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# The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal

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# THE VISUAL ARTISTS RIGHTS ACT'S “RECOGNIZED STATURE” PROVISION: A CASE FOR REPEAL

DREW THORNLEY\*

## ABSTRACT

Using as a case study the recent “5Pointz” litigation, a case involving visual artists’ moral-rights claims to graffiti they drew on a piece of private property in Queens, New York, this article examines the threat that VARA’s grant to visual artists of the right “to prevent any destruction of a work of recognized stature” poses to common-law property and contract rights. This article advances the argument that the default legal rule should be that the rights of property owners (real or personal), including the right to destroy such properties, trump any moral rights that visual artists claim are affixed to a property. Ultimately, this article recommends repealing the aforementioned right “to prevent any destruction of a work of recognized stature,” leaving the traditional rules of property law and contract law to determine when, if ever, visual artists’ moral rights have legal priority over the rights of property owners.

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## I. INTRODUCTION

The Visual Artists Rights Act of 1990 (“VARA”)<sup>1</sup> is an addition to United States copyright law that grants certain protections to visual artists. Specifically, VARA protects the “moral rights” of visual artists, a statutory first in United States copyright law.<sup>2</sup> One of these moral rights includes the right “to prevent any destruction of a work of recognized stature.”<sup>3</sup> Using the “5Pointz” litigation as a case study—a case involving visual artists’ moral-rights claims to graffiti they drew on a piece of private property in Queens, New York—this article examines the threat that this right “to prevent any destruction of a work of recognized stature” poses to common-law rights, with regard to private property and contracts. In the 5Pointz<sup>4</sup> litigation, a federal district court judge ruled, for the first time, that a property owner violated visual artists’ moral rights, per VARA, and awarded the artists \$6.75 million.<sup>5</sup>

In addition to arguing against the trial court’s ruling in the 5Pointz litigation, this article advances the argument that the default legal rule should be that the rights of property owners (real or personal), including the right to destroy their properties, trump any moral rights that visual artists claim to art affixed to the property. Ultimately, this article recommends repealing the aforementioned VARA provision regarding the right “to prevent any destruction of a work of recognized stature,” leaving the traditional rules of property and contracts to determine when, if ever, visual artists’ moral rights have legal priority over the rights of property owners.

If this provision is not repealed, more rulings placing the moral rights of visual artists above the traditional rights of property owners can be expected. As such, property owners who wish to avoid such rulings should either not allow visual art on their properties or should, as VARA instructs, receive a written waiver of rights from visual artists prior to allowing such art on their properties. The former option is a surer form of protection for property owners, but it would lead to fewer mediums for visual art, and therefore, may inhibit the public’s access and exposure to visual art, which, according to VARA, is culturally important enough to warrant moral-rights protections.<sup>6</sup> The latter option could also lessen the quantity of visual art, because it would preserve a property owner’s right to destroy such art; but, more fundamentally, the option is problematic because it places upon a property owner the burden of securing a waiver. The more appropriate course of action would be to require a visual artist to receive an express grant of moral rights from a property owner, before such rights attach to art on a property owner’s property.

The great irony of the 5Pointz ruling, which placed for the first time visual artists’ moral rights over a property owner’s rights, is that it was meant to enforce VARA and, in turn, to protect visual art, but might ultimately thwart the creation and preservation of such art. The ruling should serve as a wake-up call to any property owner who might recognize that his ability to use his property as he wishes is in jeopardy. Far from

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<sup>1</sup> 17 U.S.C. §106A (2012).

<sup>2</sup> *See id.*

<sup>3</sup> §106A(a)(3)(B).

<sup>4</sup> *See Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 448 (E.D.N.Y. 2018).

<sup>5</sup> *Id.* at 488.

<sup>6</sup> *See* Christopher R. Matthews, *VARA’s Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future*, 10 UCLA ENT. L. REV. 139, 142–43 (2003).

helping visual art flourish, the 5Pointz ruling could end up being the catalyst for property owners implementing preventive measures, resulting in the opposite effect.

## II. BACKGROUND

### A. *The Visual Artists Rights Act of 1990*

The Visual Artists Rights Act of 1990 ("VARA") is an amendment to the Copyright Act of 1976 that grants certain non-economic "moral rights" to visual artists, a statutory first in federal copyright law.<sup>7</sup> Congress passed VARA in response to the United States joining the Berne Convention for the Protection of Literary and Artistic Works, which requires signatories to protect visual artists' moral rights.<sup>8</sup> The United States officially became a Berne Convention signatory in 1989, when it enacted the Berne Convention Implementation Act of 1988.<sup>9</sup> Congress enacted VARA on December 1, 1990, and VARA took effect on June 1, 1991.<sup>10</sup> Other countries, and even some U.S. states, recognized (to varying degrees) the moral rights of visual artists, prior to VARA's enactment.<sup>11</sup>

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<sup>7</sup> Prior to VARA's enactment, several U.S. states passed moral-rights legislation, beginning with California's enactment of the California Art Preservation Act of 1979, CAL. CIV. CODE § 987 (1979).

<sup>8</sup> See Berne Convention for the Protection of Literary and Artistic Works art. 6, Sept. 9, 1886 ("(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.")

<sup>9</sup> *International Copyright Relations of the United States*, CIRCULAR 38A (U.S. Copyright Office, D.C.), Jan. 2019, at 2.

<sup>10</sup> Nathan Murphy, *Theme et VARAations: Why the Visual Artists Rights Act Should Not Protect Works-In-Progress*, 17 UCLA ENT. L. REV. 110, 113 (2010).

<sup>11</sup> See Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 266, 268 (2009) ("The concept of moral rights originated in nineteenth century France and has long been recognized by most civil law countries . . . European moral rights laws are far more extensive than their U.S. counterparts in a number of important ways."); David Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L. J. 985, 988 (2014) ("VARA . . . provides less protection than most European moral rights legislation."); Jacqueline Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas* 497–540 (Case Res. Paper Series in Legal Stud., Working Paper No. 2011-6, 2011), <https://ssrn.com/abstract=1802788> ("Moral rights can encompass a variety of different elements of the author's relationship with her work, and the exact scope of the rights differs from jurisdiction to jurisdiction . . . However, it is worth noting that some civil jurisdictions maintain a broader array of moral rights. Courts in a number of civil law jurisdictions have recognized additional rights such as the right to refuse to create, the right to create and publish in any form desired, the right to withdraw or destroy the work, the prohibition against excessive criticism,

VARA grants several moral rights to the author of a work of visual art.<sup>12</sup> First, the author of a work of visual art maintains the right “to claim authorship of that work”<sup>13</sup> and “to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”<sup>14</sup> Second, the author “shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”<sup>15</sup> Finally, the author has 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, and any intentional distortion, mutilation, or modification of that work . . .”<sup>16</sup> and “to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work . . .”<sup>17</sup> This last right—the right “to prevent any destruction of a work of recognized stature”—is the central focus of this article.<sup>18</sup> The rights granted by VARA are: (1) granted only to the author of a work of visual art, regardless of whether the author owns a copyright to the work, and authors of joint works of visual art are co-owners of such rights;<sup>19</sup> (2) valid only for the life of the author(s);<sup>20</sup> and (3) not transferable, but are waivable if the author expressly agrees to such a waiver via a signed writing.<sup>21</sup>

VARA is a seldom-litigated statute, but a recent well-publicized dispute highlights the potential threats VARA poses to fundamental principles of property and contract and, thus, to fundamental American freedoms.

