rep. No. 101-514, *reprinted in* 1990 U.S.C.C.A.N 6915, 6918–19.

[33] It is important to note that, contrary to some authors' views, VARA was not enacted to comply with the Berne Convention. *Compare* Thurston, *supra* note 14, at 705 (claiming that VARA was enacted "[i]n order to comply with the Berne Convention's Article 6bis") *with* Sherman, *supra* note 14, at 406 *and* Harry, *supra* note 14, at 196 (explaining that VARA was a separate law passed after the adoption of Berne).

[34] Robinson, *supra* note 14, at 1944.

[35] *Id.*

[36] *See* H.R. Rep. No. 101-514, at 6–7 (providing a brief history of the House and Senate bills, H.R. 2690, 101st Cong. (1990) and S. 1198, 101st Cong. (1990)).

[37] *See* H.R. Rep. No. 101-514, at 5–10 (explaining Congress's justifications); Stern, *supra* note 14, at 858 ("Congress had Berne compliance in mind when passing VARA."). *See also* Mastroianni, *supra* note 14, at 427 (citing artists' rights and standardization as justifications for

one of its final acts, the 101st Congress passed the Visual Artists Rights Act.[38] Federal law at last guaranteed artists' moral rights.

B. VARA's Limited Protections

The Act, however, accomplished less than many had hoped for. Effective June 1, 1991, VARA gave authors of visual works the rights of attribution and integrity.[39] The American right of attribution has two components: the right to claim authorship of a work and the right to disclaim authorship of a work the artist did not create.[40] The integrity right is protected by giving the author the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[41] A special integrity right, the right to prevent destruction, attaches to the author of a work "of recognized stature."[42] Together, these rights give American authors the minimum scope of protection required by Berne—but little more.[43]

Indeed, VARA has come to be defined more by what it does not protect than by what it does. Most obviously, VARA only provides half of the traditional European set of rights. Disclosure and withdrawal rights remain unprotected. Some authors have argued that American law already gives copyright protection to unpublished works, and thus already provides a disclosure right.[44] It is true that American copyright law does protect unpublished works, and that case

---

VARA); Thurston, *supra* note 14, at 704 (citing international competitiveness as a justification).

[38] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 17 U.S.C).

[39] Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a) (2006).

[40] *Id.* § 106A(a)(1)(A)–(B).

[41] *Id.* § 106A(a)(3)(A).

[42] *Id.* § 106A(a)(3)(B). Ironically, the negative implication of this provision is that works that do not rise to the "recognized stature" standard may be completely destroyed, although not mutilated. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8 D.06 (C)(1) (2009) ("[P]edestrian artworks, even if destroyed, raise no cause of action under the statute."). Courts, however, have managed to downplay the "recognized stature" provision by interpreting it very broadly. *See, e.g.*, Martin v. City of Indianapolis, 982 F. Supp. 625, 631 (S.D. Ind. 1997) (concluding that a sculpture had "recognized stature" even though that stature was distinctly local).

[43] Some commentators argue that VARA does not even comply with Berne. *E.g.*, Stuart, *supra* note 14, at 654 ("VARA . . . does not fully comply with the Berne Convention by encompassing all literary and artistic works as required by Article 6 bis.").

[44] *E.g.*, 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, 607 (2006).

law—most notably the United States Supreme Court's *Harper & Row* decision—has placed great emphasis on a work's unpublished nature in adjudicating copyright claims.[45] But the parallelism between U.S. copyright protection and moral-rights disclosure protection is overstated. Indeed, "Copyright law does protect unpublished works . . . , but not from mere disclosure."[46] And while the copyright "right of first publication" does vindicate some traditional disclosure interests, the publication right is much more limited than a moral-rights disclosure right and thus leaves many disclosure rights unprotected. For example, in response to *Harper & Row*, Congress amended 17 U.S.C. § 107 to "make it clear that unpublished works did not necessarily rule against a finding of fair use."[47] Thus, unlike a true disclosure right, which gives an author absolute control over publication, U.S. authors' unpublished works remain subject to fair use—the "most important" limitation on copyright.[48] And because fair use is a factor-intensive test which leaves substantial discretion to the courts,[49] the copyright "first publication" right creates more uncertainty for artists than a robust disclosure right, where courts have no such discretion. Finally, the "right of first publication" is not only limited in scope, but also in time. Unlike European-style disclosure rights, which are perpetual, copyright protection of an unpublished work ends 70 years after its author's death.[50] The American regime is thus far less

---

[45] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 553 (1985) (denying a fair use defense to quotations from Gerald Ford's unpublished memoirs because "Congress intended the unpublished nature of the work to figure prominently in fair use analysis"). *See also* New Era Publ'ns Int'l., ApS v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989) (denying fair use to an unauthorized publication of the unpublished writings of Church of Scientology founder, the unpublished nature of the letters "weigh[ing] heavily" against the infringer); Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987) (denying fair use to a J.D. Salinger biographer who used his unpublished letters, in large part because they were unpublished).

[46] Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249, 259 n.32 (2003).

[47] Adrian Liu, *Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 400 n.78 (2008). *See* 17 U.S.C. § 107 (2006) ("The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

[48] *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 549 (2008) (asserting that fair use is "the most important . . . limitation on the otherwise extraordinarily broad rights granted to copyright owners under section 106 of the [Copyright] Act").

[49] Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 433 (2007).

[50] R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain*, 85 TEX. L. REV. 585, 609 (2007) (contrasting the period of protection granted by French and American law).

favorable than the expansive Continental rights.[51]

Moreover, even those rights that VARA does grant are significantly limited. Modification caused by the passage of time or the nature of the materials the artist uses, for example, does not violate the right of integrity.[52] Nor does modification caused by conservation or public presentation.[53] The rights only last for the life of the author, and can only be exercised by the author.[54] Moral rights are non-transferable, although they may be waived.[55]

But beyond these express restrictions, some of VARA's most important limitations are concealed in its vague language. The most significant such restriction, by far, is the fact that VARA only applies to works of *visual* art—a category even more limited than it appears. Most paintings and sculptures, along with certain kinds of photographs, are covered, but items such as posters, technical drawings, applied art, and motion pictures are explicitly left out, even though those categories include items we routinely find in art galleries and museums.[56] And even some "paintings, prints, sculptures or photographic images" may not be protected because the House Committee report on VARA leaves the definition of those categories to the courts.[57] A First Circuit decision, for example, concluded that VARA's definition of "sculpture" did not include *site-specific* sculpture, because the statute was silent on the issue.[58] There are other limitations as well, such as only protecting works of "recognized stature" from destruction and

---

[51] *Id.*

[52] 17 U.S.C. § 106A(c)(1). This provision's implication is that art owners have no duty to preserve their art from the elements. So, for example, "[t]he owners of rusted sculptures and sun-faded drawings would . . . be exempt under the Act, even if they intentionally allowed the damage to occur." Hawkins, *supra* note 14, at 1448. This is evidently not the case in Europe. *See* Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935, 953 (1995) (including the "passage of time" exception among reasons that New York's moral rights statute "falls short" of the moral rights protection available in Europe).

[53] 17 U.S.C. § 106A(c)(2).

[54] *Id.* § 106A(d) (setting out the duration of protection); *id.* at § 106A(b) (restricting the rights to authors).

[55] *Id.* § 106A(e)(1).

[56] *See id.* § 101 (excluding "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, database, electronic information service, electronic publication, or similar publication" from VARA protection); Stuart, *supra* note 14, at 654 (noting that "many works that are visual but not considered fine art are excluded from protection").

[57] H.R. Rep. No. 101-514, at 9 (1990), *cited in* Sherman, *supra* note 14, at 410.

[58] Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006).

only prohibiting "intentional" violations of the integrity right.[59] Consequently, nearly every academic commentator to weigh in on VARA has described it as a "narrow" statute.[60]

VARA's "exceedingly narrow"[61] scope is no accident, but rather a consequence of the facts surrounding its enactment. On one hand, Congress wanted to use VARA to protect artists' rights, but on the other hand faced withering pressure from the movie, television and publication industries, which felt that increased protection would inhibit their economic interests by limiting how they could distribute and market copyrighted materials, and by curtailing publishers' editorial freedom.[62] As a result, the Act was seen as "a compromise between many conflicting interests"—for which it was "immediately criticized from several quarters."[63] But many commentators, including VARA's drafters themselves, reported that it was only because of this "very limited nature of protection" that VARA was able to pass at all.[64]

VARA, therefore, is by design and circumstance a limited statute. And it clearly protects one limited set of artworks while explicitly denying protection to a second, much larger category. But there is also a third group, consisting of works to which VARA's application is unclear. Some of the most important members of this third category are works-in-progress, to which we now turn.

III. VARA AND WORKS-IN-PROGRESS: AN UNHAPPY MARRIAGE

VARA's language and application have confounded commentators and courts alike. Opinions and articles parsing the meaning and implications of "recognized stature," "prejudicial modification," the "work for hire exception" and VARA's waiver provision abound.[65]

---

[59] 17 U.S.C. § 106A(a)(3) (2002).

[60] *E.g.*, Stern, *supra* note 14, at 861; Sherman, *supra* note 14, at 377, 410; Thurston, *supra* note 14, at 708; Mastroianni, *supra* note 14, at 429; Rigamonti, *supra* note 20, at 406.

[61] *See* Rigamonti, *supra* note 20, at 406 (calling VARA "exceedingly narrow").

[62] Mastroianni, *supra* note 14, at 430.

[63] Robinson, *supra* note 14, at 1935.

[64] Sherman, *supra* note 14, at 408.

[65] On the "recognized stature" provision, see Martin v. City of Indianapolis, 982 F. Supp. 625, 631 (S.D. Ind. 1997), *aff'd,* 192 F.3d 608 (7th Cir. 1999) (finding "recognized stature"); Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 324–26 (S.D.N.Y. 1994), *aff'd in part and vacated in part*, 71 F.3d 77 (2d Cir. 1995) (determining that a work was of "recognized stature"), and see generally Robinson, *supra* note 14, at 1963–75 and Harry, *supra* note 14, at 198–217 (both analyzing the "recognized stature" provision). On "prejudicial modification," see generally Hawkins, *supra* note 14, at 1450–76 (proposing a rule to determine what

But none of these questions, perhaps, has the same import as the question of how VARA applies—indeed, whether it applies at all—to unfinished works or works-in-progress. This precise question has arisen in some of the most important VARA cases to date, but until early 2010, neither courts nor commentators had even attempted to answer it.

After describing the early cases that left VARA's applicability to works-in-progress an open question, this Part will focus on the recent *Mass MoCA* decision, which attempted to provide an answer to that question. I conclude that the *Mass MoCA* opinion is facially unsupportable because the rule the court articulated to decide the case would apply VARA to numerous kinds of work the law has indisputably placed outside of the Act's protections. The question of whether VARA applies to unfinished works thus effectively remains unanswered. The status quo is logically intolerable: courts must either recognize a disclosure right under VARA and use that right to protect unfinished works, or else deny VARA protection for works-in-progress altogether.

A. Decisions Refusing to Reach the Issue of Unfinished Works

The first VARA case involving unfinished work was *Carter v. Helmsley-Spear, Inc.*[66] Importantly, this is also the VARA case that has received the most scholarly attention.[67] The defendants in *Carter*, the managing agent and the owner of a New York office building, had contracted with the plaintiffs, a collective of sculptors, to install sculptures throughout the building.[68] The plaintiffs began work in 1991 and continued working on the sculptures until April 6, 1994.[69] On April 7, the defendants filed for bankruptcy protection, ordered the plaintiffs to leave the property, and demanded that the art removed from the building.[70] The District Court granted a preliminary injunction essentially barring either party from modifying the

---

constitutes a "prejudicial modification"). Regarding the "works for hire" exception, see *Carter*, 861 F. Supp. 303 at 361–17 and see generally Mastroianni, *supra* note 14, at 438–52 (criticizing the *Carter* Court's application of the exception). On waiver, see generally Sherman, *supra* note 14, at 413–429 (proposing limitations on waiver rights).

[66] *Carter*, 861 F. Supp. at 324–26.

[67] As of this writing, *Carter* had been discussed, often at length, in nearly 100 law review articles.

[68] *Carter*, 861 F. Supp. at 312.

[69] *Id.* at 313.

