

EXTENDED REALITIES AND THE VISUAL ARTISTS RIGHTS ACT

Jacob J. Oliphant*

INTRODUCTION

This Note is directed to an application of the Visual Artists Rights Act (“VARA”) to works of art created or existing within extended realities (“XR”) accessible with new technology.¹ In short, VARA is “an amendment to the Copyright Act that protects the ‘moral rights’ of certain visual artists in the works they create.”² These so called moral rights include an artist’s interests in the proper use of his or her name and in maintaining the physical integrity of the work to protect his or her honor and reputation.³ Artists, assuming the VARA requirements are met, may assert their moral rights prior to, or in the wake of, the manipulation, destruction, or misattribution of their recognized works of visual art.⁴ Traditionally, artists have used VARA in situations where they have created a work of art only for that work to be the property of a new owner who later modifies or destroys it. Common knowledge may suggest that

* Juris Doctor Candidate, Oklahoma City University School of Law, 2021; Bachelor of Science in Mechanical Engineering, University of Oklahoma, 2018. Thank you to Professor Marc Blitz for his patience and guidance during the writing process and to my family and friends for their support. Special thanks to my parents, Kelle and Sharon, for the opportunities they have provided me.

1. The term “extended realities” is collective terminology that includes virtual and augmented realities for the purposes of this Note. Other common terminology includes “alternative” or “alternate” reality. It should be further noted that other “realities,” such as mixed reality, are not examined within this note, but the concepts disclosed herein may be extendable to such.

2. *Mass. Museum of Contemp. Art Found., Inc. v. Buchel*, 593 F.3d 38, 47 (1st Cir. 2010).

3. See generally Patrick Flynn, Annotation, *Validity, Construction, and Application of Visual Artists Rights Act (17 USCS §§ 101 et seq.)*, 138 A.L.R. Fed. 239 (1997)

4. 17 U.S.C. § 106A (2018).

the owner of the work is entitled to do whatever he or she may please with it. However, VARA says that is not always the case.

Under VARA, where a prominent artist paints a mural on a building for a whole city to see, a new property owner may not be able to paint over that mural upon purchase. Where an esteemed painter has created a masterful piece that becomes well-recognized over time and then sold to the highest bidder, that bidder may not be able to turn around and set the work ablaze. While courts today are still grappling with these simpler VARA questions, highly technical inquiries are likely on the way. What if the aforementioned mural only exists within an augmented reality visible through a pair of smartglasses? Or, what if that recognized painting was created by a digital artist and only exists within a virtual reality visible through a VR headset? This Note will delve into these forward-looking questions made possible by VARA's text.

To do so, Part I will briefly review VARA's history and present the road to its issues in a more technologically advanced era. Part II will focus on the rights and remedies VARA grants, and who has access to them. Part II will also include VARA's limitations and relevant jurisprudence. Part III will introduce virtual and augmented reality, survey the current state of the technology, and describe the uses of XR pertaining to works of visual art. Part IV will explore the potential applicability of VARA to works of art created or existing within XR, the intersection of Parts I and II with Part III. Specifically, an analytical framework will be developed from scholars' literature on this topic and then will be extended for employment in two hypothetical XR scenarios. This article will conclude that the text of the VARA could be reasonably interpreted to protect artists' moral rights in their art created or existing within XR, but VARA could be further amended to clarify such rights. Congress should act sooner rather than later to avoid the inevitable issues brought about by the current and coming technologies—whether that be to include digital art under VARA's umbrella or to exclude it entirely.

PART I

An understanding of VARA's origin is crucial because the current statutory text is over thirty years old as of this Note. Time and technology have brought about situations that were unforeseeable by the enacting Congress. Therefore, statutory interpretation will necessarily be heavily involved in answering the questions presented herein later. Moreover, courts occasionally look to the period in which the law was passed to aid

in interpreting its text.