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and the prohibition against other injuries to the creator’s personality. Even the more well accepted rights of integrity and attribution vary in nature and scope from jurisdiction to jurisdiction.”).

<sup>12</sup> See generally Shipley, *supra* note 11, at 987–88, 992 (“This legislation recognized several moral rights in the United States for the first time” and “VARA grants three moral rights to the creators of qualifying works of visual art”).

<sup>13</sup> 17 U.S.C. § 106A(a)(1)(A) (2012).

<sup>14</sup> § 106A(a)(1)(B).

<sup>15</sup> § 106A(a)(2).

<sup>16</sup> § 106A(a)(3)(A).

<sup>17</sup> § 106A(a)(3)(B).

<sup>18</sup> *Id.*

<sup>19</sup> See § 106A(b).

<sup>20</sup> See § 106A(d).

<sup>21</sup> See § 106A(e)(1) (“The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.”).

*B. The 5Pointz Litigation*<sup>22</sup>

In 1993, Gerald Wolkoff, the owner of an abandoned factory in Long Island City, Queens, granted permission to various graffiti artists to paint the outer wall of the building.<sup>23</sup> Painting continued in the ensuing years, but the endeavor was somewhat disorganized and “distasteful” until 2002, when Wolkoff granted Jonathan Cohen, one of the building’s graffiti artists, permission to coordinate the building’s artistic activities.<sup>24</sup> The partnership progressed smoothly, and this site, known as 5Pointz, became a graffiti hotspot and tourist attraction.<sup>25</sup>

Such was the reality until 2013, when Wolkoff filed an application with the City of New York to construct luxury condominiums on the site, a project that would call for the demolition of 5Pointz.<sup>26</sup> Various 5Pointz artists launched efforts to save the

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<sup>22</sup> This section simply presents the facts surrounding the 5Pointz dispute, without editorializing on any aspects of the case. Any commentary about the case will be found in the following section.

<sup>23</sup> See *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 219 (E.D.N.Y. 2013).

<sup>24</sup> See *id.* at 218–19 (“Starting in the early or mid-1990s, the exterior walls had become a place for distasteful graffiti by many self-proclaimed aerosol artists; it was then known as the Phun Phactory. To control this festering problem, Cohen approached Wolkoff in 2002 to become the curator of the works that would be permitted to be painted on the walls. Wolkoff agreed; Cohen, known in the art world as ‘Meres One,’ was one of the principal contributors to the aerosol wall paintings and Wolkoff liked his work. Wolkoff ‘was supportive of creative efforts but wanted somebody responsible to manage it.’ But nothing was put in writing; it was just the ‘general understanding that [Cohen] would be allowed to select who would be permitted to paint on the walls.’ Wolkoff, therefore, gave his oral blessings to permit qualified aerosol artists, under Cohen’s control, to display their works on his buildings. Soon the quality of the aerosol art vastly improved. The site became known as 5Pointz and evolved into a mecca for high-end works by internationally recognized aerosol artists.”) (citations omitted); Samantha Schmidt, *N.Y. Landlord Obliterated Dozens of Graffiti Murals. Now He Owes the Artists \$6.75 Million*, WASH. POST (Feb. 13, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/02/13/a-landlord-obliterated-dozens-of-graffiti-murals-now-he-owes-the-artists-6-7-million/?noredirect=on&utm\\_term=.5c06543e6bfb](https://www.washingtonpost.com/news/morning-mix/wp/2018/02/13/a-landlord-obliterated-dozens-of-graffiti-murals-now-he-owes-the-artists-6-7-million/?noredirect=on&utm_term=.5c06543e6bfb) (“More than a decade before the artists and their landlord were at odds, the two parties enjoyed a thriving partnership. In the 1990s, Wolkoff rented studios in the warehouse complex to local artists. He also began allowing graffiti artists to spray paint on the building walls. But there was not much order or control over the quality of the work—until one tenant, Jonathan Cohen, took charge. Cohen, a local artist known as Meres One, became the unpaid curator of what would become 5Pointz. Cohen organized a creative system in which aerosol artists would compete for prominent placement on the walls, according to court documents. He divided up the space into two areas: Short-term walls, which catered to beginner artists and would be painted over on a rotating basis; and long-term walls, which were permanent. Wolkoff gave Cohen and hundreds of other artists free rein to paint whatever they pleased, with only three exceptions: no religion, politics or sex. Artists from all backgrounds poured in from all over the world.”).

<sup>25</sup> See *Cohen*, 988 F. Supp. 2d at 219 (“Soon the quality of the aerosol art vastly improved. The site became known as 5Pointz and evolved into a mecca for high-end works by internationally recognized aerosol artists.”).

<sup>26</sup> See *id.* at 220 (“When questioned by the court, Wolkoff testified that there was no feasible engineering way he could preserve the existing buildings, with their ‘beautiful’ art work, and incorporate them into the new ones.”).

site and, thus, their art.<sup>27</sup> Ultimately, in October 2013, Cohen and other 5Pointz artists petitioned the United States District Court for the Eastern District of New York for a preliminary injunction against the demolition of the building, citing the rarely-litigated VARA.<sup>28</sup> On November 12, 2013, United States District Court Judge Frederic Block declined to issue a preliminary injunction and stated he would soon issue a written opinion.<sup>29</sup>

In that written opinion,<sup>30</sup> issued on November 20, 2013, Judge Block remarked, “[t]his marks the first occasion that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law.”<sup>31</sup> Ultimately, Judge Block opined:

Finally, whether viewed as bearing upon the issue of irreparable harm or the balancing of the hardships, the ineluctable factor which precludes either preliminary or permanent injunctive relief was the transient nature of the plaintiffs’ works. Regardless of Cohen’s belief that the 24 works were to be permanently displayed on the buildings, he always knew that the buildings were coming down—and that his paintings, as well as the others which he allowed to be placed on the walls, would be destroyed. Particularly disturbing is that many of the paintings were created as recently as this past September, just weeks after the City Planning Commission gave final approval to the defendants’ building plans. In a very real sense, plaintiffs’ have created their own hardships.

But this does not mean that defendants do not share some responsibility. After all, Wolkoff gave his blessings to Cohen and the aerosol artists to decorate the buildings, and he did not choose to protect himself from liability by requiring VARA waivers. Moreover, while he was supportive of the artists and appreciated their work, he also stood to benefit economically from all the attention that had been drawn to the site as he planned to market the new buildings’ residences. Since, as defendants’

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<sup>27</sup> See Schmidt, *supra* note 24 (“When the artists got wind of the landlord’s plans to replace the warehouses with high-rise luxury condos, they began a campaign to try to save 5Pointz. Cohen filed an application with the City Landmark Preservation Commission to preserve the site but was rejected because the artistic work was too recent. He also tried to raise money to buy the property, but its value soon skyrocketed to more than \$200 million. Even Banksy, a reclusive and famed British street artist, made a plea during a trip to New York in 2013. ‘Save 5Pointz,’ he wrote.”).

