Notes

WHEN STUFF BECOMES ART: THE PROTECTION OF CONTEMPORARY ART THROUGH THE ELIMINATION OF VARA'S PUBLIC-PRESENTATION EXCEPTION

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ABSTRACT

The Visual Artists Rights Act of 1990 (VARA) grants an artist the broad power to "prevent any intentional distortion, mutilation, or other modification of the work which would be prejudicial to [the artist's] honor or reputation." This right is significantly circumscribed, however, by VARA's public-presentation exception, which states that a modification "which is the result . . . of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification" that would otherwise violate VARA.

This Note argues that the public-presentation exception is injudicious in light of the rise of the contemporary art movement. Much more than artists of earlier movements, contemporary artists rely on precise arrangement of elements and engagement with the physical space surrounding these elements in the creation of a work of art. Yet it is control over those critical contextual elements, arguably the most critical element of a contemporary work, that VARA explicitly denies to the contemporary artist. The public-presentation exception threatens more than just the personal interests of artists—a greater societal interest in preserving authentic cultural heritage for future generations is continually undermined as long as the public-presentation exception remains codified in VARA. Lasting protection of the integrity of works of contemporary art thus requires the elimination of the public-presentation exception.

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INTRODUCTION

Since its unveiling in 1979, *Flight Stop*, the work of Canadian artist Michael Snow, has been viewed by millions of visitors to the Toronto Eaton Centre, a "downtown shopping mall and office complex."[1] Commissioned to create a work to occupy a large sky-lit galleria open to several stories of galleries, Snow envisioned an artistic solution that would bring the natural world indoors: a flock of sixty fiberglass geese suspended from the glass ceiling, posed in the moment they have broken formation to alight at the mall's southern entrance.[2] Snow's geese are not conventional sculptural works but rather three-dimensional photographs, crafted by enveloping fiberglass bodies in printed suits developed from photographs taken by the artist of a deceased Canadian goose.[3] As one scholar has noted, this treatment has rendered the work "more naturalistic—goosier—than conventional sculptural representation could . . . and this quality accentuates Snow's artistic comment on the nature of photographic illusion, on the tendency to suspend disbelief."[4]

This "goosiness" was briefly interrupted during the late autumn of 1982.[5] Perhaps overcome with holiday spirit, Eaton Centre's holiday decorators tied ribbons around the necks of each of the geese in *Flight Stop*, without the knowledge or consent of the artist.[6] However festive the display, Snow was not amused. The artist sued Eaton Centre to have the ribbons removed, "adamant in his belief that his naturalistic composition ha[d] been made to look ridiculous by the addition of ribbons and suggest[ing] it [was] not unlike dangling earrings from the Venus de Milo."[7] The Ontario High Court of Justice agreed; the ribbons did "distort or modify the [artist's] work" and, further, Snow's concern that the ribbons were "prejudicial to his honour or reputation" was indeed reasonable under the circumstances.[8] By order of the court, the Eaton Centre was to remove the ribbons without delay.[9] Snow prevailed—but had his work been installed in a mall just fifty-four

1. Martha Langford, *Michael Snow: Life & Work: Flight Stop*, ART CAN. INST., http://www.aci-iac.ca/michael-snow/key-works/flight-stop [https://perma.cc/DD4P-XVX6].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Snow v. Eaton Ctr. Ltd. (1982), 70 C.P.R. 2d 105, para. 3 (Can. Ont. H.C.J.).

7. *Id.* para. 6.

8. *Id.* para. 8 (interpreting § 12(7) of the Copyright Act, R.S.C. 1970, c C-30 (Can.)).

9. *Id.* para. 9.

miles southeast of Toronto in Buffalo, New York, the artist would likely have found himself out of luck.[10]

American artists would have to wait a few more years before being granted rights similar to those recognized by the Canadian court in *Snow*. The Visual Artists Rights Act of 1990 (VARA)[11] conferred on American artists certain moral rights long enjoyed by their European[12] and, more recently, Canadian counterparts.[13] Unlike traditional property rights that vest in the owner of property, moral rights are personal and noneconomic rights that vest in the creator of a work and survive transfer of the ownership of the work.[14] VARA protects two primary rights of the artist: the right of attribution[15] and the right of integrity,[16] the latter of which is the focus of this Note.

VARA's right of integrity first grants an artist the broad power to "prevent any intentional distortion, mutilation, or other modification of th[e] work which would be prejudicial to [the artist's] honor or reputation."[17] For works of "recognized stature," artists are granted an additional right to enjoin "any intentional or grossly negligent

10. In 1982, the United States had not yet passed the Visual Artists Rights Act (VARA) and New York had not yet passed its Artist's Authorship Rights Act (AARA), a 1984 law later preempted by the passage of VARA in 1990. Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ.1226 DAB, 2003 WL 21403333, at *16 (S.D.N.Y. June 17, 2003) (holding that VARA preempts AARA). However, even after the passage of VARA, Snow would likely have been unable to enjoin the display the beribboned geese because of the public-presentation exception to VARA. This exception states that the "modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence." Visual Artists Rights Act of 1990, § 603, 17 U.S.C. § 106A(c)(2) (2012). For further discussion of the ambiguity in the public-presentation exception as applied to the facts of the *Snow* case, see *infra* Part I.D.2.

11. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.).

12. *See generally* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995) (providing an overview of moral-rights laws in civil law countries, including Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Sweden, and Switzerland).

13. *See generally Snow*, 70 C.P.R. 2d 105 (setting the precedent that was settled six years before formal recognition of moral rights in a 1988 amendment to the Copyright Act of Canada).

14. *See* Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 388 (1995) ("[M]oral rights are rights of personality, not property-based rights in the physical art work. Accordingly, a natural person, as the creator of a work and the copyright holder, can possess both personality and property rights in a work . . . .").

15. For a definition, see *infra* note 29 and accompanying text.

16. For a definition, see *infra* note 33 and accompanying text.

17. 17 U.S.C. § 106A(a)(3)(A) (2012).

destruction" of the work.[18] These broad powers are significantly circumscribed by VARA's public-presentation exception, § 106A(c)(2), which states that a modification "which is the result . . . of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification" that would otherwise violate VARA.[19]

What types of practical implications does such an exception pose? The major implication is best illustrated by example: had Snow's geese been beribboned in the United States, he would likely have had no legal recourse to have the ribbons removed—the ribbons being a matter of display of the work rather than a physical change to the work itself.[20] In fact, the Judiciary Committee recommending VARA cited the facts of this very case as an illustration of a cause of action that would be precluded by the proposed public-presentation exception.[21]

This Note argues that the public-presentation exception should be eliminated from VARA. Added to appease museums and galleries that feared loss of control over curatorial decisions, the public-presentation exception would have been justified under a traditional understanding of works of fine art as "separately conceived art object[s] . . . simply placed in a space."[22] However, in the context of contemporary art movements, such an understanding is no longer accurate or desirable. Much more than artists of earlier movements, contemporary artists rely on precise arrangement of elements and engagement with the physical space surrounding these elements in the creation of works of art.[23] And yet it is control over those critical contextual elements, arguably the most critical elements of contemporary works, that VARA explicitly denies to contemporary artists. True protection of the integrity of works of contemporary art thus requires the elimination of the public-presentation exception.

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18. *Id.* § 106A(a)(3)(B).

19. *Id.* § 106A(c)(2).

20. For further analysis of the facts of the *Snow* case under VARA, see *infra* Part I.D.2.

21. H.R. REP. NO. 101-514, at 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927.

22. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 134 (1st Cir. 2006).

23. *See* MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 15 (2003) ("If the physicality of many minimalist works is only completed by the activation of the surrounding space, then this is a contingent physicality that ceases to exist when the elements of the work are disassembled . . . and can be profoundly compromised by a careless or imprecise arrangement of elements."). For a discussion of the increasing importance of museum space and ready-made objects in contemporary art, see generally *id.*

This Note proceeds in four parts. Part I provides an overview of the development of moral-rights protection in the United States, covering its influences, goals, and problematic limitations. Part II considers two of the most widely influential contemporary art movements—minimalism and conceptual art. It examines the defining attributes of each movement and what makes each uniquely vulnerable under the public-presentation exception. Part III proposes the elimination of the public-presentation exception in § 106A(c)(3). This Part additionally explores how this amendment is consistent with the greater aims of VARA and considers the various limitations on the proposal that maintain an appropriate balance between the interests of artists and those who own and display their works. Finally, Part IV evaluates the other legal avenues available to artists to achieve comparable protection, ultimately concluding that none provide sufficient protection over rights of presentation.

I. BACKGROUND

A. A Moral-Rights Primer

The term "moral rights," having nothing to do with ethical notions of morality, initially confuses many. Derived from the French *droit moral*, the adjective "moral" denotes a broader societal interest.[24] Moral rights are generally conceived of as "'author's rights': the incorporeal, personal connection with one's art work that most European legal systems have historically viewed as being separate from the pecuniary rights . . . protected under the United States copyright system."[25] Expanding on this definition, some have equated modifications of artworks to personal attacks on the artist herself.[26]

The concept of moral rights originated in French law[27] and encompasses under its umbrella four primary rights: attribution, disclosure, withdrawal, and integrity.[28] The right of attribution, also called the right of paternity, protects "the right to be known as the author of one's work [and] . . . to prevent others from being named the

24. Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42 (1998).