[70] *Carter*, 71 F.3d at 81.

unfinished work.[71] After a bench trial applying VARA as "an issue of first impression," the court permanently enjoined the defendants from modifying, destroying or removing the plaintiffs' artwork.[72] The opinion nowhere discussed whether VARA applied to the unfinished sculpture. Yet, in order to reach its conclusions regarding *how* VARA applied, the court had to assume VARA *did* apply because the sculpture was unfinished. The Second Circuit reversed on other grounds, holding that the work was "made for hire" and thus excluded from VARA's protections—leaving the question of the Act's applicability to works-in-progress unanswered.[73]

Flack v. Friends of Queen Catherine, Inc. involved a different type of unfinished work.[74] The plaintiff in *Flack* was commissioned to create a statue in Queens, New York, of Queen Catherine of Braganza, the borough's namesake.[75] As part of the project, the artist created a clay model of the final statue.[76] Before the statue was built, a dispute arose and the model was put into storage; while there, it was damaged and the artist sued under VARA.[77] The defendants argued that VARA's language denying protection to "models" excluded the clay model, but the court rejected their argument, concluding instead that the clay model itself met the statutory definition of a "work of visual art" even though it was an intermediate step toward the artist's ultimate goal of producing a bronze statue.[78] Up to that point, this was the "closest any decision ha[d] come to recognizing an unfinished work as protected art."[79] However, the court only extended protection to the *completed*, albeit intermediate, clay model.[80] It did not protect the uncompleted bronze statue, explaining (cryptically, given that the artist had begun work on the statue) that "VARA most decidedly does not

---

[71] Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994), *aff'd in part and vacated in part*, 71 F.3d 77 (2d Cir. 1995).

[72] *Carter*, 861 F. Supp. at 311, 337. Importantly, the court concluded that the work was of "recognized stature," which was necessary to enjoin its destruction under VARA. *Id.* at 324–26.

[73] *Carter*, 71 F.3d at 88.

[74] 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

[75] *Id.* at 528.

[76] *Id.* at 529–30.

[77] *Id.* at 530.

[78] Roberta Rosenthal Kwall & Raymond P. Niro, *How Fine Art Fares Post VARA*, AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, March 29–31, 2006 (citing *Flack*, 139 F. Supp. 2d at 532).

[79] Mass. MoCA Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 257 (D. Mass. 2008).

[80] *Flack*, 139 F. Supp. 2d at 533–34. *See also Mass. MoCA*, 565 F. Supp. 2d at 257 (explaining that in *Flack* "the protection only extended to the *completed* clay model").

cover works that do not yet exist."[81]

A recent VARA case in the District of Massachusetts was the first to even attempt to reach the question of whether VARA applies to unfinished works. *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* was a highly-publicized dispute that sent shock waves throughout the art world.[82] The plaintiff, Christoph Büchel, a well-known contemporary artist, and the defendant, the Massachusetts Museum of Contemporary Art had agreed to work together on a sprawling art installation—about the size of a football field—to be exhibited in the museum's largest gallery space.[83] For most of a year, Mass MoCA assembled the components of Büchel's exhibit, which included a two-story Cape Cod-style cottage, an entire tavern bar, a movie theater interior, a mobile home and numerous sea-cargo containers.[84] But as work progressed, disputes between the parties emerged and became increasingly bitter.[85] Negotiations failed, and Büchel eventually decided to abandon the project altogether.[86] The installation sat unfinished for several months until Mass MoCA decided to attempt to show the partially-finished piece.[87] The museum filed a complaint in federal court, seeking a declaratory judgment that it was entitled to do so.[88] Büchel counterclaimed, contending (among other claims) that the museum had already violated his rights under VARA, and that displaying his work would also violate VARA.[89] The district court disagreed. Holding that "[n]o right of artistic 'attribution' or 'integrity,' as those terms are conceived by VARA, [was] implicated" by the museum's decisions with respect to Büchel's work, the court found in favor of Mass MoCA on all counts.[90]

What is important for our purposes is that the *Mass MoCA* decision, unlike any opinion before it, explicitly attempted to address

---

[81] *Flack*, 139 F. Supp. 2d at 535.

[82] 565 F. Supp. 2d 245 (D. Mass. 2008), *aff'd in part, vacated in part*, No. 08-2199, 2010 WL 297834 (1st Cir. Jan. 27, 2010). *See generally* Laura Flahive Wu, *Massachusetts Museum of Contemporary Art v. Büchel: Construing Artists' Rights in the Context of Institutional Commissions*, 32 COLUM. J.L. & ARTS 151, 153 (2008) (calling the dispute a "much-publicized art world conflict").

[83] *Mass. MoCA*, 565 F. Supp. 2d at 246–47.

[84] *Id.* at 250.

[85] *Id.* at 247.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 248.

whether Büchel's work-in-progress was covered under VARA. Unfortunately, the court's rationale is difficult to follow. On one hand, the court believed VARA's legislative history "hints that Congress did not intend VARA to apply to unfinished works of art."[91] But then the court put forth a hypothetical work-in-progress situation—where Artist B takes Artist A's unfinished sculpture and affixes his own name on it—to which it thought VARA would apply.[92] The court admitted that its analysis left "much that is uncertain," which explains its odd conclusion: in a single paragraph, the court concluded that "[t]o the extent an artist seeks protection for an uncompleted work, a violation of VARA . . . must be demonstrated with special clarity" while observing that "unfinished art may not be covered by VARA at all."[93]

The court's indecision about VARA's applicability had a direct consequence on its holding regarding Büchel's work. The court justified its conclusion that Mass MoCA's display would not have violated Büchel's right of integrity "for the simple reason that no *completed* work of art ever existed on these facts for the museum to distort, mutilate, or modify."[94] At its core, then, this is the district court's logic:

(1) VARA may or may not cover unfinished works;

(2) Büchel's work was unfinished; and

(3) *because the work was unfinished*, it is not covered by VARA.

The logical invalidity of the court's reasoning is evident, because the syllogistic argument violates its own major premise. The court's premise and its conclusion are inconsistent with each other, so at least one must be wrong. The only way for the holding to be justified is if, despite the court's language to the contrary, it was actually deciding the issue of unfinished works and believed that unfinished works should not be protected. Because the court ultimately denied VARA protection, it is true that the court did not need to reach the question of VARA's protection of unfinished works at all; it could simply have assumed VARA applied generally to works-in-progress but determined that it did not apply in that particular case. This is, in fact, how Mass MoCA's counsel structured its argument on appeal.[95] But, having

---

[91] *Id.* at 257.

[92] *Id.* at 258.

[93] *Id.*

[94] *Id.* at 260 (emphasis added).

[95] Brief of Plaintiff-Appellee Massachusetts Museum of Contemporary Art Foundation, Inc. at 36, Massachusetts Museum of Contemporary Art v. Büchel, No. 08-2199 (1st Cir. Apr. 3, 2009) (contending that, because the district court "expressly assumed that VARA applied to the unfinished Planned Installation," the First Circuit could "affirm that grant of summary

purported to refuse to decide whether VARA applied to works-in-progress, the *Mass MoCA* district court could not then deny VARA protection based solely on the unfinished state of Büchel's artwork..

B. *Mass MoCA v. Büchel*: An Answer from the First Circuit

On appeal, the First Circuit immediately recognized the logical errors of the *Mass MoCA* district court. The First Circuit explained that "we cannot assume that VARA applies to unfinished works but instead must decide its applicability," and began its review by addressing this question.[96] Noting that the district court did not "conclude categorically" that VARA does not apply to works-in-progress, the appellate court noted that the definition of a "work of visual art" under VARA "is stated in terms both positive (what it is) and negative (what it is not)."[97] Because VARA does not explicitly exclude unfinished sculptures, the First Circuit explained that "we must determine whether the 'positive' aspect of the definition of 'work of visual art'" includes an unfinished work that would be covered by VARA if it were finished.[98] For the first time, the First Circuit concluded that VARA covers works-in-progress.[99]

i. The First Circuit's Rationale

The First Circuit began by observing, correctly, that "[t]he text of VARA itself does not state when an artistic project becomes a work of visual art subject to its protections." The court noted, though, that VARA is part of the Copyright Act, whose definitions control throughout Title 17 unless otherwise specified.[100] The court then cited Section 101, the Act's definitional section, which states that (1) a "work is 'created' when it is fixed in a copy or phonorecord for the first time" and (2) "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work."[101] According to

---

judgment without determining whether collaborative artworks and unfinished works of visual art are subject to more circumscribed protection under VARA").

[96] Mass. MoCA Found., Inc. v. Büchel, 593 F.3d 38, 52 (1st Cir. 2010).

[97] *Id.* at 50 (*citing Carter*, 71 F.3d at 84) (quotations omitted).

[98] *Id.*

[99] *Id.* at 51.

[100] *Id.* at 50-51 (*citing* 17 U.S.C. § 101).

[101] 17 U.S.C. § 101 (2006).

the court, "[r]eading VARA in accordance with the definitions in section 101, it too must be read to protect unfinished, but 'fixed,' works of art that, if completed, would qualify for protection under the statute" because "[t]o conclude otherwise would be 'contrary to the rule that provisions of a single act should be construed in as harmonious a fashion as possible.'"[102] The court also specified that, although its "conclusion that the statute's plain language extends its coverage to unfinished works makes it unnecessary to delve into VARA's legislative history," it would "nonetheless note that [the court] looked closely at that history, and it fully supports [the court's] reading of the plain language."[103] Accordingly, the court concluded that "VARA protects the moral rights of artists who have 'created' works of art within the meaning of the Copyright Act even if those works are not yet complete."[104]

In the *Mass MoCA* case, then, the First Circuit addressed the question of whether VARA applied to unfinished works head-on by concluding that it did. *Quod erat demonstrandum*, it would seem. Unfortunately, the First Circuit's *Mass MoCA* decision is badly flawed, and thus does nothing to resolve the statutory impasse caused by VARA's vagueness regarding works-in-progress.

ii. Critiques of the Mass MoCA decision

Indeed, the analytical steps the First Circuit employed to apply VARA to unfinished works are logically questionable, if not occasionally outright incorrect. First, the court stakes its determination on the general Copyright Act definition of "creation." But creation has never been the determining factor for copyright protection. In the Copyright Act, "creation" is used to mark the time that protections begin, not whether protections exist. Creation is thus a precondition for, and not an entitlement to, copyright protection. For example, "[c]opyright in a work *created on* or after January 1, 1978, subsists *from its creation* and . . . endures for a term consisting of the life of the author and 70 years after the author's death."[105] VARA, in this respect, is no exception. Consistently with the Copyright Act in general, the only time that VARA references "creation" is in determining *when* its

---

[102] *Mass. MoCA*, 593 F.3d at 52 (*citing* United States v. Maravilla, 907 F.2d 216, 231 (1st Cir. 1990)).

[103] *Id.*

[104] *Id.*

[105] 17 U.S.C. § 302 (2006) (emphasis added). *See also, e.g.*, 17 U.S.C. § 120 (2006) ("Section applicable to any architectural work created on or after Dec. 1, 1990 . . . .").

protections begin.[106]

Moreover, there is no other evidence that "creation" was ever meant to be the touchstone of VARA protection. Nowhere does VARA's legislative history refer to the Copyright Act definition of "creation." The First Circuit evidently believed that that this omission simply meant that VARA was adopting the Copyright Act's definition. But the appellate court apparently neglects an important principle of statutory construction—that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[107] In a different VARA case, the First Circuit itself pointed out that arguing "that VARA's silence on a subject is actually evidence that the statute addresses that subject [is] an odd way to read a statute."[108] More importantly, numerous types of artistic works have been excluded from VARA, both by the statute's language itself and by subsequent judicial decisions, even though those works were "created" within the definition of the Copyright Act—motion pictures, sound recordings and certain kinds of photographs being notable examples.[109] Even the First Circuit's own precedent confirms that a work can be both (1) "created" under the Copyright Act and (2) *not* explicitly excluded by VARA, and yet still not be protected by VARA. In *Phillips v. Pembroke Real Estate, Inc.*, a different First Circuit panel held that VARA does not protect "site-specific art" not because it is not "created," but because neither the statute nor its legislative history mentions any congressional intent to protect such art.[110] Under the *Mass MoCA* rule, works previously excluded under *Phillips* would now be folded back in to VARA. Thus, the *Mass MoCA* rule is both logically untenable and a direct departure from the First Circuit's own precedent. Creation alone cannot be the determining factor for VARA

---

[106] *E.g.*, 17 U.S.C. § 106A(d)(1) (2006) ("With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.").

[107] Russello v. United States, 464 U.S. 16, 23 (1983).

[108] Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 142 (1st Cir. 2006).

[109] *See* 17 U.S.C. § 101 (listing the types of work VARA does and does not cover); H.R. Rep. No. 101-514, at 9 (leaving the definition of "paintings, prints, sculptures or photographic images" to the courts); *Phillips*, 459 F.3d at 143 (concluding that VARA does not protect site-specific art, even though the statute does not mention it explicitly).

[110] *Phillips*, 459 F.3d at 143. *See also id.* ("We have simply concluded, for all of the reasons stated, that the plain language of VARA does not protect site-specific art. If such protection is necessary, Congress should do the job. We cannot do it by rewriting the statute in the guise of statutory interpretation.").

protection. Creation may be necessary, but it is not sufficient.

The *Mass MoCA* opinion also defends its reading on the grounds that "a single act should be construed in as harmonious a fashion as possible."[111] Undoubtedly, this established principle of statutory construction is true. Yet it remains a principle, and so is subject to important exceptions which are fully at issue here. Courts "do not examine statutory language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment."[112] And, as we shall see in subsequent sections, VARA's legislative history reveals that the statute intended to treat unfinished works differently than the rest of the Copyright Act treats such works.[113] Even if we were to accept that the Copyright Act's definition of "creation" establishes substantive protections, courts must construe that definition to give effect to Congress's intention to exclude unfinished works from VARA. Reading Congress's specific intentions out by referring to the Copyright Act's very general definition of "creation" contravenes the statutory construction principle of harmony instead of upholding it. Rather than looking for internal harmony within VARA itself, the court looked to the Copyright Act to divine a rule that, as we will see, runs directly *counter* to VARA's purpose.