<sup>28</sup> See *id.* (“As a final resort, Cohen tried to prevent the imminent demolition by seeking a preliminary injunction against Wolkoff under the Visual Artists Rights Act.”).

<sup>29</sup> See *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018) (“In denying the plaintiffs’ application for preliminary injunctive relief, the Court recognized that the rights created by VARA were at tension with conventional notions of property rights and tried to balance these rights. It did so by not interfering with Wolkoff’s desire to tear down the warehouses to make way for high-rise luxury condos, but cautioned that ‘defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs’ works were of “recognized stature” under VARA.’”)

<sup>30</sup> *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

<sup>31</sup> *Id.* at 214.

expert correctly acknowledged, VARA protects even temporary works from destruction, defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of "recognized stature."<sup>32</sup>

However, in the eight-day interim between the denial of the preliminary injunction and the judge's written opinion, Wolkoff had workers whitewash the exterior of the building, thereby erasing almost all of the 5Pointz graffiti and rendering moot any possible injunctive relief.<sup>33</sup> Thus, the artists' only recourse was to sue for damages under VARA.<sup>34</sup> They did so, and on February 12, 2018, Judge Block awarded the artists \$6.75 million.<sup>35</sup>

In his opinion, Judge Block notes that the "5Pointz litigation," as he called it, was "the first occasion that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law."<sup>36</sup> Thus, the ruling constitutes the first time such protection under VARA has been awarded by a United States court.<sup>37</sup> Judge Block's opinion discusses the temporary nature of most of the art at 5Pointz and the defendant's contention that the artists were aware that the 5Pointz building would eventually be destroyed.<sup>38</sup>

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<sup>32</sup> *Id.* at 227.

<sup>33</sup> *See Cohen*, 320 F. Supp. 3d at 427 ("Rather than wait for the Court's opinion, which was issued just eight days later on November 20th, Wolkoff destroyed almost all of the plaintiffs' paintings by whitewashing them during that eight-day interim.").

<sup>34</sup> *See* Laura Gilbert, *New York Judge Awards 5Pointz Street Artists \$6.75m for Whitewashed Works*, ART NEWSPAPER (Feb. 13, 2018), <https://www.theartnewspaper.com/news/new-york-judge-awards-5pointz-street-artists-usd6-75m-for-whitewashed-works> ("Although he denied the injunction, Judge Block warned Wolkoff that he would be 'exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of 'recognized stature.' Despite the court's caution, the developer immediately directed that virtually all of the art be whitewashed, without giving the artists the necessary notice. None of the works were salvageable, the judge said.").

<sup>35</sup> *See Cohen*, 320 F. Supp. 3d at 421, 448. The three-week trial was held before a jury, "but just prior to summations, plaintiffs—with defendants' consent—waived their jury rights. Rather than summarily dismiss the jury after it had sat through the entire trial, the Court converted it to an advisory jury." *Id.* at 427.

<sup>36</sup> *Id.* (citing *Cohen*, 988 F. Supp. 2d at 214.).

<sup>37</sup> *See* Alan Feuer, *Judge Awards Graffiti Artists \$6.7 Million for Destroyed 5Pointz Murals*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html> ("From the start, the 5Pointz case had pitted two of New York City's most prominent sectors against each other: the art world and the real estate business. Judge Block's ruling—and the size of the judgment he awarded—was a decisive victory for the former, said Dean Nicyper, a partner who specializes in art law at the firm Withers Bergman. 'There have been other instances where graffiti artists have been recognized as deserving protection,' Mr. Nicyper said, adding that courts have ruled that clothing designers who cribbed ideas from graffiti artists were liable for intellectual theft. But the 5Pointz case, he said, was the first time that graffiti and graffiti artists were protected under V.A.R.A.").

<sup>38</sup> *See Cohen*, 988 F. Supp. 2d at 224 ("Cohen and his fellow plaintiffs undoubtedly understood that the nature of the exterior aerosol art on Wolkoff's buildings was transient.");



According to Judge Block, “5Pointz was a site of creative destruction; most artworks had short lifespans and were repeatedly painted over by successive artists.”<sup>39</sup> Regarding Wolkoff’s testimony during trial, Judge Block writes, “[h]e was adamant that the artists knew that the day would come when the warehouse buildings bearing their works of art would come down and be replaced by high-rise residential condos.”<sup>40</sup> The judge notes, “[d]efendants’ overarching contention is that plaintiffs knew that the day would come when the buildings would be torn down and that, regardless, the nature of the work of an outdoor aerosol artist is ephemeral. They argue, therefore, that VARA should not afford plaintiffs protection for their temporary works.”<sup>41</sup>

However, Judge Block found no legal support for the argument that VARA does not protect temporary works of art, while offering myriad support for the position that such works of art are protected by VARA.<sup>42</sup> Judge Block reasoned:

VARA does not directly address whether it protects temporary works. However, in the context of works on buildings, it is clear from 17 U.S.C. § 113(d) that temporary works are protected. Moreover, relevant case law conceptually supports this conclusion. In short, there is no legal support for the proposition that temporary works do not come within VARA’s embrace.<sup>43</sup>

Judge Block’s opinion then addressed the issue of whether any 5Pointz work of art was of “recognized stature,” thus triggering VARA §106A(a)(3)(B), which gives visual artists the right to prevent the destruction of such work.<sup>44</sup> The opinion acknowledges that VARA does not define the phrase “recognized stature” and states

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Gilbert, *supra* note 34 (“The judge also rejected the defendants’ contention that the works were not entitled to legal protection because they were temporary and often painted over . . .”).

<sup>39</sup> *Cohen*, 320 F. Supp. 3d at 433.

<sup>40</sup> *Id.* at 432; see also Eileen Kinsella, *Who Owns Graffiti, the Artists or the Developers? A Landmark Trial over 5Pointz Considers This with Fresh Eyes*, ARTNET (Oct. 20, 2017), <https://news.artnet.com/art-world/5pointz-lawsuit-could-be-a-key-test-of-artist-legal-rights-1121624> (“Another key facet of the case—which the artists do not dispute—is that Wolkoff always made it clear that 5Pointz would not be permanent. The artists ‘did this work with eyes wide open. . . . They knew there was no permanency here,’ [Barry] Werbin notes.”); Schmidt, *supra* note 24 (“The landlord and his lawyer have contended that the artists knew for years that the buildings would ultimately be demolished. Wolkoff argued that even the artists would destroy artwork by constantly rotating thousands of short-term murals, according to court documents.”).

<sup>41</sup> *Cohen*, 320 F. Supp. 3d at 435. In footnote 9, the judge wrote, “[w]hile Cohen acknowledged that he knew that Wolkoff intended to eventually tear down the buildings to make way for his new condos, other plaintiffs testified that they had no such knowledge. Regardless, even if the artists were allowed to waive their VARA rights orally (which they were not), none of the other artists ever spoke to Wolkoff. As he acknowledged at trial: ‘I didn’t know any of the artists. I only dealt with Jonathan Cohen.’” *Id.* at 435 n.9.