25. Sherman, *supra* note 14, at 379.

26. Liemer, *supra* note 24, at 43.

27. *See generally* Susan P. Liemer, *On the Origins of* Le Droit Moral*: How Non-Economic Rights Came to Be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65 (2011) (providing an overview of the development of moral rights in French intellectual property law).

28. Sherman, *supra* note 14, at 381.

author of one's work . . . ."[29] The right to publish one's work anonymously has intermittently been included under the right of attribution.[30] The right of disclosure allows an author to decide when to make a work public, if at all,[31] while the right of withdrawal permits an author to remove a work from public circulation "in order to modify or destroy it."[32] Rights of integrity empower authors to "object to any distortion, mutilation, or modification of his work that would be derogatory to his reputation or honor."[33] Of the four related rights, this right has been recognized as endowing artists with the most power and, unsurprisingly, has engendered the most antagonism.[34]

Most legal systems protect these rights for at least as long as the life of the author.[35] Those who support a duration limited to the life of the author argue that rights derived from a deeply personal—even spiritual—connection between author and work should only be enforceable by the author himself.[36] If "an author's external work embodies his personal message and thus is reflective of his individual, intrinsic creative process," it is not appropriate for anyone else to be able to make decisions closely tied to the work, such as whether to disavow or allow a modification.[37]

Yet those who identify preservation of cultural heritage as a justification for moral rights on par with authorial personality have argued for perpetual moral rights, as are afforded to artists in France.[38] A grant of perpetual rights follows logically from a moral-rights theory, explains Edward Damich, "because the work is not any less an expression of the author's personality as time passes."[39] The public's

29. *Id.* at 381 n.48.

30. *Id.*

31. *Id.* at 381 n.49.

32. *Id.* at 382 n.50.

33. *Id.* at 381 n.47.

34. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 565 (1940).

35. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 22 (1999).

36. Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 2003 (2006); *see also* SAX, *supra* note 35, at 22 ("[A] work of art is conceived not only as an object, but as a constituent part of the artist's personality.").

37. Kwall, *supra* note 36, at 2003.

38. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 993 (1990) ("[I]nsofar as moral rights protection indirectly benefits art preservation, perpetual protection is appropriate.").

39. *Id.*

interest in enjoying "the fruits of a creator's labors in original form and to learn cultural history from such creations" is not limited to the lifespan of the artist.[40] A scheme of perpetual rights would allow the artist's estate, or, at its broadest realization, the community as a whole, to sue to enforce moral rights to protect elements of cultural heritage for future generations.[41] The debate as to which duration best serves the goals of moral rights, however, is outside the scope of this Note.

B. The Berne Convention: American Reluctance and Adoption

The oldest international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works, adopted its first moral-rights provision in 1928,[42] forty-two years after opening for signature.[43] This provision, article 6*bis*, codifies the moral rights of attribution and integrity:

> 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.[44]

The clause "or other derogatory action in relation to said work" was added in 1948 to "broaden the range of protection given to authors."[45] Noticeably absent from protection are the moral rights of withdrawal and disclosure, which were omitted to attract more wide-ranging support from participating countries.[46] Another compromise established the duration of the rights as the length of the economic rights of the author, usually death plus a number of years subsequent.[47]

The United States first ratified the Berne Convention in 1935 but withdrew shortly thereafter when the Senate realized compliance with

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40. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 69 (1985).

41. *Id.*

42. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 356 (2006).

43. Sherman, *supra* note 14, at 373 n.11.

44. Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, § 1, July 14, 1967, 828 U.N.T.S. 221.

45. Sherman, *supra* note 14, at 385.

46. *See id.* at 384 (noting that "[t]he original article 6*bis* was the product of a compromise made for the benefit of common law countries" and that the rights of disclosure and withdrawal were not included).

47. *Id.* at 385.

the convention would require amendments to U.S. law.[48] At the time, the most significant opponents to moral-rights legislation included movie studios and newspaper and magazine publishers who feared the adoption of such rights would severely curtail their editorial control.[49] Industry lobbying was hardly the sole barrier to moral-rights legislation, however; many have suggested the relatively late adoption of moral rights in the United States was primarily a function of American reluctance to "attach non-economic rights to property that do not belong to the traditional property owner."[50]

The movement in favor of moral rights did not start gaining traction until the mid-twentieth century, noncoincidentally coinciding with a boom in the American art scene.[51] On the international scene, "American artists only gained . . . clout beginning with abstract expressionists . . . in the 1940s" and, as such, "the rise of the economic value of American art may have contributed to concern that destruction of such work would have a negative impact both culturally and economically."[52] Artistic interests aside, the true impetus for American accession to the Berne Convention was predominantly self-serving: joining the Convention provided an opportunity to increase protection of American copyright interests abroad.[53] Recognizing how "American popular culture and information products ha[d] become precious export commodities of immense economic value," but that such "value [had been] badly eroded by low international copyright standards," Congress intended to bolster the international legal regime by lending American "prestige and power" to the credibility of the

48. *Id.* at 398.

49. *Id.*

50. Natalia Thurston, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 704 (2005). Speaking on the difficulty of passing moral-rights legislation, California State Senator Alan Sieroty lamented,

> To pass this law, you have to get legislators to rethink their concepts of property rights. Property rights are very strong in this country, and that's why we have not adopted art preservation laws. You have to begin to think that maybe the person who created the work . . . retain[s] some interest in seeing that the art is not destroyed, not mutilated, and not changed without the artist's consent.

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, 904–05 (2007) (citations omitted). A decade before moral rights were recognized at the federal level in VARA, California enacted a statute conferring moral rights—the California Art Preservation Act of 1979 (codified as amended at CAL. CIV. CODE § 987 (West 2007)).

51. Thurston, *supra* note 50, at 705.

52. *Id.*

53. Sherman, *supra* note 14, at 398–99.

Convention's standards, to the benefit of American authors.[54] Further, according to Congress, no new laws were needed to bring the United States into compliance with the Convention, as existing state moral-rights systems in concert with federal copyright and trademark law already provided satisfactory protection of artists.[55] This minimalist approach was met almost immediately with both domestic and international criticism.[56] Such criticism—centering on the hypocritical nature of American actions[57]—prompted the reintroduction to Congress of a federal moral-rights statute, an earlier version of which had been presented by Senator Edward Kennedy in 1989.[58] Concluding a century-long conflict, Congress finally established a federal moral-rights regime by passing VARA, which took effect June 1, 1991.[59]

C. The Visual Artists Rights Act

Rather than one extolling the "intimate bond" between an artist and her work, the view taken by Congress in enacting VARA was predominantly pragmatic: "The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation."[60] This approach is consistent with the primary goal of the Copyright Act to incentivize creation, deriving its legitimacy in turn from the mandate of the Copyright Clause of the U.S. Constitution to "promote the Progress of Science and useful Arts."[61]

Supplementing the economic rights of artists already protected under the Copyright Act, VARA provides rights of attribution and integrity. The elements of the right of attribution are found in § 106A(a)(1)(A) and (B):

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54. H.R. REP. NO. 100-609, at 19–20 (1988).

55. Sherman, *supra* note 14, at 375.

56. *Id.* at 406–07.

57. The United States refused to join the Berne Convention out of reluctance to adopt a broad, federal moral-rights system. Upon accession to the Convention, Congress concluded that no new federal laws were necessary to bring the United States into compliance with the Convention. *Id.* at 397–99.

58. *Id.* at 407. Senator Kennedy's bill protected a much broader class of artworks than would be protected by the version eventually codified in VARA and, significantly, did not allow for the waiver of moral rights. *Id.*

59. 17 U.S.C. § 106A(a)(1)–(2) (2012).

60. H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

61. U.S. CONST. art. I, § 8, cl. 8.

> The author of a work of visual art—
>
> (1) shall have the right—
>
> (A) to claim authorship of that work, and
>
> (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.[62]

Section 106A(a)(2) further permits an artist to "disavow" a work of visual art that has been mutilated or modified, reflecting an understanding that a work that has been modified is no longer the same work that the artist authored.[63] The right of integrity codified in § 106A(a)(3) empowers artists:

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[64]

Although reflecting the broad language of article 6*bis* of the Berne Convention, significant limitations narrow the reach of VARA. First, VARA applies only to "works of visual art," an extremely limited category encompassing paintings, drawings, prints, and sculptures in a single copy or of a limited-edition run of two hundred or fewer signed and dated copies.[65] Specifically excluded from this category are works made for hire, advertising and promotional materials, and numerous

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62. 17 U.S.C. § 106A(a)(1)(A)–(B).

63. *Id.* § 106A(a)(2) (stating that an artist "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").

64. *Id.* § 106A(a)(3)(A)–(B).

65. *Id.* § 101. A "work of visual art" is defined as:

> (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.

Id.

other types of visual works.[66] Second, an artist's rights under VARA are limited to the duration of the artist's life and only apply to works created after the statute's enactment.[67] Third, the public-presentation exception prevents an artist from enjoining certain modifications of her work.