Furthermore, the purported "harmony" the First Circuit's *Mass MoCA* opinion finds within VARA itself is simply non-existent. According to the court, VARA's legislative history "fully supports" its reading of the statute.[114] The court gives no justification for this bald assertion, and for good reason—none exists. As the next section of this paper explains, not only does VARA's history not "fully support" application to unfinished works, but the only plausible reading of that history is that it quite clearly does *not* support such a conclusion.[115] This stands in direct contradiction to the *Mass MoCA* court's unsubstantiated assertion.

Lastly, the court appeals to "common sense" to justify its reading, pointing out (correctly) that "[t]he history of art is full of sublime 'unfinished' works of art, such as Leonardo da Vinci's *Statue of a Horse*."[116] However, the court fails to distinguish between these

---

[111] *Mass. MoCA*, 593 F.3d at 51 (*citing Maravilla*, 907 F.2d at 231).

[112] Prospect Med. Group, Inc. v. Northridge Emergency Med. Group, 45 Cal. 4th 497, 506 (2009).

[113] *Infra* Section IV.A.i.

[114] *Mass. MoCA*, 593 F.3d at 51.

[115] *Infra* Section IV.A.i-ii.

[116] *Mass. MoCA*, 593 F.3d at 52 (*quoting* Monica Pa & Christopher J. Robinson, Making

permanently "unfinished" works, which are "considered 'art' even though they capture creative expression short of an artist's ultimate realization of that expression,"[117] and true works-in-progress, such as Mr. Büchel's *Training Ground for Democracy*, for which VARA protection is sought while their assembly continues. As we shall discover, the practical and theoretical distinction between these two categories is crucial.

C. The Status Quo Is Unacceptable

Taken together, the VARA cases described above underscore how urgent it is for courts to reach a rational understanding of how VARA applies to unfinished works. The cases illustrate that works-in-progress issues are likely to continue to constitute some of the most important VARA litigation. *Carter*, *Flack*, and *Mass MoCA* all involved commissioned work, where disputes between the commissioner and the artist are especially likely to arise during the creation phase. At least two cases, *Flack* and *Mass MoCA*, centered on large-scale works assembled by someone other than the artist. This practice is increasingly common among contemporary artists, and it creates even more possibilities for misunderstanding and conflict over artistic vision. Moreover, such large-scale commissioned works have a big sticker price—the more money at stake, the more potential for litigation if the relationship goes bad. Mass MoCA and Christoph Büchel were represented by two of the country's most prominent law firms.[118] Whether VARA applies to unfinished works can be, quite literally, a million-dollar question, yet it has not been satisfactorily answered. As the flaws in the *Mass MoCA* opinions—both from the district court and the circuit court—suggest, this status quo is intolerable.

Courts' confusion may spring from their failure to understand that the concept of "moral rights" actually incorporates several distinct rights.[119] Indeed, trying to protect works-in-progress with the rights

---

Lemons Out of Lemons: Recent Developments in the Visual Artists Rights Act, 3 LANDSLIDE, Jan.-Feb., 2009, at 22, 24).

[117] *Id.* at 52 (*quoting* Wu, *supra* note 86, at 163).

[118] Massachusetts Museum of Contemporary Arts Foundation was represented by Skadden, Arps, Slate, Meagher & Flom, LLP, and Mr. Büchel by Wachtell, Lipton, Rosen & Katz, LLP.

[119] *See, e.g.*, Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 93 (1997) (explaining common ambiguities within VARA and European law "because the specific rights of visual artists are not singled out").

VARA confers raises serious problems in the creative process. If a work is "in progress," by definition it is changing and will continue to change. What does the right of "integrity," for example, mean in this context? The work is constantly being modified, raising the question of which of those modifications become "modifications" for the purposes of VARA. This question is particularly germane in collaborative projects like Christoph Büchel's installation at Mass MoCA. Unless Büchel had given meticulously detailed instructions, how could the museum have determined whether a certain change comported with his artistic vision? The line-drawing problem quickly becomes intractable. The attribution right is similarly inadequate; although it would allow an unsatisfied artist to disclaim an unfinished work, it does not protect him if he wants to complete it.

Another problem attaches to the nature of protection that VARA's rights afford. As a part of the Copyright Act, VARA provides plaintiffs the same remedies available in copyright: they may seek "an injunction, seizure of the infringing works, actual damages and any additional profits of the infringer, or statutory damages and costs and attorney's fees."[120] In practice, plaintiffs in disputes over unfinished work often ask courts for injunctions.[121] But with works-in-progress, granting injunctions rarely makes sense. Consider the example of an artist creating a commissioned work: if that artist's integrity right vests as soon as he begins working on a piece, he now holds all the cards vis-à-vis the commissioner. Like Büchel, he can dawdle—or walk away from the project completely—leaving his client with an incomplete work that is nevertheless protected and with respect to which the client has little recourse. Damages suits are possible in the abstract, but often are unavailable in practice. Young artists may be judgment-proof.[122] Contracts between artists and galleries or museums often "fall some distance short of the theoretical ideal of a complete contract,"[123] so may be difficult to enforce. Historically, museum-artist contracts have unfavorable to artists,[124] and so might raise unconscionablity problems. And museums and artists frequently work together without a contract

---

[120] Pa & Robinson, *supra* note 116, at 22, 26.

[121] *See, e.g.*, *Flack*, 139 F. Supp. 2d at 529; *Carter*, 861 F. Supp. at 310–11; *Mass MoCA*, 565 F. Supp. 2d at 247.

[122] Robert G. Bone, *Secondary Liability for Trade Secret Misappropriation: A Comment*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 529, 537 (2006).

[123] Richard E. Caves, *Contracts Between Art and Commerce*, 17 J. ECON. PERSP. 73, 74 (2003).

[124] *See* Jill I. Prater, *When Museums Act like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause*, 17 LOY. L.A. ENT. L. REV. 97, 98 (1996) (describing unfair contracts attributable to artists' weak bargaining positions).

at all. Such was the case in *Mass MoCA*, where one of the major roadblocks to resolution the absence of any "enforceable written or oral contract defining the parties' relationship."[125] Many cases end like the *Mass MoCA* scenario, with the museum eating its costs.

The courts' troubles applying integrity and attribution rights in these circumstances should not surprise us because the courts are using the wrong tool for the task: it is neither the right of integrity nor the right of attribution, but primarily the right of disclosure that protects works-in-progress, as the next section explains.

D. A Decision Point: Either Disclosure Rights or No Rights at All

Indeed, if the rights of integrity and attribution seem ill-suited to works-in-progress, it is because countries with full moral rights protection do not use either right to protect unfinished works. Rather, that role is served by the right of disclosure—which gives the artist "complete discretion to determine if and when his work is ready to be displayed to the public."[126] This right, which Congress declined to include in VARA, is "the most closely tied to the preliminary stages of an artist's work."[127] It is the right of disclosure that gives the artist control over the creative process.[128] In an early French example, *Rouault c. Consorts Vollard*, Rouault, a painter had contracted to be represented by Vollard, a famous art dealer.[129] Vollard held all of Rouault's paintings in a gallery that Rouault occasionally visited to add brush strokes "here and there" to his unfinished works.[130] When Vollard died, a civil tribunal held that it was Rouault, not Vollard's heirs, who held the rights to "complete, change or destroy" his unfinished paintings because "until final delivery the painter remains master of his work, and may perfect it, modify it, or even leave it

---

[125] Mass. MoCA Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 248 (D. Mass. 2008).

[126] Hansmann & Santilli, *supra* note 20, at 136.

[127] *Mass. MoCA*, 565 F. Supp. 2d at 257. American Copyright protection for unpublished vindicates some types of disclosure interests, but is far more limited than a full-fledged disclosure right. *Supra* note 47.

[128] Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 52 (1998).

[129] Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 375 (1998) (*citing* Judgment of 10 juillet 1946 (Rouault c. Consorts Vollard), Trib. civ. Seine, 1946 Receuil Dalloz [D.A.] 107, *aff'd*, Judgment of 19 mars 1947, Cour d'appel Paris, 1949 Receuil Périodique Sirey [D.P.] 20).

[130] *Id.*

unfinished if he loses all hope of making it worthy of himself."[131] For Rouault, it was his disclosure right, not an integrity or attribution right, that provided him "the exclusive right to possess any rights in an uncompleted work."[132]

Beyond its historical relationship with the creative process, there are three reasons the right of disclosure is the preferred protection for works-in-progress. First, it is much easier for parties in a moral rights dispute to know their status with respect to a disclosure right: so long as the author refuses to release the work, the work cannot be displayed, with no exceptions. In contrast, it can be nearly impossible for a party like Mass MoCA to determine whether showing unfinished art violates an artist's integrity right. Second, establishing the artist as the sole judge of when his work is ready for the public removes some of the tension that can otherwise lead to disputes between the artist and his client. The artist's veto power creates a "time out" period during which both parties can negotiate a solution. The client has little choice but to participate in negotiation discussions because attempting to act alone would clearly violate the artist's disclosure right. But the artist will be encouraged to negotiate too—after all, the veto power provided by the disclosure right is only valuable to an artist who eventually does want to show his work. The artist who resolves a dispute by refusing to *ever* disclose his work achieves a victory with little value. Third, the remedies provided by disclosure rights align incentives better in disputes over incomplete work. Unlike the integrity and attribution rights, which are primarily protected by injunctions, the disclosure right is in essence a modification of normal contract rules, which allow specific performance in certain circumstances.[133] The right "does not

---

[131] *Id.* (*citing* Judgment of 19 mars 1947, Cour d'appel Paris, 1949 Receuil Périodique Sirey [D.P.] 20). For another account of a French dispute, also protecting an unfinished work by the "divulgation" right, see André Françon & Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work,* 9 COLUM.-VLA J.L. & ARTS 381, 387–91 (1985).

[132] Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 153.

[133] While the general rule in American contract law is that specific performance is generally not allowed in personal service contracts, that rule is not absolute. 71 AM. JUR. 2D *Specific Performance* § 184 (2009). Occasionally, courts will allow specific performance of a personal services contract where the services in question are "unique and extraordinary, as in the case of singers, actors, artists, and the like." Kennerley v. Simonds, 247 F. 822, 829 (S.D.N.Y. 1917). A disclosure right, in contrast, is an absolute bar on such a remedy. Moreover, disclosure rights only exist in civil law jurisdictions such as France, which also favor specific performance more than American law. Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 728 (2007). Disclosure rights, consequently, tend to have more impact in

free the artist from the obligation to pay damages for his failure to perform his contract," but instead "effectively amounts to a refusal to grant specific performance on a contract for a work of art,"[134] which solves the holdout problem that would have resulted in *Mass MoCA* had the court applied the right of integrity. Instead of being able to refuse performance free of consequences, as would be the case under an integrity-right protection, a disclosure-right regime imposes a tradeoff on the artist. He may refuse performance, but must pay damages if he does. Incentives are thus more properly allocated between the parties than in an integrity-rights model, where the artist has all the control.

Consequently, courts should recognize that works-in-progress cannot be adequately protected by integrity rights or attribution rights, which were never intended for the task. Cases like *Mass MoCA* demonstrate that courts may not be able to wait for legislative changes to VARA. The law must go in one of two diametrically-opposed directions: either create a disclosure-like right in VARA, or refuse VARA protection for unfinished works categorically. I use "disclosure-like" for the first option, because, if moral rights attach to works-in-progress, even though the primary protection for them would be the disclosure right, we can conceive of some integrity right existing in those works. However, as the next Part demonstrates, a far superior way for courts to resolve the logical inconsistencies they have created is to squarely recognize that VARA, in its current form, does not protect *any* works-in-progress. This paper does not reach the question of what pre-disclosure VARA rights might resemble because it concludes that no such rights should exist.

IV. VARA SHOULD NOT COVER WORKS-IN-PROGRESS

As the previous discussion makes clear, the integrity and attribution rights included in VARA are insufficient for protecting works-in-progress.[135] Courts thus have two viable options with respect to unfinished works: creating a disclosure right or denying VARA protection. The latter is the preferable course for four reasons. It is most consistent with statutory interpretation of the Act, with contemporary art theory, and with economic theory and, moreover,

---

those jurisdictions than they would have in the United States.

[134] Hansmann & Santilli, *supra* note 20, at 136.

[135] *Supra* notes 90–120 and accompanying text.

applying VARA to works-in-progress might actually protect artists' rights less rather than more.