<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 437–39.

that "the seminal case interpreting the phrase"<sup>45</sup> is *Carter v. Helmsley-Spear, Inc.*,<sup>46</sup> which requires "a two-tiered showing that: (1) the visual art in question has 'stature,' *i.e.* is viewed as meritorious, and (2) this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."<sup>47</sup>

Judge Block notes that the Second Circuit had not weighed in on *Carter's* two-tiered test<sup>48</sup> but that the Seventh Circuit "did thereafter embrace and apply the district court's standard for evaluating whether a work of visual art is of 'recognized stature.'"<sup>49</sup> However, though the Second Circuit had not assessed the *Carter* standard, it held in the *Carter* appeal<sup>50</sup> that courts "should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition"<sup>51</sup> of "work of visual art."<sup>52</sup> Judge Block then recognized, "The same common sense should be utilized in assessing whether the visual work is of recognized stature . . . ."<sup>53</sup>

Ultimately, Judge Block held:

In the present case, the Court need not dwell on the nuances of the appropriate evidentiary standard since the plaintiffs adduced such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary

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<sup>45</sup> *See id.* at 437.

<sup>46</sup> 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

<sup>47</sup> *Cohen*, 320 F. Supp. 3d at 437.

<sup>48</sup> *See id.* ("The Second Circuit on appeal never had occasion to address the correctness of this formulation since, in reversing, it held that the work did not qualify for VARA protection because it was made for hire.") (citations omitted).

<sup>49</sup> *Id.* at 438; *see Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999).

<sup>50</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

<sup>51</sup> *Id.* at 84 (quotation omitted).

<sup>52</sup> *See* 17 U.S.C. § 101 (2012) ("A 'work of visual art' is—(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include—(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.")

<sup>53</sup> *See Cohen*, 320 F. Supp. 3d at 438.

standards almost all of the plaintiffs' works easily qualify as works of recognized stature.<sup>54</sup>

The court ruled that forty-five of the forty-nine works of art at issue were works of "recognized stature."<sup>55</sup>

Because the plaintiffs did not reliably establish a market value for their art, the court did not award actual damages.<sup>56</sup> However, the court awarded statutory damages.<sup>57</sup> After stating that Wolkoff willfully destroyed the works of art, the court listed the six statutory factors that must be weighed, when determining the amount of statutory damages.<sup>58</sup> The court dismissed one of the six factors as irrelevant to the case,<sup>59</sup> but held that, for the other five factors, "Wolkoff rings the bell on each,"<sup>60</sup> holding, "[c]ollectively, all five relevant factors support the maximum award of statutory damages. Therefore, the Court awards \$150,000 for each of the forty-five works, for a total statutory damages award of \$6,750,000."<sup>61</sup>

### III. A CASE FOR REPEAL

Before arguing against moral rights for visual artists by default and against VARA's "recognized stature" provision, it is worth noting a common argument—perhaps the main argument—for visual artists' moral rights: Visual art is a unique creation that deserves special legal treatment. More specifically, economic rights alone do not sufficiently protect the special relationship that exists between an artist

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<sup>54</sup> *See id.*

<sup>55</sup> *See id.* at 440.

<sup>56</sup> *See id.* at 442.

<sup>57</sup> *See id.* at 447.

<sup>58</sup> *See id.* at 445 ("When determining the amount of statutory damages to award for copyright infringement, courts consider: (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties." (quoting *Bryant v. Media Right Prods.*, 603 F.3d 135, 144 (2d Cir. 2010)).

<sup>59</sup> *See Cohen*, 320 F. Supp. 3d at 445 n.21 ("The fifth factor does not fit this case. It is designed for traditional copyright cases where a defendant is liable for selling infringing material and the plaintiff's damages proof requires evidence of defendant's sales that can only be provided by defendant. Here, defendants destroyed, rather than sold, plaintiffs' works, so this factor is inapplicable, and the Court will not consider it." (citing *Curet-Velazquez v. ACEMLA de Puerto Rico, Inc.* 656 F.3d 47, 59 (1st Cir. 2011)).

<sup>60</sup> *See Cohen*, 320 F. Supp. 3d at 445.

<sup>61</sup> *See id.* at 447. Judge Block then writes, "[i]f not for Wolkoff's insolence, these damages would not have been assessed. If he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully. Given the degree of difficulty in proving actual damages, a modest amount of statutory damages would probably have been more in order." *Id.* A footnote adds, "Of course, all this could have been easily avoided with a written waiver of the artists' VARA rights up front, as § 113(d) expressly contemplates." *Id.* at n.22.

and her art.<sup>62</sup> Thus, personal rights, not just property rights, are needed to protect artists and their work.<sup>63</sup>

In her excellent article *Against Moral Rights*, which "seeks to undermine the foundations of moral rights scholarship, law, and theory,"<sup>64</sup> Amy Adler explores the justifications for granting and protecting artists' moral rights, when such protections are not similarly granted to other creations and products.<sup>65</sup> Adler points to the beliefs that art is an extension of the artist into which the artist injects his spirit and that art is a unique and valuable thing worthy of preservation for posterity.<sup>66</sup> Regarding Congress's enactment of VARA, Professor Adler writes:

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<sup>62</sup> See Lipton, *supra* note 11, at 502–03 ("However, copyrights do not fully capture the nature of the relationship between an author and her work. . . . Further, creators of copyright works engage in their artistic endeavors for reasons other than pecuniary reward. . . . Given the diverse motivations for creation and the variety of relationships authors have with their creations, a law that focuses purely on the protection of economic rights will miss important elements of the creative process."); see also Laura Nakashima, *Visual Artists' Moral Rights in the United States: An Analysis of the Overlooked Need for States to Take Action*, 41 Santa Clara L. Rev. 203, 206, 230 (2000) ("The doctrine of moral rights recognizes that artists invest a part of themselves in the works they create, and as such, certain acts against the artists or their work jeopardize the artists' reputation. The doctrine realizes that allowing such acts to occur produces disincentives for artists to create, which harms the society that is then deprived of the artists' creations. . . . The doctrine of moral rights originated in France as the civil law doctrine of 'droit moral.' Droit moral protects artists' personality rights in their works of art based on the belief that an artist's personality is embodied in, and inseparable from, her work of art. As an artist creates, '[s]he projects into the world part of [her] personality and subjects it to the ravages of public use.' Thus, injuring an artist's work of art also injures her reputation. . . . The doctrine of moral rights serves the noble purpose of protecting artists' personality rights in their works of art that they share with the world. . . . By allowing artists to protect their personality rights embodied in their works of art, the doctrine of moral rights stimulates artists' creativity, which then benefits the public who enjoys the artists' works").

<sup>63</sup> See Lipton, *supra* note 11, at 508.

<sup>64</sup> Adler, *supra* note 11, at 265.