D. The Public-Presentation Exception

The right of integrity provided in § 106A(a)(3) is subject to further narrowing by the public-presentation exception in § 106A(c)(2), which provides:

> The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.[68]

This exception is quite troublesome if one accepts one of the most common justifications for providing artists with a right of integrity—that "to deform artists' work is to present them to the public as creators of something that is not their own and in that way to subject them to criticism for work they have not done."[69] It is particularly problematic given of the rise of contemporary art for which contextual elements are integral if not definitional. The unique vulnerability of contemporary art in the face of the public-presentation exception is examined below in Part II.

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66. *Id.* § 101. The Act provides that 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.

Id.

67. *Id.* § 106A(d)(1) ("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.").

68. *Id.* § 106A(c)(2).

69. SAX, *supra* note 35, at 21.

1. *Defining the Exception*. There are two potential situations where a display-type modification could result in an artist receiving an undeserved critique. First, the introduction of an offensive auxiliary element or the placement of a work in an offensive context may expose an artist to criticism resulting from an artistic choice they did not make. Consider the example of Maya Lin, designer of the Vietnam War Memorial in Washington, D.C. Lin intended that the memorial encompass "not only the black wall, but the grassy approach to it as well" and thus strenuously objected to the introduction of a nearby statuary group, which "interfere[d] with this intention by drawing approaching observers away from the wall and thereby altering the memorial itself."[70] Even if Lin were able to demonstrate that the introduction of the statuary group distorted her work in a manner prejudicial to her reputation, she would have no cause of action under VARA.[71] An artist who discovers that her work has been hung in a bathroom stall at a museum or gallery is similarly powerless to object, despite the attendant prejudicial repercussions of such a display.[72]

Second, a public-presentation modification results when the work is not displayed as the artist designed it. Artists whose works comprise multiple elements are particularly at risk of this type of modification. The Whitney Museum's failed loan of Carl Andre's *Twelfth Copper Corner* for a 1976 exhibition provides an apt illustration. The piece, a

70. Eric M. Brooks, *"Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 CALIF. L. REV. 1431, 1437 n.50 (1989).

71. *See* JOHN HENRY MERRYMAN, ALBERT E. ELSEN & STEPHEN K. URICE, LAW, ETHICS AND THE VISUAL ARTS 773 (5th ed. 2007) (describing the juxtaposition of Lin's memorial against the statuary group of American soldiers).

72. The restrooms of art museums are understood to be an inappropriate place to display works of art and, as such, have been the site of a number of satirical exhibitions. *See* Geoff Edgers, *Breaking: Bathroom Art Takes over the MFA*, BOSTON.COM (June 15, 2011, 5:15 PM), http://archive.boston.com/ae/theater_arts/exhibitionist/2011/06/breaking_bathro.html [https://perma.cc/3YMP-BCSF] (describing a group of artists who hung art in the bathroom of the Museum of Fine Arts in Boston to commemorate the *Flush with the Walls* exhibit and draw attention to local artists); Randy Kennedy, *At the Modern, Art in a New York Minute*, N.Y. TIMES (Apr. 11, 2008), http://www.nytimes.com/2008/04/11/arts/design/11moma.html [https://perma.cc/H2GA-L5BK] (describing a group of master's-degree students who staged an unauthorized exhibit in the fifth-floor restroom at the Museum of Modern Art). One of the most well known of these protest exhibitions, called *Flush with the Walls*, was staged in the restroom of the Museum of Fine Arts in Boston in 1971. Without the knowledge or permission of the museum, a group of Boston artists planned the exhibition "to point out that the men's room seem[ed] to be the only place in the Museum of Fine Arts that an exhibit by contemporary local artists [could] be seen." Sarah Hwang, *Flush with the Walls at the Museum of Fine Arts*, BERKSHIRE FINE ARTS (May 7, 2011), http://www.berkshirefinearts.com/05-07-2011_flush-with-the-walls-at-the-museum-of-fine-arts.htm [https://perma.cc/D4HF-U3YX].

sculptural work comprising "50 cm x 50 cm copper plates set into the corner of the room in descending rows" forming a right triangle with a "jagged-edge hypotenuse," requires a very particular space and arrangement.[73] Bearing this in mind, the Whitney permitted Andre to participate in selecting an appropriate space—a space where the work could "take[] control not only of the floor, but also of the column of space that extends above the array of plates."[74] When the work was moved from the location he had chosen to a corner where it had to compete with a window and an emergency-exit door, Andre withdrew his piece.[75] Though "[p]resumably the collectors and institutions that own [Andre's] work also understand that the effect of the work depends on its placement within the space of the room" and that "the arrangement of elements is an integral part of Andre's work," the Whitney, one of the premier collections of contemporary American art, nevertheless chose to ignore the artist's instructions regarding the presentation of the work.[76] Luckily for Andre, he still owned the piece and was able to withdraw it from the exhibition. But even if VARA had been in existence at the time, it would not have provided the artist a cause of action.

2. *Remaining Ambiguity*. Much of VARA, including the public-presentation exception, remains largely uninterpreted by the courts.[77] For one, there exists no clear line between those modifications that are a result of the public presentation of the work and those that are not. The facts of the *Snow* case provide a useful illustration of this ambiguity—is physically but nonpermanently affixing an auxiliary element to a work of art a matter of presentation?[78] Neither VARA nor the remainder of the Copyright Act define public presentation beyond the explanation that it includes "lighting and placement."[79] In describing this exception, the Judiciary Committee explained that it would reserve for museums and galleries the "normal discretion to light, frame, and place works of art" but that "conduct that goes

73. BUSKIRK, *supra* note 23, at 27.

74. *Id.*

75. *Id.*

76. *Id.*

77. Kevin A. Goldman, *Limited Times: Rethinking the Bounds of Copyright Protection*, 154 U. PA. L. REV. 705, 716 n.63 (2006) (explaining that the rights provided in VARA are "rarely litigated" because of the statute's narrow definition of "work of visual art").

78. For an explanation of the facts of the *Snow* case, see *supra* Introduction.

79. 17 U.S.C. § 106A(c)(2) (2012).

beyond the presentation of a work to physical modification of it is actionable."[80] But what constitutes a physical modification?

Imagine that Eaton Centre had used specialized lighting to project Christmas ribbons onto the surface of the sculptural geese rather than using physical bows. These facts would seemingly fit squarely in the realm of a public-presentation modification, as the issue is one of lighting. What about the addition of physical ribbons? Although courts have yet to weigh in on this matter, one plausible distinction could be drawn as to the relative permanence of the modifications. The addition of a physical element, easily reversible without the intervention of art conservators, would not be considered a physical modification and would instead fall under the umbrella of public-presentation modifications. Modifications of this type would include such acts as placing a hat on a figural bust or displaying a work in a completely mirrored room. Permanent or semipermanent modifications, reversible but requiring professional intervention to restore the work to its original state, on the other hand, would be actionable under § 106A(a)(3)(A) of VARA. Examples of modifications of this sort include painting a sculpture another color[81] or cutting a painting into hundreds of pieces.[82]

Employing this framework, Eaton Centre's beribboning of *Flight Stop* would be distinguishable as a matter of public presentation falling within the § 106A(c)(2) exception. Yet it is plausible that a court faced with a similar fact pattern could take a narrower view of the statutory language to find that the introduction of an auxiliary element qualifies as an actionable modification under § 106A(a)(3)(A).[83]

Although the public-presentation exception operates as a limitation on § 106A(a)(3) rights to prevent intentional modification or destruction of a work, VARA permits an artist to disavow a work that has been prejudicially modified as to an element of its presentation. Under § 106A(c)(2), a modification that is the result of the public presentation of the work "is not a destruction, distortion,

80. H.R. REP. NO. 101-514, at 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927.

81. In 1959, before installing an Alexander Calder mobile in the atrium of the Pittsburgh Airport, county maintenance workers repainted the work orange and green, the colors of Allegheny County. Megan M. Carpenter, *Drawing a Line in the Sand: Copyright Law and New Museums*, 13 VAND. J. ENT. & TECH. L. 463, 485 (2011).

82. In 1986, an Australian company planned to turn a profit by cutting a Picasso linocut into five hundred one-inch squares and selling each square for $135. Dillinger, *supra* note 50, at 923.

83. This is made possible by the absence of the "physical modification" language used by the Judiciary Committee in the actual text of VARA. 17 U.S.C. § 106A.

mutilation or other modification described in subsection (a)(3)." However, an artist's right to disavow a work—"to prevent the use of his or her name as the author of a work . . . in the event of a . . . modification of that work which would be prejudicial to his or her honor or reputation"—is provided for in § 106A(a)(2). So, although an artist may not enjoin a modification to an element of the presentation of her work, if she can demonstrate that the modification, once carried out, is nonetheless prejudicial, she is empowered to disavow the work.