A crucial definitional point must be made at the outset. Some commentators equate questions of VARA's applicability with the question of "when is art . . . art."[136] But that formulation is much too broad. Determining whether something is "art" does not answer the question of whether VARA protects it. As federal courts have explained, "[n]ot every artist has rights under VARA, and not every piece of artwork is protected by such rights."[137] Given that VARA is a limited statute, *how* is it limited? That is what this section attempts to answer. The relevant question here is, if VARA's integrity and attribution rights would protect an artwork once it was completed, should courts create a disclosure right to protect that same artwork while it is a being created? I answer no.

A. Statutory Interpretation Suggests No Protection

Because the text of VARA explicitly addresses neither disclosure rights nor rights regarding works-in-progress, courts might search for such rights in VARA's statutory history. But just like the statute itself, VARA's legislative history is silent both with respect to disclosure rights and with respect to protecting works-in-progress. And the statute's history *is clear* in establishing that VARA's provisions must be interpreted narrowly. Accordingly, the complete absence of any language discussing rights in works-in-progress or disclosure rights implies that VARA does not protect works-in-progress.

i. Legislative history is silent on disclosure rights

VARA contains no disclosure right.[138] Facts surrounding the statute's enactment, moreover, indicate Congress intentionally excluded such rights from the statute. For example, several European countries had included some version of a disclosure right in their moral rights legislation well before VARA was enacted,[139] and legal scholars writing before 1990 routinely included the disclosure right in their

---

[136] Kelly Lynn Anders, *Fight at the Museum*, NAT'L L.J., May 12, 2008, at S1. This same assumption apparently underlies the First Circuit's analysis of *Training Ground for Democracy* in *Mass MoCA*. *See Mass MoCA*, 593 F.3d at 52 ("[M]any works are considered 'art' even though they capture creative expression short of an artist's ultimate realization of that expression.").

[137] Hunter v. Squirrel Hill Assocs., L.P., 413 F. Supp. 2d 517, 519 (E.D. Pa. 2005).

[138] Santilli, *supra* note 119, at 93.

[139] *See* Rigamonti, *supra* note 20, at 359 & n.33–35 (noting that the statutes guaranteeing disclosure rights were enacted in France in 1957, in Germany in 1965 and in Italy in 1941).

definition of moral rights.[140] In fact, Professor Jane C. Ginsburg, whose testimony heavily influenced the congressional committee that drafted VARA, had written a law review article less than five years earlier focusing specifically on the right of disclosure.[141] And in 1980, the World Intellectual Property Organization had included artists' "right to decide on disclosure of the[ir] work" in its definition of "moral rights."[142] Yet it is incorrect to assert, as some authors have, that Congress "expressly" declined to include disclosure rights in VARA.[143] Disclosure rights are mentioned nowhere in VARA's legislative history, either approvingly or negatively.[144] The statute's silence regarding disclosure rights can be construed as a denial of such rights. There is certainly no statutory disclosure right as there is in Europe. Conversely, the statute's silence on such a right can also be read as giving the judiciary the opportunity to answer the question of whether such a right exists. Congress left undefined other aspects of VARA, such as the definition of "works of visual art" or the sufficiency of markings on reproductions, leaving the definitions to the courts.[145] Thus, even though there is no explicit language about disclosure rights in VARA, one can at least argue that Congress opened the door for courts to liberally interpret disclosure-like rights within the statute's moral-rights protection. The statute's silence regarding disclosure does not end the inquiry.

ii. Legislative history is silent on unfinished works

Because VARA's legislative history is silent on full-fledged disclosure rights, the next logical step is looking for a more particular congressional intent to protect unfinished works. Although VARA's legislative history is ambiguous regarding disclosure rights, that history shows much more clearly that that Congress did not intend for VARA to cover unfinished works. VARA's history makes no explicit mention

---

[140] *E.g.*, Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 6 n.31 (1988); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 631 n.143 (1987); David J. Kohs, *Paint Your Wagon-Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1, 11 (1988).

[141] *See* Françon & Ginsburg, *supra* note 138, at 381; H.R. Rep. No. 101-514 (citing Professor Ginsburg's testimony).

[142] WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO GLOSSARY OF THE TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 161 (1980).

[143] *See* Pa & Robinson, *supra* note 116, at 23 (advancing this view).

[144] *See* H.R. REP. NO. 101-514.

[145] *Id.* at 11, 13.

of unfinished works, just like it does not discuss disclosure rights—a point noted by the District Court in *Mass MoCA*.[146] But although the legislative history does not permit any inferences regarding disclosure rights, those same documents "hint[] that Congress did not intend VARA to apply to unfinished works."[147] The central justification for the Act was that "[v]isual artists, such as painters and sculptors, have complained that their works are being mutilated and destroyed, that authorship of their works is being misattributed, and that the American copyright system does not enable them to share in any profits upon resale of their works."[148] Such passages suggest a response to artists' concerns about their completed works rather than about their creative process. Although mutilation and destruction can happen either before or after sale, artists' concerns regarding resale and attribution strongly suggest a completed work being resold, or a work out of their possession being misattributed. Indeed, the House Judiciary Committee's report discusses protections for works that artists "have created," in the present perfect tense, without any discussion of works artists "are creating."[149]

iii. Legislative history requires a narrow interpretation of VARA

Without anything more than VARA's silence regarding unfinished works, however, it would be difficult to categorically conclude that Congress did not intend to protect them. But that conclusion is demanded by another aspect of VARA's legislative history. Many interpretational aspects of the Act are difficult, but one thing is clear: Congress intended VARA to be a very limited statute. A "crucial difference between the VARA and Continental European moral rights legislation is the exceedingly narrow scope of the moral rights regime established by the VARA."[150] Numerous commentators have noted this difference, and even one of the cosponsors of the bill that became VARA stated that "I would like to stress that we have gone to *extreme lengths* to *very narrowly define* the works of art that will be covered" and that "this legislation covers only a *very select* group of artists."[151]

---

[146] *See* Mass. MoCA Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 257 (D. Mass. 2008). (commenting that "VARA itself makes no mention of unfinished work," nor does its legislative history).

[147] *Id.* at 257.

[148] H.R. REP. NO. 101-514, at 9.

[149] *Id.* at 13–14.

[150] Rigamonti, *supra* note 20, at 407.

[151] H.R. REP. NO. 101-514, at 10-11 (emphasis added). For commentary on VARA's narrow scope, see, e.g., Pa & Robinson, *supra* note 123, at 22; M.J. Williams, *Framing Art*

In VARA, "Congress chose to protect . . . only a narrow subset of the many different forms and types of what can be called art."[152] VARA has not only been interpreted narrowly regarding the types of works it protects, but also regarding the extent of the rights that it grants. The United States Supreme Court has said that the right of attribution is "carefully limited and focused" and that VARA "encompasses aspects of the moral rights guaranteed by Article 6*bis* of the Berne Convention, 'but effectively gives these rights a narrow subject matter and scope.'"[153] Other decisions have explained that "the definitions in VARA are to be construed narrowly."[154]

None of these judicial and congressional pronouncements explicitly requires a narrow view of works-in-progress. Rather, they require a narrow interpretation of VARA's provisions as a whole. Consequently, when courts are determining whether to grant a VARA rights to a claimant, they should be wary of expanding the statute's language to guarantee rights or cover subject matter outside of VARA's clear language.[155] In the nearly twenty years since VARA was enacted, only one artist has successfully brought a VARA case.[156] Apparently, this is what Congress intended. The application to our inquiry is evident. Without the clear mandate to interpret VARA's legislative history narrowly, courts could read it broadly enough to grant a disclosure right. But because the history must be read narrowly, and neither creates a disclosure right nor explicitly protects works-in-progress, such protections cannot be inferred.

B. Contemporary Art Theory Suggests No Protection

VARA's legislative history indicates that works-in-progress should

---

Vandalism, 74 BROOK. L. REV. 581, 584 n.19 (2009); Wu, *supra* note 86, at 157.

[152] Pollara v. Seymour, 344 F.3d 265, 271 (2nd Cir. 2003).

[153] *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34 (2003) (discussing the right of attribution) *and* Quality King Distributors, Inc. v. L'anza Research Intern., Inc., 523 U.S. 135, 149 n.21 (1998) (discussing VARA's scope generally).

[154] Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 99 (D. Mass. 2003).

[155] *Cf.* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006) (observing that "the plain language of VARA does not protect site-specific art," and concluding that "[w]e cannot do it by rewriting the statute in the guise of statutory interpretation").

[156] Stuart, *supra* note 14, at 669 (citing Martin v. City of Indianapolis, 192 F.3d 608 (1999)). *See also* RayMing Chang, *The Visual Artists Rights Act of 1990: A Follow-Up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 141 (2005) ("An artist prevailed in only one [VARA] case."). There have, however, been several reported out-of-court settlements involving VARA. *See* Chang, *supra*, at 141–42. But still, moral-rights advocates have been disappointed by VARA's overall lack of success. *E.g.*, Pa & Robinson, *supra* note 123, at 22 ("VARA's success, however, has been largely illusory.").

not be protected. But it is not alone in pointing toward that conclusion. Contemporary art theory, which one would perhaps expect to be most supportive of artists' rights, instead supports the same understanding of American moral rights. VARA's drafters were not the only ones hesitant to advocate applying the Act broadly. The art world, too, is growing increasingly uneasy with moral rights generally and with applying them to unfinished works in particular. The art world's opinion matters because VARA specifically references it. To determine whether a particular work falls within VARA's scope, courts must use "generally accepted standards of the artistic community."[157] And the "artistic community" is rapidly moving away from the concept of moral rights altogether.

Although moral rights were not included in the Berne Convention until 1928, "the tradition of protecting moral rights emerged during the Renaissance and formalized in nineteenth century case law."[158] Those early European cases were premised on a conception of the "artist" that was rooted in Hegel's philosophy of "an intimate bond . . . [existing] between a literary or artistic work and its author's personality."[159] According to that view, the artist has "a creative persona that is injected into the work of art at creation and which remains a part of his work" even after he relinquishes it to others.[160] These traditional moral

---

[157] H.R. Rep. No. 101-514, at 10–11.

[158] Hawkins, *supra* note 14, at 1443 (discussing the emergence of moral rights). *See also supra* note 17 and accompanying text (discussing the evolution of the Berne Convention); Liemer, *supra* note 56, at 41-42 (chronicling the rise of moral rights).

[159] Chintan Amin, Note, *Keep Your Filthy Hands Off My Painting! The Visual Artists Rights Act of 1990 and the Fifth Amendment Takings Clause*, 10 FLA. J. INT'L L. 315, 318 (1995) (quoting Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 466 (1968)). *See also* Kristina Mucinskas, Note, *Moral Rights and Digital Art: Revitalizing the Visual Artists' Rights Act?*, 2005 U. ILL. J.L. TECH. & POL'Y 291, 299 ("[M]oral rights defend the bond between the artist and the work, a bond that endures after sale."). According to Hegel, "experience without art is barbaric." JACK KAMINSKY, HEGEL ON ART: AN INTERPRETATION OF HEGEL'S AESTHETICS 29 (1st ed. 1962). Hegel viewed the artist's investment in his work as the very definition of beauty: "[h]e is able to bring sounds, words, or colors together in such a unique fashion that a certain highly organized and original relationship makes its appearance to the artist and the observer." *Id.* at 30. An interesting nuance of Hegel's philosophy is that his view of the artist was justified by his view of property, and not the other way around. His justification for protecting property was premised on "the need for human beings to define themselves through control of material goods." Paul J. Heald, *The Rhetoric of Biopiracy*, 11 CARDOZO J. INT'L & COMP. L. 519, 528 (2003). According to Hegel, "[i]n order to realize our 'personhood,' we must be able to extend ourselves into the world around us" by exercising control over objects. *Id.* Some authors have argued that the Berne Convention's "recognition of broad moral rights for artists is . . . due to the influence of Hegel" because the remedies it grants are justified in Hegel—"the work represents an extension of the artist's personality into the world and she may want to maintain some control over it." *Id.*

[160] Robinson, *supra* note 14, at 1939.

rights have been described as "rights which protect the personal interests of all authors, [and] safeguard the dignity, self-worth, and autonomy of the author."[161] This view of moral rights protected "the superior interests of human genius."[162] The traditional concept of "moral rights," the so-called "moral rights orthodoxy," then, is very much a nineteenth-century, Romantic invention.[163]

i. A new theory of art

But that theory has a problem: "the conception of 'art' embedded in moral rights law has become obsolete."[164] At the time they were created, moral rights mirrored the prevailing view of the process of artistic creation. They accorded with the "Romantic emphasis on the original creation of the lonely genius" who was so deeply emotionally invested in the creation of his art as to make his *chef-d'oeuvre* indistinguishable from himself.[165] That view, however, is nearly 150 years old. In the meantime, art theory has undergone a total revolution.

The mid-1800s, when French courts were developing the moral rights theory,[166] was the era of Parisian salons, yearly events at which artists would present a few of their works for public and critical approval. Most of these pieces were highly detailed paintings, often of enormous scale, produced over hundreds of hours by a single artist.[167] But norms began to change in 1863, when Edouard Manet first showed his *Déjeuner sur l'herbe* at the Salon des Refusés.[168] Manet's work ushered in the era of Impressionism, where art was created much more

---

[161] Kwall, *supra* note 6, at 5.