<sup>65</sup> *Id.*

<sup>66</sup> See Adler, *supra* note 11, at 269–70 ("Why do we wish to preserve the integrity of art? And why do we grant moral rights only to the rarified category of 'visual art' and not to other objects? Embedded in moral rights law are two basic assumptions about visual art. First is that a work of art is an extension of the artist himself. I use the term 'himself' rather than 'herself' advisedly because of the language of 'paternity' that is a refrain in moral rights scholarship. Scholars invoke the metaphor of paternity to explain the artist's profound connection with his work: he cares so deeply about the fate of his art because it is somehow his child and not just another object. Thus the artist feels personal anguish when someone else modifies his artwork/child. This is so even though the child has grown up and left home, and even though the artist/father has sold his child (more about commerce later). The work of art is not just another product he has sold, but rather an 'expression of his innermost being.' As the Second Circuit observed, moral rights 'spring from a belief that an artist in the process of creation injects his spirit into the work.' Indeed, moral rights advocates sometimes speak of art works as if they were living things: 'To mistreat the work is to mistreat the artist.' It is as if the work has a magical connection to its maker; hurting the piece will hurt the artist as if you were sticking pins in a voodoo doll. Because of this emphasis on the artist's (and indeed, the art's) personhood, moral rights are said to have a 'spiritual, non-economic and personal nature.' The second assumption embedded in moral rights law, deeply related to the first, is that works of visual art deserve special treatment in the law because they are especially valuable and unlike other

Members of Congress invoked the “special societal need” and “important public interest” served by the arts as a justification for enacting VARA. Members repeatedly noted the dual purposes of the bill to protect “not only . . . the artistic community, but also . . . the American public[’s] . . . access to artistic creations.”<sup>67</sup>

VARA and most U.S. state moral rights laws are premised on the view that moral rights serve not only the interests of individual artists, but also a shared public interest in art. VARA’s concern for the public interest is evident in its legislative history as well as its heightened protection for certain works that have achieved recognized stature.<sup>68</sup>

In contrast to those beliefs, I believe visual art is not worthy of special treatment and should be governed by the same rules of property and contracts that govern any other product or creation.<sup>69</sup> This argument does not flow from any aversion toward art

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objects. As a prominent French legal decision explained, moral rights protect ‘the superior interests of human genius.’ We must preserve a work as the artist intended it so that his genius can be ‘conveyed to posterity without damage.’ Thus moral rights protect not only the personality interests of the individual artist; they also protect the public interest by preserving for posterity the object that immortalizes the traces of the artist’s greatness.” (citations omitted); see also Jeffrey P. Cunard, *Moral Rights for Artists: The Visual Artists Rights Act*, 27 CAA NEWS, May/June 2002, at 6–8, <https://pages.uoregon.edu/csundt/copyweb/CunardCAA2002.htm> (“VARA, like other statutory copyright legislation, has both a private and a public justification. The first aim of the Act is to encourage visual artists to make and disseminate works of art by affording them certain protections and remedies against the destruction or damage to that art. The second aim is to preserve the artistic heritage for the benefit of society on the principle that living and working among works of art has positive societal effects.”) (citations omitted).

<sup>67</sup> Adler, *supra* note 11, at 270.

<sup>68</sup> *Id.* at 272. Interestingly, however, unlike an affected visual artist, the public typically has no cause of action under VARA, as does an affected visual artist. Adler writes that, “although VARA and most state statutes purport to protect both public and individual interests, these statutes vest sole power to enforce the moral right in the individual artist. They do so based on the assumption that there is an unproblematic convergence between the public interest and the interest of the artist who created the work. His decisions, according to the assumption, will inevitably be in the public interest. Thus, even in the case of a work of ‘recognized stature’ under VARA, only the artist can enforce or not enforce the right of integrity. The public has no cause of action. Moreover, the artist always has the right to destroy his work, even if it is a work ‘of recognized stature’ and thus the kind of work that the public presumably has an interest in preserving.” *Id.* at 272–73. Adler notes that “California, however, allows an ‘organization acting in the public interest’ to bring a cause of action to protect a work of ‘fine art’ if it merits ‘substantial public interest.’ Cal. Civ. Code § 989(a)(1), (c) (West 2006).” *Id.* at 272 n.53.

<sup>69</sup> In this way, I echo Professor Adler, who writes, “Ultimately, I question the most basic premise of moral rights law: that law should treat visual art as a uniquely prized category that merits exceptions from the normal rules of property and contract.” Adler, *supra* note 11, at 265. Adler writes, “Here I want to confront a deeper problem at the heart of moral rights law: the doctrine’s very existence is premised on the idea that ‘the bond between an artist and his work is different from that between any other craftsman and his product.’ . . . In my view, this premise is problematic. What is so special about visual art? Why do we grant it special rights and treat it differently from other objects, excepting it from the normal rules of property and contract? At its heart, moral rights law rests on the notion that a work of visual art is not merely another product in our capitalist society. Instead, it is alive with the creative spirit of the individual

or artists. Rather, it springs only from the belief that art should not be treated uniquely, in contravention of normal common-law rules of property and contracts, and that doing so threatens the very foundations of these rights.<sup>70</sup>

A. VARA's Interference with Fundamental Common-Law Rights

Private property rights and freedom of contract are fundamental aspects of our nation's legal system. Such rights and freedoms existed in the American colonies before the United States was founded and were basic principles that the nation's founders embedded in the United States Constitution.<sup>71</sup> Moreover, property and contract rights have existed for hundreds of years in English common law, upon which American states' legal systems are largely based.<sup>72</sup> I contend that it is unreasonable to curtail such entrenched rights, based on the creation of controversial moral rights for visual artists that the United States did not recognize until 1990. But even then, these were recognized reluctantly, to comply with obligations under the Berne Convention, instead of as a result of a fundamental, philosophical shift regarding basic, common-law rights.<sup>73</sup>

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genius/artist who, to quote the Second Circuit, 'injects' himself into the work. His interests in the work are loftier and richer than mere pecuniary ones. Indeed they transcend his individual interests and become interests shared by the public. The mundane laws of copyright protect only economic interests. They could never fully capture what the artist and all of us value about artistic expression. Thus we must make special rules for works of art. But does visual art as a category merit this special treatment? I think the answer might be no. It once seemed obvious that there was a distinction between art and other objects. But that is no longer the case. Indeed, I would argue that 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. Moral rights law thus protects art under a justification that is the very target of the art it purports to protect." *Id.* at 294–95.

<sup>70</sup> Though not a focus of this paper, another objection to recognizing moral rights for visual artists is the threat that it poses to free-speech rights under the First Amendment. See Dana L. Burton, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 657 (1995) ("[George C. Smith] further suggests that VARA restrictions are an assault on free speech akin to that of the rejected flag protection amendment. The commentary urges that an individual should be able to buy a work which they consider, for example, pornographic, and destroy it as a political statement in the same manner that flag burning is permissible as an expression of free speech.").

<sup>71</sup> See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 274 (1988).