In prohibiting the use of an artist's name in relation to a modified work going forward, the right of disavowal does provide an artist some reputational relief. Museums can no longer attribute the work to the artist and auction houses will likely be unable to sell the work at all, given that disavowal creates "doubt as to attribution" in violation of sales contracts.[84] This relief is limited to the extent the work is still widely known or recognizable as one by the artist even absent official attribution. A work that is recognizable, whether by the general public or by the art community, will continue to be associated with the artist even after he or she disclaims authorship of it. Irrespective of the legal significance of the act, disavowal cannot erase the memory of the public at large.[85]

3. *An International Comparison*. The American approach of including a public-presentation exception is not the standard around the world, as cases from Canada, France, and Germany demonstrate. In *Snow v. Eaton Center, Ltd.*,[86] the Ontario High Court of Justice determined that the hanging of Christmas ribbons around the necks of sculptural geese was a modification "prejudicial to [the artist's] honour or reputation."[87] The court noted that this standard necessarily

84. *See* Marc Jancou Fine Art Ltd. v. Sotheby's, Inc., No. 650316, 2012 WL 7964120, at *4 (N.Y. Sup. Ct. Nov. 13, 2012) (explaining that Sotheby's did not breach their sales contract with Jancou in withdrawing a disavowed work from the auction because an artist's disavowal of her work creates "doubt as to attribution").

85. Disavowal can be a powerful tool in signaling to the community that a work has been modified against the wishes of the artist. But the strength of disavowal depends naturally on the extent to which the disavowal is publicized. Even then, the work will remain associated with the artist—becoming known, perhaps, as "the work formerly attributed to Artist X." *See, e.g.*, Amy Adler, *Cowboys Milking: Formerly Attributed to Cady Noland*, BROOKLYN RAIL (Mar. 4, 2016), http://www.brooklynrail.org/2016/03/criticspage/cowboys-milking-formerly-attributed-to-cady-noland [https://perma.cc/PZW9-3ZSG] (referring to the work disavowed by the artist Cady Noland).

86. Snow v. Eaton Ctr. Ltd. (1982), 70 C.P.R. 2d 105 (Can. Ont. H.C.J.). For an explanation of the facts of the *Snow* case, see *supra* Introduction.

87. *Snow*, 70 C.P.R. 2d para. 8.

involved "a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at."[88] In a subsequent case, the Federal Court of Canada confirmed that a subjective criterion was appropriate but held that consideration of an objective criterion—"evaluation of the prejudice based on public or expert opinion"—was also required.[89]

In both France and Germany, the prohibition on modifications of a work under the right of integrity extends to contextual modifications "that leave the substance of a work intact, but that change the appearance or perception of the work by putting it into a context that differs from the one originally intended or envisioned by the author."[90] Where on the same facts an American court had found no moral-rights violation,[91] a French court held in favor of a Soviet composer who objected to the use of his work in an American film with an anticommunism theme.[92] In a similar vein, the German Federal Court of Justice held that the addition of customized frames that extended the patterns of the paintings they held without the knowledge or consent of the artist violated the artist's right of integrity.[93] These two foreign decisions demonstrate "that a court in a nation adhering to the Berne Convention should find that an objectionable context violates a work's integrity, for it results in a misrepresentation of the artist's personality just as a mutilation would."[94]

II. THE RISE OF CONTEMPORARY ART

The public-presentation exception is particularly problematic for current artists in light of two of the most prominent contemporary art movements: minimalism and conceptual art. Both movements gained

88. *Id.* para. 5.

89. Prise de Parole Inc. v. Guérin, Éditeur Ltée (1995), 66 C.P.R. 3d 257, para. 26 (Can. Ont. Trial Div.).

90. Rigamonti, *supra* note 42, at 365.

91. Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 578–79 (N.Y. Sup. Ct. 1948) (holding that there is no moral-rights violation when an artist's work is placed in an objectionable context), *aff'd*, 275 A.D. 692 (N.Y. App. Div. 1949).

92. Brooks, *supra* note 70, at 1437–38 (referring to the Jan. 13, 1953 decision of the Cour d'appel, Paris, 1954 D. Jur. 16, 80).

93. DANNY FRIEDMANN, TRADEMARKS AND SOCIAL MEDIA: TOWARDS ALGORITHMIC JUSTICE 278 n.35 (2015) (relating the German court's central ruling in the *Hundertwasser* case "that putting a painting in a frame which extends the patterns of the painting can be perceived as a new 'Gesamtkunstwerk', made by the author, and therefore violates the right of integrity of the work").

94. Brooks, *supra* note 70, at 1438 (footnote omitted).

prominence in the 1960s[95] and continue to influence if not define many of the artists of today.

A. Minimalism

Pioneered by artists such as Donald Judd, Sol LeWitt, Robert Morris, Carl Andre, and Dan Flavin, minimalism emerged in New York in the early 1960s.[96] This movement consciously renounced as "stale and academic" the "overt symbolism and emotional content" of the art of previous generations.[97] Eschewing the drama of abstract expressionism in particular, minimalists instead favor anonymity and an industrial aesthetic that calls attention to the materiality of the works.[98] Characterized by simplified geometric forms and industrial, fabricated materials, minimalist works often involve "the repetition of identical units, and the activation of the surrounding or contained space."[99]

The early minimalist artists acknowledged that perception of a work changes as a viewer moves through space.[100] As such, the engagement of viewers in the physical space surrounding the work represents a critical element of both the experience of the work and the work itself.[101] As art critic Suzi Gablik has explained, well-known minimalist artists "Judd and Morris were concerned that the work should present itself as 'one thing,' a simple gestalt that can be perceived as a whole, effective as an all-at-once experience."[102] It is often the case in minimalist works that "the environment . . . becomes, as it were, the pictorial field," for example, in the way in which a neon

95. *Conceptual Art*, MOMA LEARNING, http://www.moma.org/learn/moma_learning/themes/conceptual-art [https://perma.cc/RYY9-BVVJ]; *Minimalism*, MOMA LEARNING, http://www.moma.org/learn/moma_learning/themes/minimalism [https://perma.cc/KDW5-42P6].

96. *Minimalism*, ART STORY: MODERN ART INSIGHT, http://www.theartstory.org/movement-minimalism.htm [https://perma.cc/V35W-T6SJ].

97. *Id.*

98. *Id.*

99. BUSKIRK, *supra* note 23, at 3; *see Minimalism: Serial Forms and Repetition*, MOMA LEARNING, https://moma.org/learn/moma_learning/themes/minimalism/serial-forms-and-repetition [https://perma.cc/6Z69-YC6J] ("Minimalists adopted the techniques and materials of the factory, and showed us our new 1960s world of industrial, mass-produced beauty.").

100. *Minimalism: Constructing Space*, MOMA LEARNING, https://moma.org/learn/moma_learning/themes/minimalism/constructing-space [https://perma.cc/5776-RMY4].

101. *Id.*

102. Suzi Gablik, *Minimalism*, *in* CONCEPTS OF MODERN ART 244, 252 (Nikos Stangos ed., 2d ed. 1981).

sculpture might diffuse iridescence upon the surrounding walls.[103] Unlike the traditional art object—"that unique, permanent yet portable . . . luxury item"[104]—minimalist art relies on the space around the work not simply as a secondary element of presentation but as a primary element of the work itself.

One particularly representative example of minimalism is Morris's work, *Untitled (1965/71)*; the piece consists of four mirrored three-foot cubes arranged in a square.[105] As the viewer moves around the work, "their mirrored surfaces produce complex and shifting interactions between gallery and spectator."[106] Forcing viewers to be simultaneously aware of their own body and the work of art, *Untitled (1965/71)* manifests the "minimalist archetype that contrasts the ideal world of art with the imperfection of reality."[107]

B. Conceptual Art

Like minimalism, the conceptual art movement rejects another traditional notion of art: that "concerns such as aesthetics, expression, skill and marketability" are the relevant standards by which art should be judged.[108] Instead, conceptual artists emphasize the idea over the physical product, believing that "the articulation of an artistic idea suffices as a work of art."[109] Though unified by this core belief, conceptual art lacks a cohesive style, often incorporating such nontraditional elements as photographs, musical scores, architectural drawings, and performances into works.[110] "A doctrinaire Conceptualist viewpoint," explained conceptual artist Mel Bochner in a mid-1970s interview, "would say that the two relevant features of the 'ideal Conceptual work' would be that . . . it could be described and

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103. *Id.*

104. Roberta Smith, *Conceptual Art*, *in* CONCEPTS OF MODERN ART, *supra* note 102, at 256, 256.

105. *Robert Morris: Untitled 1965, Reconstructed 1971*, TATE, http://www.tate.org.uk/art/artworks/morris-untitled-t01532 [https://perma.cc/W5ZV-Y24G].

106. *Id.*

107. *Robert Morris: Untitled (Mirrored Cubes), 1965–1971*, INHOTIM, http://www.inhotim.org.br/en/inhotim/arte-contemporanea/obras/untitled-mirrored-cubes [https://perma.cc/663F-WVGH].

108. *Conceptual Art*, ART STORY: MODERN ART INSIGHT, http://www.theartstory.org/movement-conceptual-art.htm [https://perma.cc/A273-SKFS].

109. *Id.*

110. *Conceptual Art*, MoMA LEARNING, *supra* note 95. For a discussion of limits on copyright protection for minimalist and conceptual works, see *infra* Part II.D.

experienced in its description, and that it be infinitely repeatable."[111] The repeatability of the work derives from the understanding that, as conceptual artist Sol LeWitt put it, "the idea becomes the machine that makes the art."[112] As "all planning and decisions are made beforehand," the actual execution of the physical work is often merely perfunctory.[113]

Joseph Kosuth's *One and Three Chairs* is a commonly cited example of conceptual art. The work is composed of a manufactured wooden folding chair, a photograph of the chair, and a copy of a dictionary entry of the word "chair."[114] As Kosuth has explained, "[f]undamental to [the conceptual] idea of art is the understanding of the linguistic nature of all art propositions, be they past or present, and regardless of the elements used in their construction."[115] Positioning an object, the chair, next to its visual and verbal forms, Kosuth prompts viewers of the work to reflect on the language of art—how it is seen, reproduced, and described.