[162] Adler, *supra* note 7, at 270 (quoting John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1029 (1976)).

[163] *See* Rigamonti, *supra* note 20, at 355–56 (describing the "moral rights orthodoxy").

[164] Adler, *supra* note 7, at 265.

[165] Robinson, *supra* note 14, at 1938.

[166] *See* Elizabeth Dillinger, Note, *Mutilating Picasso: The Case for Amending the Visual Artists Rights Act to Provide Protection of Moral Rights After Death*, 75 UMKC L. REV. 897, 900–01 (2007) (chronicling this evolution).

[167] *See* Patricia Leighten, *Réveil Anarchiste: Salon Painting, Political Satire, Modernist Art*, MODERNISM/MODERNITY, Apr. 1995, at 17, 17 (describing "large-scale salon paintings"); Jason Rosenfeld, *The Salon and the Royal Academy*, *in* METROPOLITAN MUSEUM OF ART, HEILBRUNN TIMELINE OF ART HISTORY (2004), http://www.metmuseum.org/toah/hd/sara/hd_sara.htm (describing the rise and fall of the national salons as the institutions that "had a virtual monopoly on public taste and official patronage"). On the rise of the Salon generally, see HARRISON C. WHITE AND CYNTHIA A. WHITE, CANVASES AND CAREERS: INSTITUTIONAL CHANGE IN THE FRENCH PAINTING WORLD 27–33 (1992).

[168] H. H. ARNASON, HISTORY OF MODERN ART: PAINTING, SCULPTURE, ARCHITECTURE 13 (1968).

extemporaneously, and with much less emphasis on visual realism.[169] With impressionism's departure from a strict adherence to visual replication, in turn, came new generations of artists more and more divorced from the need to copy reality.[170]

Yet from the Impressionists through Picasso, as the nature of art changed, the process of creating art did not. All of this "new" art could still be characterized as the product of "lone geniuses," pouring their time and creative effort into their works. In other words, moral rights still made sense in the early twentieth century. However, these "modern" artists had opened the door for a new form of art which would completely challenge the very idea of moral rights. They had been "groping their way toward a goal . . . an art of non-representation in which the illusion of nature was completely eliminated."[171] Although the first "moderns" remained essentially wed to the representational forms, their successors completed the transition to art that looked nothing like the art of the salons. Chief among these revolutionaries was Marcel Duchamp.[172] Duchamp's early work was influenced by impressionism and cubism.[173] But between 1912 and 1917, he focused on employing "ready-made" objects such as bicycle wheels and furniture, which culminated with his sculpture *Fountain*, a porcelain urinal whose only adornment was the mysterious signature "R. Mutt."[174] *Fountain* has been called the single most important piece of modern art; with it, the separation between artist and creative process was completed.[175]

---

[169] *See, e.g.*, PAUL JOHNSON, ART: A NEW HISTORY 584–587 (2003) (comparing the enormous work of Gustave Courbet, an "academic" painter, with Manet's new and much more spontaneous painting techniques); Arnason, *supra* note 175, at 21 (describing how Impressionists sought realism "in the eye of the spectator" rather than in the "objective nature of the natural phenomena" themselves).

[170] In the late 1800s, for example, the work of Cézanne and van Gogh incorporated a level of abstraction that would have been inconceivable two decades earlier. *See generally* JOHNSON, *supra* note 169, at 603–07 (elaborating on the revolutionary nature and surprising contemporaneous commercial success of both artists). Matisse's Fauvisim and Picasso's Cubism are examples of movement toward even further abstraction.

[171] ARNASON, *supra* note 168, at 209.

[172] *Id.* at 209 ("Among the first artists to desert cubism in favor of a new approach . . . was Marcel Duchamp.").

[173] *Id.* at 210.

[174] *Id.* at 210, 301–305.

[175] *See* Nan Rosenthal, Marcel Duchamp (1887–1968), in Metropolitan Museum of Art, Heilbrunn Timeline of Art History (2004), http://www.metmuseum.org/toah/hd/duch/hd_duch.htm ("[Duchamp's] most striking, iconoclastic gesture, the readymade, is arguably the century's most influential development on artists' creative process."); Barbara Rose, *Behind Duchamp's Door*, WALL ST. J., Sept. 23, 2009, at D7 (reporting a survey of British art experts that identified *Fountain* as "the most

By redefining the creative process, the work of Duchamp and of his contemporaries calls moral rights into question. Further, it does so in a way that is important for this inquiry. Duchamp did not eliminate the idea of art completely. His works are valued as seminal pieces in the field of contemporary art.[176] Rather, Duchamp's crucial insight was into how art is produced. He divorced the conception of "art" from the creative process. After Duchamp, an object is not art only if it took skill, time and emotional investment to create. Instead, it is art because the artist declares it to be so. This is how a readymade urinal can become not only art, but very important art.

It is this distinction that explains the difference between moral rights protection for completed work and works-in-progress. One does not have to reject the idea of moral rights entirely to see how they can apply differently to work-in-progress in a post-Duchamp art world. Just as in 1850, a "work of art" is ultimately produced. But, unlike in 1850, what is required to produce it has changed. Instead of the "creative genius" toiling alone for years, art can become art, in an instant, by being designated as such.

> It once seemed obvious that there was a distinction between art and other objects. But that is no longer the case. Indeed, . . . the incoherence of the category of "art" has become the subject of contemporary art. The lack of distinction between art and other objects is now a central preoccupation in contemporary art.[177]

In this respect, Christoph Büchel's piece in *Mass MoCA* is illustrative. Recall that his piece, *Training Ground for Democracy*, was a giant assembly of ready-mades, including sea containers, a house and a mobile home. As a contemporaneous article in *Artforum* explained, with respect to ready-made installation art in particular, "where there is a definite whole in mind," it makes "little sense" to protect "each phase of the assembly process, much less each object used in the installation."[178] With the disappearance of the artist-as-craftsman and the emergence of the artist-as-assembler, protecting the finished product may make sense, but protecting the process no longer does.

---

influential modern art work").

[176] According to some art philosophers, contemporary art is "defined by Duchamp as its generative thinker." Adler, *supra* note 7, at 285 (quoting ARTHUR DANTO, After the End of Art 85 (1997)).

[177] *Id.* at 295.

[178] Virginia Rutledge, *Institutional Critique*, ARTFORUM, Mar. 1, 2008, at 151.

ii. A new theory of the artist

Just as the understanding of "art" has changed, so has the understanding of the "artist," again in ways suggesting unfinished works should not be protected. The traditional view of moral rights presupposes a special, bilateral relationship between the artist and artwork. Thus, the artwork is protected because it is the special product of the artist's creativity, and the artist is protected because this relationship "makes [the artist] unusually vulnerable to certain personal harms."[179] In the act of creation, an artist "produces something that allows others a glimpse into her individual human consciousness," taking on "a very personal risk" by "showing others what is going on in her head . . . . Because the artist infuses her work with her own personality, a harm to the work or her relationship to the work may well harm the artist herself."[180]

Consequently, moral rights reflect a highly individualistic view of the artist.[181] But, just like the definition of "art" underlying orthodox moral rights protection, this individualistic notion of authorship has largely been abandoned in critical circles. The change occurred later. Although Duchamp's artwork looked nothing like the work of his predecessors, it was valued for the same reason—because, through his bold iconoclasm, he proved himself worthy of the title of "artist." In other words, he too was a "creative genius."[182] But by the middle of the century, artists and philosophers were challenging the elevation of the artist in the same manner as Duchamp had questioned the elevation of art.

With the artist-as-genius notion being a thoroughly modern view, it should be no surprise that postmodern thinkers sharply criticized its most basic assumptions. By the 1970s, philosophers like Roland Barthes and Michel Foucault were advancing a new idea—that the concept of "authorship" entails an "exclusive focus on the individual Romantic author" and is therefore open to question.[183] The postmodern

---

[179] Liemer, *supra* note 52, at 43.

[180] *Id.*

[181] Stern, *supra* note 14, at 853.

[182] *See* James Roy MacBean, *Godard and the Dziga Vertov Group: Film and Dialectics,* FILM Q., Autumn 1972, at 30, 32 ("Duchamp, though seeking to destroy the cult of the artist as creative genius, merely shifted our attention from execution to *selection* of a work of art.").

[183] Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got it Wrong*, 2007 UTAH L. REV. 741, 741 (*citing* Roland Barthes, *The Death of the Author*, *in* BARTHES: IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., 1977); Michel Foucault, *What Is An Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979)).

understanding of authorship they proposed is starkly different, and views authorship essentially "as the product of individual or collective borrowing from the social fabric rather than the essence of any single person's creativity" or creative genius.[184] Postmodernists argue that no individual work is the product of a unitary source of inspiration.[185] Though "artworks very well may be expressive," they are not necessarily "personally expressive."[186] As a result, postmodernism largely downplays the role of the artist altogether by making "the wall of separation between art and life . . . permeable in both directions," a defining feature of the postmodern ethos being "the aestheticization of everyday life."[187] With the arrival of postmodernism, the artist fades from the scene, and the last vestiges of the "creative genius" theory are gone.[188]

Postmodernist theory can be used to question all of moral rights law and indeed all of copyright law.[189] But one need not go so far. Confining our analysis to unfinished works, postmodern theory essentially eliminates the traditional justification for artists' moral rights. If we believe that art is such a unique product, so individual to the author, that harming it somehow harms the author, we have a basis for protecting a work from inception. After all, according to that view, it is during the creative process that artist and work are most inextricably linked. But that is not the direction of modern art theory; instead, many authors see something "problematic" in the "idea that the bond between an artist and his work is different than that between any other craftsman and his product."[190] In fact, some of the twentieth-century's most famous artists have had essentially no link, much less an "emotional" or "inextricable" one with their work during creation. Andy Warhol's "pop art," for example, purposely rejected the author-centric idea of art.[191] Instead of "baring his soul on canvas," he had

---

[184] *Id.* at 741.

[185] Kwall, *supra* note 161, at 21.

[186] Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1068 (2008).

[187] PETER J. LEITHART, SOLOMON AMONG THE POSTMODERNS 48 (2008).

[188] *See* Barthes, *supra* note 194, at 148 ("[A] text's unity lies not in its origin but in its destination. . . . [T]he birth of the reader must be at the cost of the death of the Author.").

[189] *See* Kwall, *supra* note 168, at 21 ("[M]any commentators have criticized copyright law as a whole for its implicit reliance on the Romantic view of authorship.").

[190] Adler, *supra* note 7, at 295 (internal quotation marks omitted).

[191] *Id.* at 296. For a direct connection between Barthes's postmodernist theory and Warhol's denial of the concept of personal authorship, see generally Nicholas de Villiers, *Unseen Warhol/Seeing Barthes*, PARAGRAPH, Nov. 2005, at 21. According to de Villiers,

assistants create mass-produced prints "that never even touched the romantic hand of the artist."[192] Sol LeWitt's art, too, embodied the idea that the hand of the artist in a work can be nothing more than "his/her signature"—much of it was actually created by his students and apprentices.[193] In our time, Damien Hirst has become "the richest living artist in all of history" by explicitly renouncing originality.[194] His famous series of "spot paintings," for example, consists of more than 300 oil paintings, all done entirely by assistants.[195] All Hirst does is affix his name.[196] In other words, many contemporary artists' only act of "authorship" is signing the work, once it is complete. To the extent the idea of the "author" is undermined, so too we must discount that justification for moral rights.

Most academic writers discussing VARA have missed this point, apparently assuming that VARA can still be explained using the same conception of moral rights as the nineteenth-century European laws.[197] However, the legislators who created VARA were not behind the times—for once, as the statute's history clearly shows. When Congress enacted VARA, it did not refer to the "orthodox" art-theory view of the author in adopting VARA. The Congressional report is bereft of any discussion of the "artist-genius," of "pouring" oneself into an artwork, or of the "intimate bond" between the creator and the creation. Rather, Congress's view of the matter is far more pragmatic. "The theory of moral rights," Congress says, "is that they result in a

---

"Barthes's assertion that there is nothing behind his mask, 'personne' behind his 'personae,' is echoed by Warhol in his famous aphorism . . . 'If you want to know all about Andy Warhol, just look at the surface of my paintings and films and me, and there I am. There's nothing behind it.'" *Id.* at 23.

[192] Adler, *supra* note 7, at 296.

[193] EDGAR ALLEN BEEM, WHOSE DRAWINGS ARE THEY ANYWAY?: SOL LEWITT WALL DRAWINGS AT MASSMOCA, YANKEE MAGAZINE (2009), http://www.yankeemagazine.com/blogs/art/lewitt.

[194] *See* Andrew Graham-Dixon, *Artworld Insanity*, SUNDAY TELEGRAPH (U.K.), Sept. 21, 2008 (describing Hirst's personal fortune).