<sup>72</sup> *Id.*

<sup>73</sup> Burton, *supra* note 70, at 641 ("The Committee on the Judiciary of the House of Representatives found that 'existing law is sufficient to enable the United States to adhere to the Berne Convention, the implementing legislation is completely neutral on the issue of whether and how protection of the rights of paternity and integrity should develop in the future.' Moreover, Senator Hatch stated that "while existing U.S. law satisfies U.S. obligations under article *6bis* of Berne, our judicial system has consistently rejected causes of action denominated as 'moral rights' or arising under the moral rights doctrine." Senator Hatch's self-contradictory statement suggests that Congress, in an effort to meet merely the letter of the Berne Convention, speciously bootstrapped moral rights protection into existing U.S. law."). As Professor Alder

VARA's "recognized stature" provision interferes with these basic property and contract rights, including the right to license one's property for a particular use by another party.<sup>74</sup> A property owner who grants a license typically has the power to revoke the license at-will.<sup>75</sup> Such should be the case with regard to allowing a visual artist to produce art on one's property. The artist should be regarded merely as a licensee, whose permission to use the property for his art can be revoked at any time by the property owner. Nothing more should be required of the property owner, yet VARA's "recognized stature" provision does just that, requiring the property owner to obtain a written, moral-rights waiver from the artist.<sup>76</sup> VARA places on the property owner a burden that otherwise would not exist, a burden that does not apply to property licenses in other contexts.

Additionally, a license is a contract, which by its very nature should involve only the terms and conditions agreed upon by the private parties who make it. In this context, those parties are the property owner and the visual artist, whose terms should not be interfered with, provided they do not violate the law. But VARA, in effect, adds a third-party to the contractual relationship. A judge's or jury's determination that a work of art is "of recognized stature" sweeps the aforementioned license within VARA's reach and, thus, overrides the agreed-upon terms of the original parties. Moreover, it does so after the fact, after the license is granted. So, the duty that VARA imposes on the property owner is a duty to seek a written waiver from a visual artist, to protect herself should a judge or jury later decide that the art the license permitted is culturally important enough to protect, when such art would not be protected, had the factfinder decided the other way. This is an unreasonable restraint on freedom of contract that comes nowhere close to the common law's normal reasons for overriding contracting parties' agreed-upon terms. Courts typically will not enforce private agreements that violate the law (criminal or civil) or violate public policy; but in each case, a court's decision not to honor the private parties' agreed-upon terms is due to the court's finding fault with one or more of the terms and/or a party's consent to those terms. By contrast, in the case of VARA's "recognized stature" provision, a court is adding a new term to the parties' relationship, one to which they did not agree.

Fundamentally, no property owner's revocable grant should ever become irrevocable or otherwise lead to grantee rights the grantor did not agree to, absent the grantor's express consent. No party—visual artist or otherwise—should be able to back his way into property rights not expressly granted by the respective property owner. This should be particularly true when those rights are due to a third-party's subjective classification of a work of art, made after the property owner gave the artist permission to create the art. Given that the context here is a property owner giving permission to use a property for visual art, no argument can be made that an artist should acquire property rights not granted by the property owner, through concepts like adverse possession or prescriptive easement. One can take issue with the legitimacy of acquiring property rights by such means, but at least in such cases, the rights arise solely due to the actions or inactions of two parties (*i.e.*, the property owner

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notes, [m]oral rights were only recently and grudgingly accepted in the United States." Adler, *supra* note 11, at 266.

<sup>74</sup> 17 U.S.C. § 106A(a)(B) (2012).

<sup>75</sup> De Haro v. United States, 72 U.S. 599, 627 (1866).

<sup>76</sup> 17 U.S.C. § 106A(e)(1) (2012).

and the party adversely using the property) and not due to any third-party actions. VARA permits a third-party’s subjective decision to label a work “of recognized stature” to impose a restraint on private property the property owner never agreed to.<sup>77</sup> There is no legitimate justification for such a restraint.

Certainly, moral rights can be agreed to by the artist and the property owner, who can grant to the artist whatever protection she agrees to; but the granting of moral rights that trump property rights should never be, by statute or other means, the default rule. Far from placing upon a property owner, who might be unaware of VARA, the onus to seek a detailed, express waiver of moral rights by a visual artist,<sup>78</sup> the burden should be on the artist to secure such rights, via express grant by the property owner. VARA’s “recognized stature” provision is antithetical to and, thus, should never trump, the ordinary rules of contract law and property law, absent an express waiver of the latter by real or personal property owners.

### B. VARA’s Fatally Subjective Language

Even if one rejects the argument above and believes moral rights should, by default, trump private-property rights and freedom of contract, VARA contains several undefined concepts, leaving too much open to subjective interpretation to be justified. For example, 17 U.S.C. § 106A(a)(3)(A) states a visual artist has 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,” but it does not specify what counts as prejudicing honor or reputation.<sup>79</sup> More importantly, for purposes of this paper, 17 U.S.C. § 106A(a)(3)(B) gives visual artists the right “to prevent any destruction of a work of recognized stature” but does not define “a work of recognized stature,” so its meaning is open to interpretation.<sup>80</sup> Its use, then, is ripe for inconsistent results from factfinders, *i.e.*, judges and juries.<sup>81</sup> Thus, a work of art might be deemed

<sup>77</sup> See *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018).

<sup>78</sup> VARA’s waiver provision requires an express, written waiver signed by the author that specifically identifies the work and uses of that work that the waiver applies to. See 17 U.S.C. § 106A(a)(B) (2012).

<sup>79</sup> § 106A(a)(3)(A).

<sup>80</sup> § 106A(a)(3)(B).

<sup>81</sup> See *Burton*, *supra* note 69 at 648 (“The problem intensifies when the issues are put to a jury. The average layperson juror is not going to be able to determine what is prejudice to an artist’s honor or reputation or what a work of recognized stature is in light of the inevitable disagreement of art experts.”). *Burton* explains that VARA poses interpretation problems beyond the meaning of “a work of recognized stature,” writing, “The provisions of VARA have left much open to interpretation by the courts. For example, the statute provides protection of an artist’s work by creating a right to ‘prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.’ The statute fails, however, to define what is required for an act to be intentional or what qualifies as prejudice to an artist’s honor or reputation. It is unclear whether a person must intend to prejudice the artist’s honor or reputation or only intend to alter the work. Moreover, the statute provides no guidance on what is required to prove intent or prejudice.” *Id.* (citations omitted); see also *Cunard*, *supra* note 66 (“The most influential case on this and many other VARA issues is *Carter v. Helmsley-Spear* . . . Two sculptors sued building owners under both the modification and destruction clauses of VARA for damage to their lobby installation. Judge Edelstein of the Southern District of New York enunciated a test for recognized stature that required a two-part inquiry—that the work in question was meritorious and that the merit was



“of recognized stature” by one factfinder, while a different factfinder may reach the opposite conclusion. In addition, art that might be regarded as of “recognized stature” today might not be viewed as such at some future point (by different factfinders or even by the same factfinder), or vice versa.