C. Contemporary Art as Objects Recontextualized

In conceptual art, where the conveyance of the artistic idea is the work itself, a work's success relies exclusively on the configuration or arrangement of the elements identified by the artist to his exact specifications. This is similarly true for the broader category of contemporary works beyond conceptual art. Many works of contemporary art are made through the act of designation or fabrication of an object based on instructions provided by the artist.[116] Indeed, it is not uncommon for the hand of the artist to be far removed from a work if not entirely absent.[117] However, the materials used by an artist in creating her work are not synonymous with the work itself but are mere elements of the work. It is only when the physical

111. Smith, *supra* note 104, at 259 (quoting Mel Bochner with John Coplans, *Mel Bochner on Malevich: an Interview*, ARTFORUM June, 1974, at 59, 62 (1974)).

112. *Id.* at 261 (quoting Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM Summer, 1967, at 79, 80 (1967)).

113. *Id.*

114. *One and Three Chairs*, MOMA LEARNING, https://www.moma.org/learn/moma_learning/joseph-kosuth-one-and-three-chairs-1965 [https://perma.cc/HMM3-KVCL].

115. *Joseph Kosuth: One and Three Chairs*, MOMA, http://www.moma.org/collection/works/81435 [https://perma.cc/8V98-5JVX].

116. BUSKIRK, *supra* note 23, at 4–10.

117. *Id.* at 6 ("The emphasis on idea or concept makes explicit the possibility that the work of art will not be synonymous with an object . . . .").

elements are arranged to reflect the artist's idea that a conceptual or minimalist work comes to life.[118] Arranging the physical elements differently or introducing new elements (lighting, a window, or another work, for example) runs the risk of undermining the artistic idea and, thus, the very work itself.[119]

That is not to say, however, that the introduction of any display element unanticipated by the artist will constitute a compromising distortion. The conclusion will naturally depend on the nature of the work itself: the illumination of one artist's work by a spotlight may have no bearing on the idea conveyed, but that same act could create a significant prejudicial distortion for another artist, perhaps one working in neon.

An additional factor distinguishing contemporary art from the genres of previous generations is the presumed context of the work. For works of contemporary art, the presumed space is overwhelmingly that of a museum or gallery space, and artists now commonly conceive of their works with these spaces in mind.[120] For these works, and especially those "that are completed not in the studio but . . . in an exhibition or performance space, the [very] existence of the work itself is linked to its public presentation."[121] With contextual considerations a more critical artistic element than ever before, minimalist and conceptual artists are left particularly vulnerable by the exclusion of presentation modifications from the definition of actionable modifications under VARA.

D. Contemporary Art's Eligibility for Copyright Protection

Satisfying the elements for federal copyright protection is a prerequisite for protection under VARA. Some works of conceptual and minimalist art, therefore, will be ineligible for VARA protection as they will fall under one of the specifically excluded categories of works listed in § 101, the definitions section of the Copyright Act.[122] Works may also be disqualified from VARA protection for failing to meet either the originality or fixation requirements necessary to merit

118. *Id.*

119. *Id.* at 4–10. Because authorship is often entirely dependent on these directory acts by the artist, authorship may be compromised if such acts are interfered with, either by the failure to follow an instruction or by the addition of an unanticipated element.

120. *Id.* at 10. Buskirk considers this "recontextualization" to be a "technique that artists often choose to employ as a key element of the artistic process." *Id.*

121. *Id.* at 14.

122. For the relevant text, see *supra* note 66.

copyright protection more generally. As part of the Copyright Act, VARA's definition of "a work of visual art" expressly excludes "any work not subject to copyright protection under this title."[123] To merit copyright protection, a work must be an "original work[] of authorship fixed in a[] tangible medium of expression . . . from which [it] can be perceived, reproduced, or otherwise communicated."[124] These requirements of originality and fixation, although easily satisfied by most traditional art objects, pose unique problems for some contemporary works.

The threshold for originality is minimal.[125] The standard requires "only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[126] Further, originality does not require complete novelty, as a "work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[127]

An oft-cited example of a minimalist artist's failure to overcome the original-expression requirement is Kazimir Malevich's work *White on White*.[128] As its title suggests, *White on White* is a painting of a "white square on a white background."[129] "[I]n light of Robert Rauschenberg's series of all white paintings," Malevich's work would not be original because, although the *ideas* of the artists are unique, copyright requires unique *expression*.[130] Minimalist artists who present "art items that are indistinguishable from the raw material" from which they are made may also run into trouble with the originality requirement.[131] Those artists may find encouragement, however, in a 1992 decision by the D.C. Circuit: "Recalling the creativity of the work of Mondrian and Malevich, for example, we note that arrangement itself may be indicative of authorship."[132] Although the physical elements composing

123. *Id.*

124. 17 U.S.C. § 102(a) (2012).

125. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

126. *Id.*

127. *Id.*

128. Rikki Sapolich, Note, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 IDEA 453, 466–67 (2007).

129. *Id*. at 464; *see Suprematist Composition: White on White*, MOMA (Sept. 17, 2016), http://www.moma.org/collection/works/80385 [https://perma.cc/M2W7-Z5QC] (detailing the composition of the aforementioned artwork).

130. Sapolich, *supra* note 128, at 466–67.

131. *Id.* at 460.

132. Atari Games Corp. v. Oman, 979 F.2d 242, 243 n.1 (D.C. Cir. 1992).

the work of minimalist art on their own may lack the requisite creativity for copyright protection, the arrangement of such elements by the artist or under her direction may suffice to clear this very low threshold.

Fixation is likewise a constitutional requirement for copyright protection, as "unless a work is reduced to tangible form it cannot be regarded as a 'writing' within the meaning of the constitutional clause authorizing federal copyright legislation."[133] Taking in mind these requirements, Professors Melville Nimmer and David Nimmer conclude that "certain works of conceptual art stand outside of copyright protection."[134] For example, a work constituting the action of an artist throwing colored streamers from an airplane, thereby "call[ing] attention to the higher spirit of mankind" by "sculpting in space,"[135] would be outside copyright protection for failure to satisfy the fixation requirement. Although admittedly some conceptual works, especially those involving a performative aspect, will fail to satisfy the fixation requirement and thus be ineligible for VARA protection, by no means will all conceptual works fall into this category. A majority of the works of contemporary art will satisfy both the originality[136] and fixation requirements.[137]

E. Contemporary Art as Objects Threatened

It at first seems counterintuitive that a work prizing "idea" over physical elements can nevertheless exist at the mercy of its presentation. But given "the degree to which the surrounding environment . . . [has] a profound impact on how the work is understood," a contemporary artist without control over the presentation element of her work may cease to have a work at all, or at least one that is authentic.[138] A few scholars, notably Professor Amy Adler, have taken a contrary view that "[m]oral rights law enshrines

133. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[B] (2016).

134. *Id.* (footnote omitted).

135. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1577 n.204.

136. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1076 (9th Cir. 2000) ("The vast majority of works make the [creativity] grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' . . . ." (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991))).

137. Kelley v. Chicago Park Dist., 635 F.3d 290, 304 (7th Cir. 2011) ("[M]ost works presented for copyright are unambiguously authored and unambiguously fixed.").

138. BUSKIRK, *supra* note 23, at 23.

notions of art directly at odds with contemporary artistic practice."[139] Adler notes that, while VARA purports to protect individual and public interests in art, it "vest[s] sole power to enforce the moral right in the individual artist."[140] This precludes the possibility, Adler observes, that a work of art actually be improved by a modification done in contravention of an artist's wishes.[141]

Adler's position misunderstands the purpose of VARA as protecting the "best" art for preservation, rather than the "most authentic" art. While it is possible that a gallery owner or collector with impeccable taste may be the most able judge of what art is "best," only the artist, as author, can be the arbiter of the authenticity of her own work.[142] Further, Adler's position conceives of the work and its presentation as separate, or at least separable, entities.[143] As discussed above, this understanding of an art object is anachronistic in view of the rise of contemporary art.

Under the traditional understanding of a work of art as a "separately conceived art object [that] is simply placed in a space," the public-presentation exception is defensible.[144] Although poor lighting or placement may impede the full appreciation of these works, "one doesn't tend to think that the object itself has changed, whereas works involving components arrayed on the floor or walls of a room depend on their arrangement for their impact on a viewer."[145] Some slight deviations from the presentation intended by the artist are to be expected, and rarely will such a deviation rise to the level of prejudice to an artist's reputation or honor. But when the rare situation does arise, an artist should be empowered to prevent such distorted displays—both from occurring in the first place and from continuing to be displayed in that manner. When an artist lacks such a power, the authenticity of her work is jeopardized.

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139. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 272 (2009).