[195] Celia Lury, *'Contemplating a Self-portrait as a Pharmacist': A Trade Mark Style of Doing Art and Science*, 22 THEORY, CULTURE & SOC'Y, 93, 96 (2005). Hirst gives his assistants very general directives, such as to make the spots and the gaps between them the same size, and to paint using household gloss. He then "tells his assistants what size he wants the paintings to be and they make them," leaving the assistants full discretion regarding the dots' colors and sizes. *Id.* at 95.

[196] Note that this distance from his art is Hirst's intent: "Hirst is not so much concerned with being an origin or even with originality, as with the use of a name to mark an organization of relations between things." *Id.*

[197] *See, e.g.*, Raphael Winick, *Intellectual Property, Defamation and the Digital Alteration of Visual Images*, 21 COLUM.-VLA J.L. & ARTS 143, 168 (1997) (connecting Berne and VARA).

climate of artistic worth and honor that encourages the author in the arduous act of creation" and are thus "consistent with the purpose behind the copyright laws."[198] This utilitarian understanding is a far cry from the lofty, artist-centered justifications of prior generations.

Congress permitted courts to interpret VARA in accordance with the standards of the art community. Those standards, however, are markedly—and increasingly—antagonistic to moral rights in general and moral rights for unfinished works in particular. Rather than reflecting the consensus of the art community, "moral rights are premised on the precise conception of 'art' that artists have been rebelling against for the last forty years."[199] If protections for works-in-progress are to be found in VARA, they must be supported by some other theory. With the dramatic redefinition of both "art" and the "artist," the "artists' rights" theory of moral rights is simply no longer viable.

C. Contemporary Economic Theory Suggests No Protection

It may be, then, that much of the confusion regarding VARA's application springs from the fact that, from the start, American moral rights laws may have had a different justification than analogous laws in Europe. This view, in essence, is shared by a small but growing number of commentators, who see within VARA's idiosyncrasies not some sort of congressional failure, but rather an effort to protect a set of interests altogether different from the ones that "moral rights" traditionally vindicate. Instead of protection for the "Romantic Artiste," these commentators see VARA as a purely economic statute. There are problems with this view, and many authors—this one included—consider economics alone to be insufficient to justify moral rights statutes like VARA. But, insofar as an economic framework is the only plausible theoretical alternative to traditional aesthetically-based moral-rights theory as a justification for VARA, and accepting this paper's argument that the moral rights orthodoxy that may partially justify protecting completed artworks does not justify protecting

---

[198] H.R. Rep. No. 101-514, at 6 ("We should always remember that the visual arts covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest."); *id.* at 7 ("Witnesses at the Subcommittee's hearings were united in their support for H.R. 2690 because of its benefit not only to individual visual artists, but also to the American culture to which these artists make such a significant contribution."); *id* at 10 ("Because of its limited nature, H.R. 2690 protects the legitimate interests of visual artists without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system.").

[199] Adler, *supra* note 7, at 265.

works-in-progress, economic theory is the *only* remaining justification for extending VARA to unfinished works. Yet the economic justification, which makes sense for post-creation integrity and attribution rights, fails completely when applied to the creative process. The logical outcome of this Section's analysis, therefore, is the conclusion that VARA does not protect unfinished works.

i. VARA can be justified economically

Perhaps the most confused area in the scholarly treatment of American moral rights is the economic nature of VARA's protection. Many authors consider moral rights to be rights that can only be justified in nonpecuniary terms, and thus see them as being wholly distinct from economic interests. In this view, "artists have certain rights in their creations, *independent of any economic rights*."[200] Artists are frequently described as possessing two types of rights: "economic" rights and "moral rights," which "operate independently of each other."[201] Commentators who hold this view apparently derive it mainly from the language of the Berne Convention's Article 6*bis*, which grants authors moral rights "[i]ndependently of the author's economic rights, and even after transfer of said rights," which to some authors would imply that moral rights are, *by definition*, any non-economic legal rights authors have to their work. But a close reading of Berne reveals that this common definition of moral rights is misguided, because it confuses justification with definition. Just because moral rights are partly *justified* on non-economic terms does not mean they must be *defined* as such. Instead, in addition to nonpecuniary protection, moral rights also protect very concrete economic rights.

It is probably true that giving artists moral rights protection cannot be justified solely on an economic basis. Instead, "moral rights are a reflection of personhood and the value of moral rights lies in the protection of the artist's reputation, so a purely economic analysis falls short of appreciating the intrinsic value of art."[202] A seminal study by Professors Landes and Posner found that some types of moral rights

---

[200] Mastroianni, *supra* note 14, at 419 (emphasis added). *See also* Chang, *supra* note 163, at 131 (defining moral rights as "non-economic rights" that "are rights that extend beyond the economic interests of an author"); Sherman, *supra* note 14, at 379 (summarizing moral rights as "as distinct from an author's economic rights in his or her work").

[201] Applebaum, *supra* note 4, at 186. *See also* Liemer, *supra* note 52, at 44 ("[M]ost countries that recognize moral rights also provide a separate set of rights . . . to protect economic interests.").

[202] Thurston, *supra* note 14, at 718.

protection might actually do more harm than good to artists, and were thus not economically efficient.[203] According to Professors Hansmann and Santilli, there is "some truth" in the view that moral rights are independent of economic rights.[204] Those very same studies, though, conclude that, even though moral rights protect some non-economic benefits, they protect economic interests as well.

For example, the integrity right is defined in terms of protecting against actions "prejudicial to the artist's honor or reputation."[205] This definition suggests that the right serves "to protect not just artists' personal feelings about their creations but rather (or in addition) their reputational interests," which can have "a strongly pecuniary character."[206] Alteration of works that an artist has already sold can damage that artist's reputation and lower the sales price of future works.[207] For the same reason, integrity rights protect the economic interest of future owners of that artist's work, by preserving its value in their hands.[208] Even the public at large benefits. For instance, future buyers of a work can be assured that the work remains as the author intended it, and can avoid being "misled" about the work's fidelity to the artist's vision.[209] Attribution rights have similar justifications:

> [T]he affirmative right of attribution . . . derives much of its importance from the fact that each work by a given artist gains value from its association with the artist's other work. To remove the artist's name from one of her works is to remove the artist's oeuvre as a whole and, thus, to diminish the value of the other works that make up that oeuvre. Thus, as a general rule, not only the artist herself, but also the other owners of the artist's work and perhaps the public at large, have an interest in assuring that the artist's name continue to be associated with each of her works.[210]

Hansmann and Santilli view moral rights as balancing interests along two dimensions. Moral rights serve to protect both pecuniary

---

[203] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW, 276 (2003) ("Economics suggests that integrity rights, though not attribution rights, may do more harm than good and on balance may actually discourage artistic creation."). Landes and Posner explain that "the destruction or mutilation of a single work will reduce the effective supply of the artist's works and by doing so increase rather than reduce the value of the remaining works plus any works that he creates in the future." *Id.* at 280.

[204] Hansmann & Santilli, *supra* note 20, at 102.

[205] Hansmann & Santilli, *supra* note 20, at 104 (internal quotation marks omitted).

[206] *Id.* at 104.

[207] *Id.* at 104.

[208] *Id.* at 105.

[209] *Id.* at 107.

[210] *Id.* at 132.

and non-pecuniary interests. Further, they balance these dual interests among multiple groups: the artist of a work, subsequent purchasers of that work, and the public at large.[211] Most important for our analysis, Hansmann and Santilli's formulation was the very same justification used by Congress when it enacted VARA. According to the House Judiciary Committee's report, the "moral rights" granted by VARA

> promote the interests of *artists and public alike*. They benefit artists by assuring their rights to recognition for the works they have created and by protecting the works themselves against destruction or mutilation. These safeguards may enhance the creative environment in which artists labor. *Equally important, these safeguards enhance our cultural heritage*. The attribution right not only affords basic fairness to artists, it promotes the public interest by increasing available information concerning artworks and their provenance, and by helping ensure that that information is accurate. The integrity right helps preserve artworks intact for all of us to enjoy.[212]

The committee's commentary continues by noting that, while VARA rights are separate from the economic rights the Copyright Act grants in other sections, VARA rights implicate "important economic consequences."[213] Congress recognizes that moral rights protect both non-economic values, such as "cultural heritage" and "basic fairness to artists," and traditional economic interests such as accurate information for purchasers, artists' right to recognition, and increasing artists' creative productivity.[214] Accordingly, in the view both of academics and Congress, VARA's purpose is to protect two interests: some idea of "moral rights" beyond traditional economic rights, and also a large set of traditional economic rights. Granting rights to multiple stakeholders helps make the moral rights regime more efficient by roughly aligning all parties' economic incentives.[215] But this very

---

[211] This observation prompts an interesting parallel between the economics of moral rights and its philosophy: shifting the law's focus from a work's author to those who enjoy it is also consistent with the postmodern shift from Author to Reader. *See supra* Part IV.B.ii (explaining the postmodern theory of authorship); Barthes, *supra* note 183, at 194 (connecting the "death of the Author" to the "birth of the reader").

[212] H.R. REP. NO. 101-514, at 13 (emphasis added and ellipsis removed).

[213] H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6928.

[214] These same economic incentives that Congress mentions underlie copyright law generally. *See, e.g.*, WIPO Copyright Treaty, Preamble, Dec. 20, 1996, *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf (stating the signatories' emphasis on "the outstanding significance of copyright protection as an incentive for literary and artistic creation," and their recognition of "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information").

[215] *See* Hansmann & Santilli, *supra* note 20, at 103; Rikki Sapolich, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art,* 47 IDEA 453, 482 (2007) ("[A]lthough VARA purports to grant moral rights, its provision

understanding of moral rights as an optimal allocation of incentives that explains why completed works should be protected also explains why works-in-progress should not be protected.

ii. Protection for unfinished works cannot be justified economically

As a threshold matter, the economic justifications described above are inadequate to justify protecting works-in-progress because those arguments assumed a completed work. For example, integrity rights are protected because alteration of works *that have already been sold* can lower the purchase price of future works, hurting artist and purchaser (who achieves a lower price on resale) alike. But altering an unsold work has a different consequence: because the work has not been released to the public, the alteration has not been revealed to the public and thus has no impact on the work's value.[216] The author retains control of the work, can rectify any changes that do not accord with his vision, and can release the work to the public with no trace of a change that is "prejudicial to his honor or reputation."[217]

But the argument goes even further. The very economic argument that justifies protecting finished works—that doing so satisfies the worthwhile economic interests of author, purchasers and public—militates *against* protecting works-in-progress. Underlying the argument that moral rights benefit all parties is the assumption that all parties are in a position to benefit from the work, i.e., that they have

---

of moral rights are [sic] centered on protecting economic interests.").

[216] The more difficult situation arises in cases like *Mass. MoCA*, where the artist does not have complete control over his in-progress work. In such a scenario, an unauthorized modification may be revealed to the public, if the public has access to the unfinished work. Still, the fact that the work remains in-progress means that the artist has some control over it, so the artist will often be able to undo prejudicial alterations. The artist can also vindicate his rights with a tort or breach-of-contract suit. *Infra* Section IV.D.i. This kind of scenario, however, is not the norm, and is generally limited to large-scale installations that are being erected on-site, such as Christoph Büchel's work in *Mass. MoCA* or the lobby sculpture in *Carter*. Mass. MoCA Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 246-47 (D. Mass. 2008); *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 311 (S.D.N.Y. 1994).

[217] It is germane to this discussion to note that scholars have provided markedly less of an economic justification for disclosure rights—the rights traditionally associated with incomplete work—than for integrity or attribution rights. One notes, for example, that "the right of disclosure serves the artist's interest in protecting her persona and reputation" but "[u]nlike the rights of integrity and attribution, however, it does not also serve as an economic incentive." Sapolich, *supra* note 227, at 488. Disclosure rights, where they are recognized, seem to primarily protect non-economic "reputational" interests by preventing disclosure of "less refined" versions of a work. John T. Cross, *Reconciling the "Moral Rights" of Authors with the First Amendment Right of Free Speech*, 1 AKRON INTELL. PROP. J. 185, 194–95 (2007).

access to the work in its final form. But, in order for purchasers and public to enjoy these benefits, the work must be completed and released to the public. Thus, in order to maximize the total economic utility of a work, moral rights law needs to provide incentives for completing that work. Protecting works-in-progress, however, accomplishes the exact opposite goal by creating holdout incentives.

Consider the consequences of granting VARA protection during the creation phase. During that phase, the benefits of moral rights would be concentrated almost entirely with the author. A disclosure right, and particularly an integrity right, would give the author power *in the present*. He could wield them to justify reneging on a contract, substantially modifying it, or renegotiating it for a higher sum. Most importantly, his power would decrease dramatically once he finished and delivered his work. After delivery, the economic benefits of moral rights protections become spread more evenly among author, purchaser and public. The author can no longer use VARA for leverage in the same way. He can use it to preserve his reputation, but not necessarily to increase his economic rent. Consequently, the author may want to delay finishing the work as long as possible, limited only by the non-VARA economic advantages of completion (e.g., royalties and payment for the delivery). Until the marginal cost of forgoing those benefits is greater than the marginal return of delaying—a return only possible because of VARA protections—the artist will continue to stall. Accordingly, VARA protection creates entirely misaligned incentives: the author may want to delay completion, at least for a time, in order to maximize his bargaining power, while the public and purchaser benefit from a rapid delivery.