As noted above, the leading case regarding the determination of whether art is “a work of recognized stature” is *Carter v. Helmsley-Spear*,<sup>82</sup> where the United States District Court for the Southern District of New York held:

17 U.S.C. § 106A(a) (3) (B) provides that the author of a work of visual art shall have the right “to prevent any destruction of a work of recognized stature.” This provision is preservative in nature: Congress was concerned that the destruction of works of art represented a significant societal loss. . . . The phrase “recognized stature” is not defined in VARA. In light of the preservative goal of this Section, however, the recognized stature requirement is best viewed as a gate-keeping mechanism protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature. . . . The recognized stature requirement must be interpreted in such a manner as to maintain the preservative purpose of 17 U.S.C. § 106A(a) (3) (B) and in light of this Section’s plain meaning. Thus, for a work of visual art to be protected under this Section, a plaintiff must make a two-tiered showing: (1) that the visual art in question has “stature,” *i.e.* is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact. Finally, in order to be entitled to injunctive relief, a plaintiff must show that the defendant has commenced destruction of, or intends to destroy, the subject art work.<sup>83</sup>

Here, too, subjective words create interpretation problems. The court says “stature” means “viewed as meritorious,” but what does “meritorious” mean?<sup>84</sup> Whether a piece of art has merit depends on how one defines “merit.” In this way, we are no closer to an interpretation that is not ripe for inconsistency. Additionally, the

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recognized by some relevant section of society (critics, collectors, art historians, the local community, and so on). Although it was not the intent of the Act to require judges or juries (recognized stature is a question of fact) to make aesthetic judgments, such a test comes perilously close to it, and it appears that some judges since may have allowed their personal aesthetic bias to color their opinions. (See the dissenting opinion of Judge Manion in *United States v. Martin*, 192 F.3d 608 [7th Cir. 1999].) In assessing recognized stature, courts generally rely on expert testimony, but, as the *Martin* case illustrates, such testimony is not always necessary. Other forms of evidence—reviews of exhibitions in which the work appears, other critical comment, catalogues, and newspaper articles can all be employed. Interestingly, Judge Edelstein noted that VARA does not specify when a work might have obtained recognized stature, raising the possibility that the destruction of the work and the subsequent litigation might alone ‘generate’ the required stature.”) (citations omitted).

<sup>82</sup> 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

<sup>83</sup> *Id.* at 324–25.

<sup>84</sup> *Id.* at 325.

court says that “this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”<sup>85</sup> Again, what qualifies as being “recognized” and what does not? Which “experts,” which “other members of the artistic community,” and which “cross-section of society” get to make this determination? How many experts or others must agree? What if half of the most well-known art “experts” think a piece of art is of “recognized stature,” but the other half do not? Which half prevails? The determination of whether art is of “recognized stature” will depend, then, not only on the factfinder, but also on each witness who offers testimony. Surely art is in the eye of the beholder and cannot be measured, graded, or judged by anything close to an objective standard.

In his 2018 5Pointz ruling, Judge Block stated that “common sense should be utilized in assessing whether the visual work is of recognized stature.”<sup>86</sup> However, just as “recognized stature” and “meritorious” are subjective, “common sense” is a subjective phrase, open to varying interpretations and application. The fact VARA leaves so much open to subjective interpretation is reason enough not to prioritize its protections over the common law’s far-more-objective rules of property and contracts. One can objectively determine ownership of property via deed. One can objectively prove the existence of a binding agreement via signed contract (among other ways). But one cannot objectively determine whether a work of art is one “of recognized stature.” And given that art is ever-changing, it stands to reason that increasingly more works of art could meet the loose standard of “work of recognized stature” and that, as a result, more and more properties would be swept within VARA’s reach. Certainly, nothing this subjective should ever, by default, trump our nation’s long-held rights regarding private property and contracts. Judge Block acknowledges that a test to determine what qualifies as a “work of recognized stature” that is too lenient risks curtailing legitimate property interests;<sup>87</sup> but my contention is that any test—no matter how lenient or strict—that permits a third-party factfinder to determine subjectively that a piece of art is a “work of recognized stature” illegitimately curtails property rights. The absence of a consistent, objective standard alone should foreclose the possibility that visual artists’ moral rights trump the rights of property owners.

However, as stated above, even if one could objectively determine whether a work of art is “a work of recognized stature,” that art’s fate should still be determined according to the normal rules of contracts and private property, because pre-existing rights to property and contractual freedom should never be subservient to determinations of third parties. Quite simply, VARA interferes with one’s freedom to bind oneself to another only to the extent of their contractual agreement with one another and interferes with one’s ability to use her property as she sees fit.

### C. VARA’s “Visual Art” Exclusions

In addition to VARA’s subjective language, another reason to object to VARA is that it specifically lists which art is and which art is not “visual art,” for purposes of the statute.<sup>88</sup> By statutorily excluding certain art from VARA’s coverage, Congress undercuts VARA’s imposition of moral rights on the grounds that visual art, unlike

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<sup>85</sup> *Id.*

<sup>86</sup> *See* Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 438 (E.D.N.Y. 2018).

<sup>87</sup> *Id.*

<sup>88</sup> 17 U.S.C. § 101 (2012).

other types of art, is unique and worthy of special treatment. According to 17 U.S.C. §101:

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

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

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.<sup>89</sup>

Why is a limited-edition work of more than 200 copies not considered “a work of visual art?” Why is a piece of art not “a work of visual art” if it is made for hire?<sup>90</sup> Is it not conceivable that an item used for advertising or promotion could be as culturally significant as one that is not? Such disqualifying conditions weaken the already weak position that art is worthy of moral rights protection, particularly in the case of art that is deemed “a work of recognized stature.” Whether a piece of art is “a work of recognized stature” is an inherently subjective determination, but even if it were not, a piece of art deemed worthy of that label should be worthy of that label regardless of how many copies of it exist, whether it was made for hire, or regardless of any other reason. If such factors, at least one of which (number of copies) seems entirely arbitrary, affect whether the art qualifies for VARA protection at all, then a statute that

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<sup>89</sup> *Id.* For an in-depth look at these “visual art” exclusions, see Shipley, *supra* note 12, at 1000–20.

<sup>90</sup> David Shipley writes that “the idea that the employee-artist does not have moral rights in the creations done for an employer is antithetical to moral rights theory.” *See id.* at 1010.

prioritizes artists' moral rights over the traditional rights of property owners is even less justified than it already is.