140. *Id.*

141. *Id.* at 289 ("Another rationale for destruction in the name of advancing art arose in the modern period: modifying the original artists' efforts would renew works of art and rescue them from death in the museum/mausoleum.").

142. *See* Kwall, *Inspiration and Innovation*, *supra* note 36, at 1986 (explaining that the "essence of moral rights protection is the idea of respect for the author's original meaning").

143. *See* Adler, *supra* note 139, at 278 ("[A]ll curatorial choices change the meaning of a work.").

144. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 134 (1st Cir. 2006).

145. BUSKIRK, *supra* note 23, at 25.

III. PROPOSED AMENDMENT TO VARA TO INCREASE PROTECTION OF THE INTEGRITY OF CONTEMPORARY ART

A. Proposal To Eliminate the Public-Presentation Exception

Protection of the integrity of works by contemporary artists requires the elimination of the public-presentation exception to VARA. Instead of eliminating § 106A(c)(2) altogether, this Note suggests merely replacing the word "public" currently in the statute with "private." This amendment would provide a cause of action to enjoin prejudicial modifications that are a result of the public presentation of a work while underscoring the fact that private displays of an artwork do not fall under the ambit of the statute. Public presentation would include displays in museums, galleries, parks, building lobbies, or any other such place where the work is regularly accessible to individuals beyond just the owner of the work and her family and friends. On the other hand, displaying a work in a home or personal office would be considered private and outside VARA's reach. Such an exception is appropriate given that a private display is by definition one to which only a limited number of individuals have access and therefore unlikely to have much effect on an artist's reputation.[146]

For an artist to enjoin a modification resulting from an element of the public presentation of a work under VARA as it currently stands, an artist must provide evidence that the modification is prejudicial to her reputation or honor. This Note proposes this right should take the form of a tort-type right rather than a more expansive property-type right; a tort-type right would "permit[] an artist to sue for injunction or damages when his work is mistreated in ways that cause conspicuous injury to his reputation."[147] Bringing a successful claim will naturally involve convincing a court that the mistreatment caused the artist injury.[148] This contrasts with a property-type right, which "permit[s] an artist to retain a property right in his work," the content of which he could largely determine without convincing a court.[149]

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146. For further discussion of the exclusion of private displays from the ambit of the statute, see *infra* notes 178 and 181 and accompanying text.

147. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 118 (1997).

148. *Id.*

149. *Id.* at 118–19.

As to the standard used by a court in determining prejudice, a mixed objective–subjective standard is advisable.[150] A case from the Federal Court of Canada, *Prise de Parole Inc. v. Guérin, Éditeur Ltée*,[151] provides a useful exemplar of such a standard.[152] In determining whether modifications made to an author's story in a reproduction violated the author's right of integrity, the court first considered the subjective view of the author, finding that the author was frustrated by a clumsy reproduction and wished not to have his name associated with it.[153] Considering this view credible, the court nevertheless found that the author failed to prove the second prong of the prejudicial standard—that there was objective evidence of damage to the author's reputation, essentially that the author's subjective belief was reasonable.[154] Because there had been no change in the number of public appearances by the author, no ridicule or mocking by associates or the newspapers, and no complaints about the editing of the excerpts, the court found no objective evidence of prejudice.[155]

In the context of fine art under VARA, the court could also consider testimony of experts such as art professors and gallery owners in evaluating evidence of objective prejudice.[156] As this requires judges or juries to assess the credibility of competing experts, this option is not ideal[157] but has nevertheless proved workable in a number of cases involving VARA claims.[158]

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150. An objective criterion evaluates prejudice based on public or expert opinion while a subjective standard considers the opinion of the artist that a modification is prejudicial, so long as her judgment is reasonable. For further discussion, see *supra* notes 88 and 89 and accompanying text.

151. Prise de Parole Inc. v. Guérin, Éditeur Ltée (1995), 66 C.P.R. 3d 257 (Can. Ont. Trial Div.).

152. The case involved a publisher who had been assigned rights by an author objecting to the use of large segments of that author's work in the publication of a collection of stories for schools. *Id.* paras. 24–26.

153. *Id.* paras. 24–25.

154. *Id.* para. 28.

155. *Id.* paras. 27–28.

156. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 314 (S.D.N.Y. 1994) (considering the testimony of expert witnesses, including art professors and the president of an art gallery), *aff'd in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

157. *See* Richard J. Hawkins, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause*, 55 UCLA L. REV. 1437, 1474 (2008) (discussing the problems attendant with the introduction of expert witnesses into litigation).

158. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 62 (1st Cir. 2010) ("Büchel proffered an expert who opined that showing an unfinished work without the artist's permission is inherently a distortion."); Phillips v. Pembroke Real Estate, Inc., 459 F.3d

The use of an objective standard is advisable for a number of other reasons. First, using an objective standard to evaluate the prejudicial nature of a modification to an artist's work will thwart frivolous suits based on "mere relocation" or nonprejudicial lighting choices made by galleries or museums. Additionally, museums or galleries that are concerned with the ability to control the presentation of a work without interference by an artist have the option, at the time of purchase or loan from the artist, to contract with the artist as to which methods of presentation will or will not be deemed a modification or distortion prejudicial to the artist's reputation. Evidence of such an agreement would provide strong evidence in court that a certain modification either is or is not prejudicial in violation of VARA. If elements of presentation are unimportant to an artist, she can likewise waive these VARA rights in a written contract, as allowed for in § 106A(e)(1), an option buyers especially concerned with insulating themselves from litigation may be motivated to pursue.[159] This allocation of rights forces discussion: buyers are incentivized to engage in dialogue with artists during the purchase process to find out how the artists intend the work to be displayed to minimize the risk of a later suit.

B. The Proposed Amendment Is Consistent with the Aims of VARA

1. *Nonpecuniary Interests of the Artist.* According to the Judiciary Committee's report, the moral rights granted by VARA "promote . . . the interests of artists and public alike."[160] VARA rights most obviously benefit artists by serving a number of nonpecuniary interests. In ensuring artists' recognition for works they have created and protecting the fruits of their artistic labor from destruction or mutilation, VARA "may enhance the creative environment in which artists labor."[161] These safeguards also protect an artist on an emotional

128, 134 (1st Cir. 2006) (discussing the expert testimony of an art history professor and of a director of an art institute); *Carter*, 861 F. Supp. at 314 (considering the expert testimony of an art professor and of an art gallery president).

159. 17 U.S.C. § 106A(e)(1) (2012) ("The rights conferred by subsection (a) . . . 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.").

160. H.R. REP. NO. 101-514, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6924.

161. Nathan Murphy, *Thème et VARAations: Why the Visual Artists Rights Act Should Not Protect Works-In-Progress*, 17 UCLA ENT. L. REV. 110, 148 (2010) (quoting H.R. REP. NO. 101-514, at 13, *reprinted in* 1990 U.S.C.C.A.N. at 6924). As a point of clarification, "fruits," as used above, refers to the works the artist produces as opposed to the profits to be reaped from the

level, insulating him from "personal anguish the artist feels from seeing his work abused."[162] The thinking is that artists will be more willing to dedicate their proverbial blood, sweat, and tears into artistic creation if they are assured of their right to preserve the integrity of their works for the remainder of their lifetimes.

Extending the right of integrity to include aspects of presentation only bolsters the artist's nonpecuniary interests. For some artists, especially conceptual artists, preserving the integrity of the mode of presentation can be more important than the preservation of the integrity of the physical materials used to assemble the work.[163] If an artist cannot be sure that her work will be presented in a manner consistent with her vision, she may not bother creating such a work in the first place.[164] Not every artist will take a hands-on approach to presentation, instead preferring for the owner of the work to display it as she sees fit. Yet the preference of some artists should not undercut the rights of others to whom presentation is an integral element of their work.

2. *Pecuniary Interests of the Artist.* Broader VARA protection will also enhance the pecuniary interests of artists. It is noted that "the economic incentive for the creation and dissemination of artistic work which is furnished by copyright protection is threatened to the extent that the artist is unable to control the manner in which his work is displayed to the public upon which he is financially dependent."[165] Any

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production of these works. *See* Kwall, *supra* note 40, at 69 (referring to "the fruits of a creator's labors").

162. Hansmann & Santilli, *supra* note 147, at 102.

163. BUSKIRK, *supra* note 23, at 6–11, 13. Consider the example of *Gnaw*, a sculptural work by Janine Antoni in the collection of the Museum of Modern Art in New York. The work comprises two six-hundred-pound cubes, one of lard and the other of chocolate, which have been gnawed on by the artist. A case of 130 lipsticks and twenty-seven heart-shaped packages of chocolate made from chewed-off pieces of these blocks accompany the cubes. The physical materials (the lard and chocolate) disintegrate over the course of the display and are expected, if not intended, by Antoni to do so. In this work, the physical integrity of the materials is not a crucial element of the work; rather it is the presentation of the cubes of lard and chocolate in juxtaposition with the cases of "gnawed by-products" that is key to Antoni's artistic statement. *Id.*

164. *See* Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 49 (1st Cir. 2010) ("The recognition of moral rights fosters a 'climate of artistic worth and honor that encourages the author in the arduous act of creation.'" (quoting Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d. Cir. 1995))).