Protecting incomplete work can create a second, albeit related, perverse economic incentive. If the creation of the work is governed by a contract, as is often the case with a commissioned work, efficient breach of that contract becomes impossible.[218] We can think of examples where a commissioning party's breach of contract might be the most economically efficient course—for example, in the *Mass MoCA* dispute. Without moral rights interference, the commissioner can call a halt to the work in progress and pay the artist damages.[219]

---

[218] *Cf.* LANDES & POSNER, *supra* note 215, at 277 (explaining that oral contracts are more common than written contracts in the art world).

[219] Those damages could even incorporate a "moral rights" concept and be enhanced beyond a normal damages measure, so long as a court could place some economic value on the injury to the artist's artistic sensibilities. *Cf.* Karetsos v. Cheung, 670 F. Supp. 111, 115 (S.D.N.Y. 1987) (holding that an artist, who had been unable to complete artwork during renovations in her gallery space, was not entitled to recover for breach of contract).

The artist, too, could breach if he found a more profitable engagement elsewhere. But applying VARA protection to the unfinished work would make efficient breach impossible in both situations, and, in both situations, would work to the commissioning party's disadvantage. In the first, the moment the project begins, moral rights protection would keep the commissioner from halting construction, regardless of how inefficient that might be and regardless of cost overruns, delays or lost profit.[220] The second scenario may be even more unjust: the artist can still breach by deciding not to complete the work, but he retains an integrity right that he can exercise to prevent the commissioning party from removing or changing the work, overcompensating him for the breach and undercompensating the commissioning party. What would normally be an efficient breach in the absence of moral rights becomes completely inefficient in their presence.

In the *Mass MoCA* case, however, Christoph Büchel raised an important counterargument to this assertion, pointing to the fact that the Copyright Act *does* protect works-in-progress generally.[221] His contention contains an implicit challenge: if unfinished works generally receive copyright protection, and VARA was codified within the Copyright Act, then reading VARA to *not* apply to works-in-progress is inconsistent with copyright law as a whole. Aside from the apparent similarity between copyright protection and VARA protection for works-in-progress, what makes this argument appealing is that, to a much greater extent than copyright protection for published works, copyright protection for unpublished works apparently does rest on some moral-rights justification.[222] His argument ultimately carried the

---

[220] If VARA applies to commissioned artworks that are still being created, the commissioner cannot breach by merely refusing to pay, because even that action might be considered a violation of the artist's integrity right. Indeed, some civil-law countries explicitly recognize a "right to complete" as a corollary to the integrity right. Edward J. Damich, *The Right of Personality: A Common—Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 20–21 (1988) (giving the example of a French case). American commentators have suggested that such a right is implicit in VARA, and have urged the courts to follow the European example. *See* Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 35 n.203 (1997) ("[A]n argument could be made that the display of an unfinished work that is prejudicial to an author's honor or reputation should give rise to a right of integrity violation."). In 1996, the National Endowment for the Arts submitted a report to the Register of Copyrights contending that the integrity right should be expanded to incorporate the right to complete a work. *Id. But see* Santilli, *supra* note 119, at 93 (explaining American courts' skepticism about a "right to complete").

[221] Mass. MoCA Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 258 (D. Mass. 2008). *See supra* note **Error! Bookmark not defined.** for an explanation of the difference between copyright protection and moral rights protection for unfinished work.

[222] *Compare, e.g.*, Sapolich, *supra* note 227, at 476 ("[U]nlike European copyright law,

day before the First Circuit. But, leaving aside the fact that numerous commentators have questioned the moral-rights justification for pre-disclosure copyright protection,[223] Büchel's contention (and the First Circuit's acceptance of it) is rejoined by an economic argument. The difference between pre-disclosure copyright protection and pre-disclosure VARA protection is explained by the entirely opposite economic incentives the two regimes provide.

Like VARA's moral-rights protections, the copyright regime is justified on a mixed-benefit basis: the government grants copyrights because they give authors incentives to create, and that creation is deemed an economic good for society as a whole.[224] Further, copyrighting a work-in-progress is consistent with that purpose because it gives its author an incentive to complete it and release it to the public. Indeed, even though the author of an incomplete work enjoys *current* protection, the economic benefit of that protection occurs mainly in the *future*. He must complete and release the work before he can enjoy the majority of the economic benefits (royalties, etc.) that the copyright confers. By creating incentives for completion, protecting the unfinished work aligns the author's incentives with those of the public. Moral rights protection for the same work, in contrast, creates the exact opposite incentive. Unlike copyright protection, VARA protection is a *current* entitlement to a *current* benefit. Moral rights give the author power now. And as we have seen, that power diminishes greatly after release; so authors have an incentive to delay

---

American copyright law is not aimed at protecting moral rights, and therefore must be protecting something else.") *with* Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work,"* 68 CHI.-KENT L. REV. 805, 820 (1993) (attributing the "use of copyright law to protect an author's unpublished writings" to the "broad-based expansion of such artists' 'moral rights'"); Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15, 55–57 (1990) (noting that moral rights rationales provide more justification for protecting unpublished works than arguments based on the traditional functions of copyright).

[223] *See, e.g.*, Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CAL. L. REV. 369, 438 n.250 (2001) (providing a list of authors who hold this view).

[224] Mazer v. Stein, 347 U.S. 201, 219 (1954) (explaining that "the copyright law . . . makes reward to the owner a secondary consideration" but that the primary goal of such reward is giving "greater encouragement to the production of literary (or artistic) works of lasting benefit to the world") (internal quotations omitted). *See also* Diane L. Kilpatrick-Lee, *Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?*, 14 U. BALT. INTELL. PROP. L.J. 87, 94 (2005) (asserting that "[t]he copyright law has a dual purpose of both protecting authors' rights and furthering knowledge and learning" and that "copyright laws encourage the individual effort of artists and creators to create by allowing them to personally gain, therefore advancing the public welfare through the talents of these artists and creators") (internal quotations omitted).

as long as possible—at least until delaying is no longer economically beneficial. Despite the apparent similarities between copyright protection and VARA protection, respecting the purpose of the two regimes requires opposite conclusions regarding their respective application to unfinished works. Copyrighting unfinished works may make sense, but giving their authors moral rights does not.

D. Protecting Works-in-Progress Protects Authors Less, Not More

We have seen that neither the moral-rights theory nor the economic theory of VARA would suggest protecting works-in-progress. But we must address the fact that Congress expressly had artists' interests in mind in enacting VARA:

> Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore . . . it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.[225]

In light of this purpose, a rule that denies artists VARA protection during the creative phase—when, arguably, their personality is most intensely invested in their work—might seem unjust to artists and thus inconsistent with the statute's purpose.[226] But, as this final section demonstrates, leaving unfinished work unprotected is not only most consistent with the theoretical underpinnings of VARA, but also most equitable for artists. Indeed, and perhaps counterintuitively, protecting unfinished works is more likely to prejudice authors than to protect them. Moreover, although the "moral rights" that VARA guarantees may be necessary to secure important rights for artists in their completed works—rights that would be unavailable otherwise—works-in-progress are adequately protected, indeed best protected, by established rules of contract and tort law.

i. Contract and tort law adequately protect authors during the creation phase

Proponents of expansive moral rights often intimate that, before VARA's passage in 1990, American authors had no "moral rights" protection whatsoever. This view of VARA is somewhat misleading, however, for numerous decisions before (and after) VARA was

---

[225] H.R. Rep. No. 101-514, at 7.

[226] *But see supra* Part IV.B.ii (explaining the limitations of that view given the contemporary view of "authorship").

enacted protected what might broadly be considered moral rights by applying legal theories beyond moral rights[227]—and indeed theories outside intellectual property law altogether.[228]

Some courts have protected moral rights using contract. In *Granz v. Harris*, for example, the plaintiff, a concert promoter and producer, recorded a jazz concert on master discs and subsequently sold those discs to the defendant, a record manufacturer.[229] The sales contract required that any records the defendant manufactured from the plaintiff's masters bear the credit-line "Presented by Norman Granz" and be accompanied by explanatory notes Granz prepared.[230] Although the record's initial release did not bear the proper legend, it was

---

[227] *See* Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14, 24 (2d Cir. 1976) (explaining that, although American copyright law at the time did not recognize moral rights, "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law [could not] be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent" and thus "courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law."); Sherman, *supra* note 14, at 393 ("Although United States law did not explicitly recognize moral rights, the landscape prior to VARA was not completely void of legal protections for artists' moral rights").

[228] This specification is important given the United States Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). Some of the most notable pre-VARA cases to recognize some form of moral rights protection were based on copyright theories. For example, in *Gilliam v. American Broadcasting Cos., Inc.*, which may be perhaps the most famous non-VARA moral rights case, the Second Circuit granted the British comedy group "Monty Python" a preliminary injunction against ABC, prohibiting ABC from showing a version of a Monty Python sketch because it had been so heavily edited as to allegedly "impair[] the integrity of the original work." 538 F.2d at 17. According to the Court, if ABC "adversely misrepresented the quality of Monty Python's work, it is likely that many members of the audience, many of whom, by defendant's admission, were previously unfamiliar with appellants, would not become loyal followers of Monty Python productions" and that the "subsequent injury to appellants' theatrical reputation would imperil their ability to attract the large audience necessary to the success of their venture." *Id.* at 19. The Court resolved several "technical" copyright arguments in the plaintiffs' favor, but noted that "[o]ur resolution of these technical arguments serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public," thus suggesting a strong moral-rights basis for its decision as well. But the viability of any intellectual property theory of moral rights recovery outside of VARA is in question after the *Dastar* decision, in which the United States Supreme Court refused to give a liberal interpretation to a provision of the Lanham Act, in part because the protection the plaintiffs sought was already provided, much more specifically, in VARA. *Dastar*, 539 U.S. at 38. For a further discussion of the reasoning of the *Dastar* case, see *infra* notes 266-73 and accompanying text. It is reasonable to assume that federal courts after *Dastar* will be loath to recognize moral rights theories based on trademark or copyright to the extent that those rights are already granted by VARA. That is why this Section only discusses *non*-copyright or trademark theories of recovery.

[229] Granz v. Harris, 198 F.2d 585, 586 (2d Cir. 1952).

[230] *Id.*

corrected upon the plaintiff's demand.[231] The major dispute arose after a second release. This time, the legend was correct but the recordings had been edited so as to omit "[f]ully eight minutes of music."[232] Even though these actions did not violate any express terms of the contract, the Second Circuit held that its requirement that defendants use the legend "Presented by Norman Granz" attributed to Granz "the musical content of the records offered for sale," which carried "by implication . . . the duty not to sell records which make the required legend a false representation."[233] This fact was enough for the plaintiff to create a *prima facie* case for an injunction.[234]

The *Granz* decision also mentioned, in passing, that the tort of unfair competition might protect the plaintiff too.[235] Indeed, other courts have protected moral rights via tort theories. For instance, a federal court in *Prouty v. National Broadcasting Co.* allowed an unfair competition claim brought by a novelist against a radio broadcaster that had created skits based on the title character in the plaintiff's novel.[236] The plaintiff considered these skits "a degradation in artistic quality and harmonious consistency from the said novel" and "of inferior artistic and commercial quality."[237] Importantly, the plaintiff's claim was premised on her view that her novel, "as a work of art, has a present and potential value," and her contention that she was contemplating writing sequels using the same character.[238] The court refused to dismiss the case, holding that evidence that "in these broadcasts the defendant had appropriated, without plaintiff's consent, the plot and principal characters of the novel, and that the use being made of her literary production was such as to injure the reputation of the work and of the author, and to amount to a deception upon the public," would entitle the plaintiff to relief.[239]

---

[231] *Id.* at 587.

[232] *Id.* at 587.

[233] *Id.* at 588.

[234] For other cases applying or contemplating contract-based recovery for violations of moral rights, see Manger v. Kree Inst. of Electrolysis, 233 F.2d 5, 8 n.5 (2d Cir. 1956); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 339 n.5 (D.C.N.Y. 1968); Soc'y of Survivors of the Riga Ghetto, Inc. v. Huttenbach, 535 N.Y.S.2d 670, 674 (N.Y. Sup. Ct. 1988); Bonner v. Westbound Records, Inc., 364 N.E.2d 570, 575 (Ill. App. 1977); Chesler v. Avon Book Div., Hearst Pubs., Inc., 352 N.Y.S.2d 552, 555 (N.Y. Sup. Ct. 1973).

[235] *Granz*, 198 F.2d at 588.

[236] Prouty v. National Broadcasting Co., 26 F. Supp. 265, 265–66 (D. Mass. 1939).

[237] *Id.* at 266.

[238] *Id.* at 265.