Prior to December 1, 1990, the effective date of VARA, an artist in the United States generally had less ability to protect his or her work of art. For example, in 1969, an artist named William Smith painted a mural in a monumental building in Maryland.⁵ Almost twenty years later, a portion of Smith's work was painted over while his signature remained.⁶ Smith's case is an example of misattribution. Another artist's modifications to Smith's work were being attributed to Smith. This hurt his reputation because this less prestigious work was credited to him.⁷ The mural had been manipulated in such a way that its value decreased by over 80%, or \$400,000.⁸ Unfortunately, Smith had no remedy.

William Smith was far from the only casualty due to the absence of federal protection. However, VARA's passage was more inspired by foreign action and wider-known events.⁹ Richard Serra's story is one such event.¹⁰ In 1981, Richard Serra created and installed a sculpture labelled *Tilted Arc* in the Federal Plaza in New York City.¹¹ The sculpture allowed people walking through Federal Plaza to see their movement with changing perception.¹² Still, the sculpture was not without its critics, namely those who worked in the Plaza.¹³ Four years later, a public meeting was held to discuss its removal.¹⁴ In 1989, *Tilted Arc* was cut into three

5. Nancy Trejos, *Restored Mural Finds a Refuge*, WASH. POST (July 8, 2021), <https://www.washingtonpost.com/archive/local/2001/07/08/restored-mural-finds-a-refuge/e08f0f07-221f-4a2f-8a18-286a3f04c5d4/>.

6. *Id.*

7. *Id.*

8. Timothy M. Casey, *The Visual Artists Rights Act*, 14 *Hastings Comm'n & Ent. L. J.* 85, 86 (1991) (citing Michael Kernan, *The Great Debate over Artist's Rights: Facing the Tough Question of Who Really Controls a Work of Art*, WASH. POST, May 22, 1988, at F1).

9. See H.R. Rep. No. 101-514, at 16 (1990).

10. See Balasz Takac, *Looking Back at Richard Serra's Controversial Tilted Arc*, *Widewalls* (Mar. 10, 2020), https://www.widewalls.ch/magazine/richard-serra-tilted-arc; see also Richard Serra's Tilted Arc, PBS, https://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/tiltedarc_a.html (last visited Mar. 15, 2020); and

Daniel Grant, *The Law Against Artists: Public Art Often Loses Out in Court*, *OBSERVER* (Sept. 4, 2014), <https://observer.com/2014/09/the-law-against-artists-public-art-often-loses-out-in-court/>.

11. Takac, *supra* note 10.

12. *Id.*

13. *Id.*

14. *Id.*

pieces and removed from Federal Plaza.¹⁵ Though questions remain about whether Serra could have enjoined the sculpture's removal or recovered from its destruction with VARA in his pocket, he was unable to succeed using his only real weapon at the time, the First Amendment.¹⁶

Moreover, state and foreign action had inspired Congress, or at least forced its hand. One congressman said “[a]rtists, lawyers, courts, and even the owners of works deserve a single set of rules on this subject.”¹⁷ Twelve states, including New York and California, already had statutes affording moral rights to artists.¹⁸ But these laws were not nearly symmetrical. Therefore, state laws with less moral rights coverage than VARA were preempted while those with more moral rights coverage were not. In other words, states had, and may still have, laws protecting moral rights beyond those granted by VARA.

Foreign countries had taken action to protect artists as well, going beyond the protections VARA provides even today.¹⁹ The U.S. would eventually choose not to go so far. In 1988, Congress enacted the Berne Convention Implementation Act, which sought to align the United States with a set of international rules and regulations known as the Berne Convention.²⁰ The Berne Convention protects intellectual property in the global marketplace and is adhered to by much of the global community.²¹ Members of the Berne Convention have minimum regulatory standards that they are required to meet in order to retain membership status. Among these standards is Article 6bis, which required at least some moral rights protections.²² Congress slightly closed the gap between the virtually

15. PBS, *supra* note 10.

16. See *Serra v. General Services Administration*, 847 F.2d 1045 (2d Cir. 1988).

17. H.R. Rep. No. 101-514, at 9-10 (1990).

18. Flynn, *supra* note 3, at 245 n.1.

19. H.R. Rep. No. 101-514, at 7-8 (1990).

20. *Id.* at 8.