165. Case Comment, *Protection of Artistic Integrity:* Gilliam v. American Broadcasting Companies, 90 HARV. L. REV. 473, 477 (1976); *see, e.g.*, Brooks, *supra* note 70, at 1443 n.99 (using this same quotation).

alteration of works that have already been sold also affects both the price of future works by the artist and the resale price of works in the market.[166] Most importantly, the price of the work that has been altered will drop: an altered work is no longer truly the artist's "own" and will command a lower price than a work in pristine condition. But a modification of just one work can have detrimental effect on the value of the artist's entire oeuvre.[167] One explanation for this phenomenon is the idea that each of an artist's works exists as an advertisement for all of her other works.[168] One less than stellar review of a work, paired with a low valuation, adversely affects an artist's overall reputation. As an artist's reputation has perhaps more influence on the demand for and the price of her works than any other factor, a blow to reputation translates into lower valuation for both extant and future works.[169] When an unauthorized modification results in a negative review, the entire body of an artist's work is devalued undeservedly and unfairly.

This phenomenon can be especially devastating to young or unestablished artists who are disproportionately dependent on just a few early pieces to establish their reputations and build market interest.[170] As Professor Jane Ginsburg has pointed out, "[r]eputation is critical to a person who follows a vocation dependent on commissions from a variety of clients. Success breeds success, but only if the first success is known to potential clients."[171] There is no reason to think that, in the case of a work to which the presentation is an integral element, a modification to an artist's intended display of a

166. Murphy, *supra* note 161, at 149; *see* Hansmann & Santilli, *supra* note 147, at 104 ("[A]lteration of works that an artist has already sold can, by damaging his reputation, lower the prices he can charge for other work that he sells subsequently.").

167. Hansmann & Santilli, *supra* note 147, at 104–05. Professors Henry Hansmann and Marina Santilli liken the relationship between a single work and the rest of the artist's oeuvre to the relationship between franchisor and franchisee:

> An individual franchisee has an incentive to skimp on quality, cutting his individual costs while still enjoying the reputation for high quality that is associated with the franchise in general. But, in doing so, he is free riding on the other franchisees and imposing a cost on them. For this reason, franchisors commonly impose strong quality standards on their individual franchisees. For the same reason, an artist has an interest in preventing the reputation of his work in general from being depreciated by the opportunistic adulteration of individual works.

Id.

168. *Id.* at 104.

169. *Id.*

170. Cambra E. Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 863 (2004).

171. Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 265 (2004).

work poses any less of a threat to her reputation than a modification to the physical elements of the work itself. Any distortion, if visible at length to the public, has the potential to garner a negative review and engender disastrous reputational effects.

3. *Third-Party Interests*. Parties beyond the artist herself also benefit from increased VARA protection. For one, owners or subsequent purchasers of an artist's work have interests aligned with the artist in preserving if not enhancing market value for these works, insofar as market value is enhanced by preserving the authenticity of the work.

The public at large has a different but no less important interest in having an artist's artistic choices respected: the preservation of cultural heritage for future generations. Both current and future generations have an interest in "seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted."[172] Besides an interest in preserving integrity of a work to ensure the most accurate historical record, scholars have also noted an interest more deeply personal—essentially that "[w]e yearn for the authentic, for contact with the work in its true version."[173]

Presentation is vital to the integrity of minimalist and conceptual works and thus is a major consideration in preservation efforts. For many of these works, possessing the otherwise intact physical elements means very little. Rather, it is the display of the constituent elements as an integrated whole in a manner consistent with the artistic vision that conveys the intended message.[174] Simply having a stack of metal plates is not the same as having a work by Andre. Not until the plates have been arranged as instructed by the artist is the work animated. "Stuff," arranged correctly, becomes art.

When artists lack adequate control over the presentation of their works, a risk arises that works will not be authentically preserved for future generations.[175] The continued display of the work in a distorted

172. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

173. *Id.*

174. For a discussion of the importance of the configuration of artistic elements to works of contemporary art, see *supra* Part II.C.

175. *See* John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 356 (1989) ("Physical preservation of discrete objects themselves may not be enough. Every cultural object is to some extent a part of a larger context from which it draws, and to which it

state of presentation permits an "inauthentic piece" to become part of our cultural heritage, providing inaccurate information to future generations. Permitting an artist to enjoin these displays during her lifetime should provide ample time for suitable documentation of the authentic oeuvre.

C. Limitations of the Proposed Amendment

The public-presentation exception was added to VARA in large part to quiet opposition to the statute from museum and gallery owners concerned about VARA's intrusion on their "normal discretion to light, frame, and place works of art."[176] The elimination of the public-presentation exception will not threaten this "normal discretion," however, because to constitute a modification or distortion in contravention of VARA the modification must be "prejudicial to [the artist's] honor or reputation."[177] Requiring not only subjective but also objective evidence of prejudice will insulate museums against frivolous suits as the majority of changes in lighting or placement will not rise to the level of objectively prejudicial. Additionally, artists are generally disincentivized from being overly litigious. If an artist earns a reputation for being difficult to work with, she jeopardizes future opportunities for gallery and museum exhibitions and commissions—in effect, her livelihood.

Another significant limitation on this Note's proposal is its inapplicability to private displays of a work. The first reason for this is purely practical: if the work is only displayed in a private collector's home, the artist may have no way of finding out how the work is displayed. But more crucially, private display has much less bearing on an artist's interests. If the "alteration has not been revealed to the public[, it] thus has no impact on the work's value" or, relatedly, on the artist's reputation.[178] Consider the example of Graham Sutherland's portrait of Winston Churchill. It is now well known that Churchill's widow stored the much-loathed portrait in the cellar of her country

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adds, meaning. Separated from its context, 'decontextualized,' the object and the context both lose significance.").

176. H.R. REP. NO. 101-514, at 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927; *see also* YEARBOOK OF CULTURAL PROPERTY LAW 2009, at 284 (Sherry Hutt & David Tarler, eds. 2009) ("[The public-presentation exception] was included in the statute so that galleries and museums could 'continue to have normal discretion to light, frame, and place works of art.'" (quoting H.R. REP. NO. 101-514, at 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 6927).

177. 17 U.S.C. § 106A (2012).

178. Murphy, *supra* note 161, at 149.

home next to the boiler for many years.[179] Under VARA, Mrs. Churchill would still be completely within her right—a private owner is under no obligation to display a piece at all.[180] If Mrs. Churchill had instead preferred to hang the portrait in her dining room but covered by a sheet, she would have been equally entitled to do so. A private owner in this situation might only run into trouble if she started conducting regular public tours of the home during which the work would be viewable in a prejudicial context.[181]

Providing the broadest protection to works by contemporary artists would require the protection of site-specific works under VARA.[182] Nevertheless, both the legislative history of VARA and case law construing the statute reject the notion that VARA applies to site-specific works.[183] Although "[a]rtists often claim . . . that to remove a site-specific work elsewhere is effectively to destroy it, or at least to alter it in ways that profoundly distort the artist's intention," consideration of the rights of property owners weighs against giving site-specific works VARA coverage.[184] U.S. courts have been wary of constraining what property owners can do with their land, and allowing artists to enjoin the removal of site-specific works not only impairs the potential alienability of the land but also "compel[s] unwilling people

179. SAX, *supra* note 35, at 25.

180. Thurston, *supra* note 50, at 719 ("[A]rtists have no right of display.").

181. The line between public and private may be a matter of fact for the jury to resolve. Has an owner who has hosted a well-attended fundraising dinner for a high-profile political candidate displayed a work publicly? Depending on the attendees, one could imagine that an artist's reputation could be harmed after only a small but well-connected group had access to the work.

182. For discussion of VARA's application to site-specific works, see generally Brooks, *supra* note 70. Richard Serra's *Tilted Arc* was an example of a site-specific sculpture designed for the Foley Federal Plaza in Manhattan. The sculpture, a twelve-foot tall, 120-foot long unfinished plate of COR-TEN steel, bisected the plaza, blocking the path and view of pedestrians. After much debate, and a lawsuit, *Tilted Arc* was dismantled and removed from the site in 1989, a year before VARA's enactment. Jennifer Mundy, *Lost Art: Richard Serra*, TATE (Oct. 25, 2012), http://www.tate.org.uk/context-comment/articles/gallery-lost-art-richard-serra [https://perma.cc/JGA9-QERT].

183. Jane C. Ginsburg, *A 'Potato' Firmly Planted: Moral Rights and Site-Specific Art*, MEDIA INST. (Feb. 26, 2013), http://www.mediainstitute.org/IPI/2013/022613.php [https://perma.cc/7SWJ-X2XN]; *see also* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 & n.12 (1st Cir. 2006) (concluding that site-specific works are not protected under VARA and noting that in addition to its reading of the statute's plain meaning, the legislative history "never mentioned" site-specific art); H.R. REP. NO. 101-514, at 17 (1990), *reprinted in* U.S.C.C.A.N. 6915, 6927 ("Generally, the removal of a work from a specific location comes within the [public-presentation] exclusion because the location is a matter of presentation . . . .").

184. SAX, *supra* note 35, at 27.

to experience their work far into the indefinite future."[185] VARA's inapplicability to works for hire[186] and works incorporated into buildings[187] similarly protects the freedom of a real estate owner to deal with her property as she sees fit.