[239] *Id.* at 266. For other cases applying or contemplating tort-based recovery for violations

These cases are informative because they show that both contract and tort law can be used to guarantee moral rights, even in the absence of specific "moral rights" legislation. Still, it is indisputable that artists often had difficulty recovering on such theories before VARA.[240] In *Crimi v. Rutgers Presbyterian Church*, the fresco the plaintiff had been commissioned to create in the defendant's church was completely painted over less than a decade later during a renovation prompted by the congregation's internecine strife about the work's depiction of Christ.[241] The court roundly rejected the plaintiff's argument that these modifications violated his "continued, albeit limited, proprietary interest," concluding instead that such a theory was "not supported by the decisions of our courts."[242] In another famous dispute, Alexander Calder, the famous American sculptor, had been commissioned to create a black and white mobile for the interior of Pittsburgh's Allegheny County airport.[243] Without the artist's permission, the airport repainted the mobile in the County colors. Calder was "incensed," but "eventually and grudgingly followed the advice of his lawyers and refrained from bringing what would plainly have been at the time a futile lawsuit."[244] These decisions tend to undermine any assertion that contract and tort law sufficiently protect artists' moral rights. What is important to note, however, is that these cases, and other unsuccessful actions like them, involved efforts to protect *completed* works.[245] Here, more than anywhere else, perhaps, is where the distinction between completed works and works-in-progress is important. Artists may require new rights, provided by moral-rights statutes like VARA to fully protect their completed works, but their rights to their *un*completed works are adequately protected by current law.

Contract law, for example, can operate differently depending on whether or not a work has been completed and delivered. Under American contract law, sellers of chattels (such as artworks) "cannot

---

of moral rights, see Edison v. Viva Intern., Ltd., 421 N.Y.S.2d 203, 206 (N.Y. App. Div. 1979); Seroff v. Simon & Schuster, Inc., 162 N.Y.S.2d 770, 774 (N.Y. Sup. Ct. 1957).

[240] Stuart, *supra* note 14, at 652–53 (describing courts' historic reluctance to protect moral rights and providing examples of unsuccessful plaintiffs).

[241] Crimi v. Rutgers Presbyterian Church in City of N.Y., 89 N.Y.S.2d 813, 813–15 (N.Y. Sup. Ct. 1949).

[242] *Id.* at 815, 819.

[243] Barbara A. Spellman & Frederick Schauer, *Artists' Moral Rights and the Psychology of Ownership*, 83 TUL. L. REV. 661, 663 (2009).

[244] *Id.*

[245] For more examples of unsuccessful attempts to protect work using non-VARA arguments, see, e.g., Sherman, *supra* note 14, at 393–94.

reserve rights in the chattel, of either an affirmative or a negative character, that are enforceable against subsequent purchasers."[246] Thus, artists cannot normally contract to protect their ongoing moral rights because they have no contractual privity. Unlike franchisors, who can protect their interests through *ongoing* contractual relationships with their franchisees, artists have no such "continuing contractual relationship with the purchasers of [their] works."[247] Moral rights legislation changes this outcome by allowing artists, effectively, "to maintain a continuing negative servitude in [their] work, analogous to the servitudes that can be created in real property in both civil-law and common-law systems."[248] Such a modification of contract rules, however, is only necessary to protect post-sale rights. Until that point, artists can protect themselves by contract without needing to appeal to moral-rights protections. Christoph Büchel, for example, could have contractually specified which particular elements his installation would contain, who would have creative control over decisions relating to its assembly, and what remedies would be available if the contract were breached.[249] That he had that option and did not choose to exercise it should not be the basis for independent VARA moral rights protection; laws such as VARA are enacted to protect interests that parties *cannot* protect contractually.[250]

Tort law, likewise, provides much more robust protection for works-in-progress than for completed works, because two of the traditional tort elements of duty, breach, causation and damages—namely duty and damages—are much easier to prove for an uncompleted work-in-progress than for a work which has been completed and delivered, and is thus no longer within an artist's control. For example, if a vandal were to enter an artist's studio and destroy a painting on which the artist was currently working, the artist would have a strong tort case. It is well-settled that "a cause of action

---

[246] Hansmann & Santilli, *supra* note 20, at 101.

[247] *Id.* at 105.

[248] *Id.* at 101.

[249] Judge Ponsor evidently wished that had happened. *See* Mass. MoCA Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 250 (D. Mass. 2008) ("Regrettably, the parties did not formalize the details of their relationship in any signed written instrument, or even through any clear oral understanding.").

[250] *See* Teresa Laky, *Dastar Corp. v. Twentieth Century Fox Film Corp.: Widening the Gap Between United States Intellectual Property Law and Berne Convention Requirements*, 14 SETON HALL J. SPORTS & ENT. L. 441, 477 (2004) ("Contract law is . . . an inadequate method to protect moral rights for all creators."); Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, 95 (1991) ("[G]iven the reluctance of courts to honor moral rights through contract law, [contract] protection is inadequate.").

in tort may be predicated upon an unlawful interference with the enjoyment by another of his private property."[251] If the artist was making the painting under contract, there would be a claim for tortious interference with contract. And if the vandal happened to be a jealous competitor, a claim for unfair competition might be possible too. But if the very same act happened *after* the work was completed, it could be much more difficult for the same artist to recover. A regular tort would be out of the question, unless the artist could convince a court that he had an ongoing property interest, for example in his artistic reputation, that was harmed by the act. This type of argument has routinely been rejected.[252] The same difficulty showing damages would probably bar an unfair competition claim, and because the contract by that point would have been fulfilled, an interference with contract claim would be impossible. Unlike in the pre-completion scenario, the artist has essentially no recourse under tort law and thus must be protected—if he is to be protected at all—by a moral-rights statute. But it is the converse of this relationship that interests us here. An anguished commentator wonders: "What about art in an artist's studio? Could vandals or anyone else destroy works-in-progress without a whimper from VARA?"[253] The answer is yes—but not without a whimper from tort law.

ii. Redundant VARA protection of unfinished work can prejudice authors

The existing protections in tort and contract law, on their own, might not be sufficient to convince moral rights supporters that VARA should not apply to unfinished works. Even if artists' works-in-progress are already protected by tort and contract law, these supporters might argue, how can offering double protection under VARA hurt? The answer to this question is surprising: because unfinished works are adequately protected, redundant VARA coverage could have pernicious effects on authors by giving them less protection, not more.

Indeed, while VARA's protections are limited, they are also very specific. That is why courts have found VARA to foreclose recovery on other, less-specific legal theories of moral rights. The specificity of VARA's protections is seen most clearly in *Dastar Corp. v. Twentieth*

---

[251] 74 AM. JUR. 2D *Torts* § 32 (2010).

[252] *See, e.g.*, Crimi v. Rutgers Presbyterian Church in City of N.Y., 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949), at 818.

[253] Anders, *supra* note 136.

Century Fox Film, the first United States Supreme Court case to address VARA's applicability (albeit tangentially).[254] The plaintiff in *Dastar* owned the television rights to a book by General Dwight D. Eisenhower, along with rights to a television series based on the book.[255] The defendant produced World War II videos using portions of the television series, which by then had entered the public domain.[256] The plaintiff sued, claiming that because the videos did not render proper attribution for their source, defendant had engaged in "reverse passing off" in violation of a section of the Lanham Act which prohibits "false designation of origin."[257] The Court rejected the plaintiff's view that "origin" referred to the original creator of the work because such a view would conflict with—and expand—the law of copyright.[258] In the Court's view:

> When Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of 'origin.' [VARA] provides that the author of an artistic work 'shall have the right . . . to claim authorship of that work.' That express right of attribution is carefully limited and focused: It attaches only to specified 'work[s] of visual art,' is personal to the artist, and endures only for 'the life of the author.' Recognizing in [the Lanham Act] a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous. A statutory interpretation that renders another statute superfluous is of course to be avoided.[259]

Accordingly, the plaintiffs had no cause of action under the Lanham Act.[260] The gravamen of the Court's holding was that the plaintiff's plausible, albeit expansive, argument ultimately failed because the expansive protection it sought under the Lanham Act had already been granted by VARA, and in a much more limited form. Applying *Dastar*'s rationale, other courts could deny tort or contract relief for artists who claim their moral rights have been violated simply because VARA is a more specific statute which addresses moral rights head-on.[261] At the very least, such an application would functionally

---

[254] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

[255] *Id.* at 25–26.

[256] *Id.* at 26.

[257] *Id.* at 27, 29.

[258] *Id.* at 33–34.

[259] *Id.* at 34–35 (internal citations omitted).

[260] *Id.* at 38.

[261] *E.g.*, Lahiri v. Universal Music & Video Distribution Corp., No. CV 02-8330 RJK, 2006 WL 6030551, at *4 n.9 (C.D. Cal. Mar. 24, 2006) (denying an attribution claim for a sound recording in light of *Dastar*'s characterization of VARA); Tilford v. Jones, No. Civ. H-05-

make artists choose between either traditional tort and contract law or VARA for protecting their unfinished works. After *Dastar*, it is difficult to see how plaintiffs could invoke both.

If that choice is the alternative, though, why should artists choose tort and contract protection over VARA? Most simply, they would not be subject to VARA's limitations. The statute, for example, excludes many types of artwork, such as posters, charts, technical drawings, audiovisual work, books, and magazines.[262] Not so for contract and tort law. Accepting VARA protection, therefore, means forgoing protection on all those types of works. Other prohibitions, such as the "recognized stature" limitation on destruction, would be avoided as well. The second reason artists should prefer contract and tort protection over VARA is more pragmatic than theoretical. Most courts that have applied VARA, especially to works not yet in their final form, have reached decisions quite prejudicial to the artist. For example, the *Carter* district judge's opinion, had it not been reversed, would have been the only instance of a federal court applying VARA to an unfinished work,[263] but one can question what good the district court's injunction—which prohibited the defendants from distorting, mutilating, modifying or moving the plaintiffs' work—would have done to the artists' "honor and reputation." While prohibiting the defendants from removing, distorting, mutilating, or modifying the plaintiffs' work, the court also refused to require the defendants to allow the plaintiffs to complete it.[264] The only way for the artists to enjoy any benefits conferred by VARA was to display a permanently uncompleted work, which by definition did not embody their entire artistic vision. Under a tort or contract theory, in contrast, they could have received more adequate protection in the form of monetary damages—and perhaps even damages that accounted for the future economic impact of the harm to their reputation. The district court in *Flack* rejected a similar request. Although it found a *prima facie* violation of VARA by the defendants, it refused an injunction the plaintiff requested to "compel the commissioning party to complete and maintain" her sculpture.[265] Once again, this was a Pyrrhic victory

---

2989, 2006 WL 2612752, at *4 (S.D. Tex. Sept. 11, 2006) (citing *Dastar* to deny a plaintiff's common-law "claim for attribution" because it did not fall within VARA's "carefully limited and focused" attribution right).

[262] 17 U.S.C. § 101 (2006).

[263] *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 329 (S.D.N.Y. 1994) (granting an injunction under VARA).

[264] *Id.*

[265] Flack v. Friends of Queen Catherine Inc., 139 F. Supp. 2d 526, 535 (S.D.N.Y. 2001).

for the plaintiff; her clay mold was protected, but her bronze statue was not. Had she protected herself by contract rather than relying on VARA, her results might have been more satisfactory.

When an artwork has been completed and is out of an artist's control, VARA may very well be the only protection the artist can use to protect his moral rights. By providing such protections, VARA gives artists valuable new rights that they formerly did not possess. But the examples cited above suffice to show that, when other protections exist, it may be in artists' best interest to seek protection under such time-tested principles as tort or contract, rather than assign the court the difficult task of applying VARA—a task that often leads to results that are confused from a legal perspective and unfair to the artist.

V. CONCLUSION

Some of the highest-profile, most fiercely litigated art law cases in the past few years have centered on the interpretation of the Visual Artists Rights Act, an odd, indeterminate statute passed in the final hours of the 101st Congress. The voluminous news coverage of cases like *Mass MoCA v. Büchel* illustrates both the widespread interest in such disputes and the widespread understanding that the courts are often the only avenue parties have to resolve their differences. The ambiguity of many of the VARA decisions, however, also demonstrates how difficult it has been for courts to apply VARA to art disputes in general, and in particular to disputes over works-in-progress. Because disputes often arise while an artwork is being created, when the artist's attention is most intimately focused on the artwork, VARA's application to unfinished works represents an important, and up to now unanswered, question in American moral-rights law.

Although some authors have rejected the doctrine of "moral rights" wholesale, together with Congress's acceptance of the doctrine in VARA, that is most decidedly not the aim of this paper. Instead, its central argument is that courts may (indeed must) accept VARA generally, and yet should refuse to apply it to works-in-progress. This conclusion is demanded by VARA's statutory history, as well as contemporary art and economic theory. Protecting unfinished art was not Congress's intention when it enacted VARA, and postmodern art theory, along with a true understanding of VARA's economic incentives, leaves those searching for protection for works-in-progress

within the statute empty-handed. But most importantly, artists' uncompleted works are protected by contract and tort law in ways that their completed work is not. The conclusion that VARA does not protect their work, then, is ultimately the most consistent with the aims of VARA: creating an American moral rights regime that optimally benefits artists, collectors and the public alike.