*D. Berne Convention Compliance Without VARA §106A(a)(3)(B)?*

A final reason to be troubled by VARA's threat to traditional property and contract rights is that Congress included Section 106A(a)(3)(B) in VARA despite the possibility that complying with the Berne Convention does not require statutorily granting the moral right to prevent destruction of art.<sup>91</sup> Article 6bis(1) of the treaty states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."<sup>92</sup> The word "destruction" is not stated in the section. Professor Adler notes that "VARA expands the right of integrity, allowing the artist to prevent not merely modification but outright destruction of the work."<sup>93</sup>

So, a statute that interferes with traditional rights of property owners was enacted by Congress solely to comply with an international treaty and includes a section arguably unnecessary for such compliance. Thus, were the United States to repeal Section 106A(a)(3)(B), it may very well still meet the Berne Convention requirements. However, even if a court found the right to prevent destruction of art to be implicitly included in Section 106A(a)(3)(A), the subjective determination of whether the destruction of a piece of art prejudiced the artist's honor or reputation would still need to be made. Again, the language of VARA leaves much to interpretation. My position, quite simply, is that compliance with an international treaty is an illegitimate reason

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<sup>91</sup> See Lipton, *supra* note 11, at 506, 510 ("It is also unclear from the wording of Article 6bis(1) whether destruction of a work by a copyright holder falls within the scope of the right of integrity. The Convention requires that an author should have the right to object to "distortion, mutilation or other modification of, or other derogatory action" in relation to the work. It is unclear whether or not this encompasses destruction of the work, particularly in cases where the destruction does not affect the "honor or reputation" of the author. In fact, many countries with well-developed moral rights laws do not protect authors against destruction of a work . . . the precise interpretation of Article 6bis, and the way in which signatory countries choose to implement its provisions, varies widely."). Citing Lipton, *id.*, Shipley writes, "[r]ecognition of a moral right against destruction is not universal." Shipley, *supra* note 11, at 1021 n.192; see also Cunard, *supra* note 66 ("One of the more controversial details of VARA is the 'recognized stature' hurdle for protection against complete destruction of a work. Many other countries give no moral-rights protection against an artwork's complete destruction on the principle that a piece which ceases to exist cannot be prejudicial to an artist's honor and reputation in the way that an existing work which misrepresents the artist can.").

<sup>92</sup> Berne Convention, *supra* note 8, at art. 6.

<sup>93</sup> Adler, *supra* note 11, at 267. Adler notes, "[t]he right to prevent destruction is not universal in civil law countries. See *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 320 (S.D.N.Y. 1994), *aff'd in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). This variation illustrates the different purposes that moral rights laws serve. To the extent that the right of integrity serves primarily to protect the artist's reputational interest, destruction tends not to be prevented; the theory is that continued display of mutilated work misrepresents an artist's intention and thus harms him more than if the work were destroyed altogether. To the extent that the right of integrity is seen as primarily protecting the public interest in preserving cultural heritage, destruction is prohibited." *Id.* at 320 n.17.

to prioritize visual artists' moral rights above the traditional rights of property owners. But at the very least, such compliance should not add rights for visual artists not expressly called for by said treaty. By expanding such rights for visual artists via VARA, Congress paved the way for the unjust ruling against Wolkoff, the property owner in the 5Pointz litigation.

#### *E. Reflections on 5Pointz Ruling*

Turning to the 5Pointz litigation, I offer that no principle of contract or property law justifies imposing upon Wolkoff, the property owner, any obligation or liability with respect to the art produced on his property. The location that would become 5Pointz existed long before the art of 5Pointz existed.<sup>94</sup> Wolkoff did not purchase the property subject to any limitations, such as an historic-landmark designation or in-gross easement.<sup>95</sup> Wolkoff took the property free and clear of any such encumbrances.<sup>96</sup> He was first-in-time and, as such, should have been first-in-right, with regard to use of the property, free to do with his private property as he saw fit.<sup>97</sup>

As the property owner, Wolkoff could have denied Cohen and the other artists permission to use his property for their graffiti. In other words, the only reason the artistic endeavor known as 5Pointz existed is that Wolkoff allowed it to happen. As such, Wolkoff's permission should most appropriately be seen as the granting of a license, which a grantor can revoke at will. Given that the artists had Wolkoff's permission, no argument can be made that the artists acquired property rights via a prescriptive easement in-gross or via adverse possession. Wolkoff granted Cohen and others permission to use his property for their art only for a limited time.<sup>98</sup> The terms of their arrangement were agreed upon by Wolkoff and Cohen, and only those terms should be enforced.<sup>99</sup> The fact that a judge later subjectively decided that the 5Pointz art was of "recognized stature" should not have altered in any way the agreement between Wolkoff and Cohen. Far from being liable for any, much less millions in damages, Wolkoff's actions should have been regarded as firmly within his legal rights. He was and is the injured party.

#### IV. CONCLUSION

The 5Pointz ruling reveals the substantial threat the Visual Artists Rights Act poses to our nation's long-standing commitment to private property and freedom of contract. A property owner granted graffiti artists permission to use his property for their art, with the understanding that the property and, thus, their art would one day be destroyed. When it ultimately was destroyed, the artists sued for damages under VARA, which gives visual artists the moral right to prevent destruction of a "work of

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<sup>94</sup> See *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 432 (E.D.N.Y. 2018).

<sup>95</sup> See *id.*

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. City of New Britain, Conn.*, 347 U.S. 81, 84 (1954).

<sup>98</sup> *Cohen*, F. Supp. 3d at 431.

<sup>99</sup> *Id.* at 433.

recognized stature."<sup>100</sup> A federal district judge decided the works at issue were works of "recognized stature" and awarded the plaintiffs damages of \$6.75 million.<sup>101</sup>

The property owner's granting of permission to the artists was simply a license to use his property for a limited purpose for a limited time. He could have denied such permission entirely but chose to open his property to the artists, thus allowing their art to flourish for years. Because he did not obtain from the artists a written waiver of their moral rights per VARA, he ended up on the wrong end of a multi-million-dollar verdict.

Nothing about this outcome comports with traditional rules of property law or contract law. Years after the agreement regarding permission to use his property was reached, a judge's decision that the destroyed art was of "recognized stature" meant that the property owner's failure to obtain a written waiver from the artists exposed him to liability under VARA. But the law should not place upon a property owner the burden of obtaining a written waiver to protect himself should a judge or jury later make a subjective determination that a piece of art is a "work of recognized stature." Rather, the burden should be on an artist to secure from the property owner a grant of moral rights, with respect to art on his property. In other words, if a party wishes to secure moral rights to art drawn on another's property, that party should receive such rights only via the property owner's express permission, rather than receiving such rights by default.

A visual artist's moral right not to have a "work of recognized stature" destroyed creates a default rule that violates individual property rights under the common law. The possibility that a judge or jury will subjectively determine that a work of art is "a work of recognized stature" and thus, the work cannot be destroyed, jeopardizes property owners' abilities to use their properties as they see fit, to be bound contractually according only to the terms of their contracts, and places upon property owners a burden (securing a written waiver of an artist's moral rights) that traditional rules of property and contracts do not require. And since VARA does not define "recognized stature," the application of the provision is ripe for inconsistent outcomes.

In short, VARA illegitimately places subjectively determined moral rights above far-more objective property and contract rights. One's right to control his property should not be subject to a third party's judgment call regarding how culturally significant a work of art drawn on that property is. If one's freedom to control his property is to be curtailed because of art he allows to be drawn on his property, then such curtailment should be due to his expressly encumbering his property, not due to a court's encumbering it after the fact. Moreover, there is no compelling reason to give special treatment to visual art that is not given to other creations or products, particularly given the fact that how one views art is subjective and that "art" is an ever-changing concept. Nothing so subjective and fluid justifies departing from normal rules of property and contract. As such, §106A(a)(3)(B), VARA's "recognized stature" provision, should be repealed, fully restoring traditional rights to property owners.

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<sup>100</sup> 17 U.S.C. § 106A(a)(B) (2012).

<sup>101</sup> *Cohen*, F. Supp. 3d at 428.