Finally, VARA's waiver provision represents a notable potential check on the rights of an artist.[188] Section 106A(e)(1) provides:

> 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.[189]

In drafting VARA, the Judiciary Committee recognized that routine waivers of VARA rights would "eviscerate the law" but, on balance, believed that "to proscribe waiver would be to inhibit normal commercial practices."[190] If absolute control over a piece is critical to the buyer, she may negotiate with the artist for a waiver of certain moral rights. But, as some scholars contend, because the grant of moral rights increases an artist's bargaining power by shifting the initial allocation of rights to the artist, artists are still better off post-VARA despite the waiver provision.[191] An artist who values control above all else always has the option of retaining full VARA protection, though at the expense of potentially lucrative sales contracts. In that way, the creator of the work, rather than the purchaser, becomes the judge of the value of the continuing integrity of her creation while still permitting the purchaser an option to bargain for control by offering higher prices.

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185. *Id.*

186. Section 101 of the Copyright Act provides that a work of visual art does not include any work made for hire. For the language of 17 U.S.C. § 101, see *supra* note 66.

187. *Id.*

188. 17 U.S.C. § 106A(e)(1) (2012).

189. *Id.*

190. H.R. REP. NO. 101-514, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6928.

191. *See, e.g.*, Kwall, *supra* note 36, at 1996 ("[T]he very purpose of moral rights laws is to 'alter the bargaining power between the authors and artists and those who use their works.'" (quoting Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 212 (1995))).

IV. FAILURE OF OTHER LEGAL REGIMES TO PROTECT INTERESTS OF CONTEMPORARY ARTISTS

The elimination of the public-presentation exception is further necessitated by the failure of other laws—most critically contract and copyright—to provide alternate avenues to protect artistic interests.

A. Contract Law Cannot Protect Artistic Interests in Public Presentation

Historically, artists had relatively weak bargaining positions in negotiating contract terms at the time of sale.[192] After the recognition of moral rights in VARA, artists enjoy "enhance[d] . . . bargaining power in drafting and negotiating contracts," but only as to terms that are recognized as VARA rights.[193] In light of the public-presentation exception, Professor Russ VerSteeg suggests that, "[i]f an artist wishes to have a work framed in a particular manner, . . . [or] wishes his or her works to be exhibited in a certain location in the gallery or lighted in a certain way, the only viable control he or she can assert . . . is by contract."[194] Yet given "'the very informality of art work commissions' and the 'handshake deal[s]' that are most common in art transactions," it is unrealistic to assume that a majority of artists will have the opportunity to protect the integrity of their works through contractual means.[195]

When such an opportunity does present itself, the contract will bind the initial purchaser of the work. As to subsequent purchasers, though, it is doubtful that these contractual provisions will be binding[196] because U.S. contract law requires parity between contracting parties to establish binding terms.[197] Without knowing each and every

192. Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 843 (1992).

193. *Id.* at 844.

194. *Id.* at 865.

195. *Id.* at 845 (quoting Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 488 (1990)).

196. *Id.* at 865.

197. Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. REV. 1, 53 (1997). Consider this situation: Artist contracts with Purchaser that Purchaser will never frame the work. Purchaser later sells the work to Collector, who immediately frames it. Artist has no contractual cause of action against Collector because Collector was not party to the original contract between Artist and Purchaser. Artist could have contracted with Purchaser that if Purchaser sold the work, he would sell it with a clause obligating subsequent owners to never frame the work. This is still not an effective solution, however, because if Purchaser were to

subsequent transferee, an artist has no method for binding these parties to the terms of the initial sales contract.

Another complication of the reliance on contractual agreements in binding subsequent purchasers is the unpredictable enforceability of equitable servitudes on chattels.[198] Under U.S. contract law, sellers of chattels such as artwork "cannot reserve rights in the chattel, of either an affirmative or a negative character, that are enforceable against subsequent purchasers."[199] The doctrine of moral rights codified in VARA alters this rule but only with respect to the few rights enumerated in the statute. Excluding matters of public presentation from VARA's scope effectively precludes artists from having a say in the presentation of their work beyond that by the original purchaser.

B. Copyright Law Cannot Protect Artistic Interests in Public Presentation

Aspects of the American copyright regime likewise provide little assistance to artists looking to retain control over presentation elements of their work. For instance, casting the modification to the presentation of a work as the creation of an unauthorized "derivative work" has initial appeal but ultimately proves unworkable. A "derivative work" is defined in § 101 of the Copyright Act as one that "'represent[s] an original work of authorship' but is 'based upon one or more preexisting works' and that 'recast[s], transform[s], or adapt[s]' the preexisting work."[200] The derivative work must be copyrightable in its own right, meaning that the author must contribute "a modicum of 'originality'" necessary to achieve that copyright.[201] Because of this additional modicum-of-creativity requirement, "[n]ot all alterations or mutilations of an artist's work that are prejudicial to his honor or reputation may constitute 'derivative works,' which infringe upon the copyright holder's exclusive rights."[202] This was the case in *Lee v.*

violate this contractual term and the subsequent owner framed the work, Artist would have a valid breach of contract claim against Purchaser but would still lack a cause of action as to the subsequent buyer.

198. *Id.* at 54 n.261 (describing that the author's research has turned up only two cases since 1956 in which a court expressly enforced an equitable servitude in chattels).

199. Hansmann & Santilli, *supra* note 147, at 101.

200. Brooks, *supra* note 70, at 1452 (citing 17 U.S.C. § 101 (2012)).

201. *Id.* (citing the standard developed in Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

202. Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM.-VLA J.L. & ARTS 297, 310 (2002).

Albuquerque A.R.T. Co.,[203] a Seventh Circuit decision that found that the mounting of copyrighted note cards onto ceramic tiles did not qualify as a derivative work but instead merely changed the mode of display.[204] In this case, the artist would have had no recourse under VARA because the court determined that the issue was one of display, explicitly exempted from coverage by the public-presentation exception.[205]

One pre-VARA case, *Gilliam v. American Broadcasting Cos.*,[206] suggested that a copyright theory could be employed to protect an artist's display interests,[207] but this avenue of recovery has likely been cut off by the U.S. Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*[208] In *Gilliam*, the Second Circuit held that, absent an agreement stating otherwise, the right to make changes to a television show resided in the authors of the show.[209] Agreeing that broadcasting an unapproved, edited version of *Monty Python's Flying Circus* injured the plaintiffs' business and personal reputation by misrepresenting their work, the court approved a "vindicat[ion of] the author's personal right to prevent the presentation of his work to the public in a distorted form."[210] However, after the Supreme Court in *Dastar* declined 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," the viability of an "intellectual property theory of moral rights recovery outside of VARA" is significantly diminished.[211] Now that there is a section of the Copyright Act that vindicates moral rights, it is unlikely that a court will be persuaded to find additional moral-rights protection, especially rights intentionally and specifically excluded under VARA, under an alternate section. A finding of additional protection is especially improbable because the remainder

203. Lee v. Albuquerque A.R.T. Co., 125 F.3d 580 (7th Cir. 1997).

204. *Id.* at 582. *But see* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988) (holding that the mounting of copyrighted note cards onto ceramic tiles did qualify as derivative works that infringed the copyright).

205. A VARA claim was not actually pursued in this case because the note cards at issue did not satisfy the § 101 definition of "works of visual art": they were not part of a limited edition of two hundred or fewer, signed and consecutively numbered by the artist. *Lee*, 125 F.3d at 583.

206. Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

207. *Id.* at 21.

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

209. *Gilliam*, 538 F.2d at 22.

210. Brooks, *supra* note 70, at 1456 (quoting *Gilliam*, 538 F.2d at 24).

211. Murphy, *supra* note 161, at 154 n.228.

of the Copyright Act outside of VARA has been understood as primarily "vindicat[ing] the economic, rather than the personal, rights of authors."[212]

The first-sale doctrine represents perhaps the most serious impediment to the enforcement of a public-presentation right outside of the scope of VARA.[213] Found in § 109 of the 1976 Copyright Act, the first-sale doctrine is named for its effect in "sharply curtail[ing]" the § 106(3) right to distribute copies by eliminating that right in its entirety after the first sale of the work.[214] More relevant to the issue of display rights is § 109(1), which reads:

> Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.[215]

Because of this section's allocation of the right to display the work to the work's owner, an artist's attempt to use an alternate copyright theory to enjoin the display of a modified or distorted work will fail.

CONCLUSION

Given that the rise in respect and value of works by contemporary American artists prompted, in part, the eventual adoption of VARA, it is ironic that the very elements which distinguished those works from those of earlier movements remain largely unprotected by the American moral-rights scheme. Only through expansion of the right of integrity to encompass issues of display as potentially prohibited modifications will the interests of American contemporary artists be adequately secured. However, the public-presentation exception threatens more than just the personal interests of artists—a greater societal interest in preserving authentic cultural heritage for future generations is continually undermined as long as the public-presentation exception remains codified in VARA.

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212. VerSteeg, *supra* note 192, at 833 (quoting *Gilliam*, 538 F.2d at 23).

213. Brooks, *supra* note 70, at 1447 ("[The first-sale doctrine] is the most serious impediment to copyright protection for the moral rights of . . . creators of singular works of art.").

214. *Id*.

215. 17 U.S.C. § 109(1) (2012).