21. RAYMOND DOWD, COPYRIGHT LITIGATION HANDBOOK § 1:3, Copyright Registration Requirement: Berne Act of 1988 (2d ed. 2020).

22. Article 6bis states, in part, the following:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886 (Paris Act, last revised July 24, 1971), *reprinted in* World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of*

nonexistent U.S. moral rights law and the more expansive moral rights law abroad by enacting VARA the following year, in 1990.

Obviously, some basic parts of life have changed since VARA's enactment, but little has transpired regarding artists' rights. In the 1990s and early 2000s, the world of technology exploded. Home computers became increasingly accessible and more popular. In 2007, the world watched Steve Jobs unveil the first iPhone, a smartphone unlike any in its class.²³ Technology was no longer a commercial-only perk but a personal one as well. While technology brought with it countless benefits, it also caused some major legal issues.²⁴ Only some of the laws have been brought up to speed. Specifically, copyright law saw an adaptation to technologies with the passing of the Digital Millennium Copyright Act (DMCA). Still, laws left behind have been subjected to statutory interpretation. VARA is one such law.

PART II

A. *Rights Granted by VARA*

Congress inscribed two moral rights in VARA—the rights of attribution and integrity.²⁵

Attribution

The right of attribution allows an artist to²⁶:

- (1) claim [ownership] of [his or her] work;²⁷
- (2) prevent the use of his or her name as the author of any work of visual art which he or she did not create;²⁸ and
- (3) prevent the use of his or her name as the author of the work

Literary and Artistic Works (1978), art. 6bis (1971).

23. History.com Editors, *Steve Jobs Debuts the iPhone*, A&E TELEVISION NETWORKS: HISTORY (Aug. 29 2012), <https://www.history.com/this-day-in-history/steve-jobs-debuts-the-iphone>.

24. Roya Bagheri, *Virtual Reality: The Real Life Consequences*, 17 U.C. Davis Bus. L.J. 101, 108 (2016).

25. 17 U.S.C. § 106A(a).

26. VARA labels a creator of works of visual art “author.” This Note will use the term “artist” in its place.

27. 17 U.S.C. § 106A(a)(1)(A).

28. 17 U.S.C. § 106A(a)(1)(B).

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.²⁹

As mentioned above, the right of attribution could have been particularly helpful to artists like William Smith. He presumably could have brought a claim under either (1) or (2) to recover for the damage to his work or even prevent its modification in the first place. Today, it is easier than ever to manipulate data and strip recognition from digital works. So, the right of attribution is especially important when considering the application of VARA to digital works created within extended realities.

Integrity

The right of integrity allows an artist “to prevent any intentional distortion, mutilation, or other modification of [his or her] work which would be prejudicial to his or her honor or reputation.”³⁰ This right may have been useful for Richard Serra. Arguably, Serra would have had a chance to prevent the chopping up of *Tilted Arc* as prejudicial to his honor. It is similarly all too easy to distort, mutilate, or modify the works of visual art another has prepared for the world to see within the confines of augmented and virtual realities.

B. Limitations and Exceptions

VARA is far from absolute. Among others, Congress included the following important restrictions: VARA rights (1) last only for the life of the author,³¹ (2) may not be transferred, though they may be waived,³² and (3) only cover “work[s] of visual art”³³ of “recognized stature.”³⁴ As one could easily guess, the last restriction is typically the crux of an artist’s hopes of recovery. Congress provided two lists—one defining what a work of visual art is and the other what it is not.

A “work of visual art” is:

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29. 17 U.S.C. § 106A(a)(2).
 30. 17 U.S.C. § 106A(a)(3)(A).
 31. 17 U.S.C. § 106A(d).
 32. 17 U.S.C. § 106A(e).
 33. 17 U.S.C. § 106A(a).
 34. 17 U.S.C. § 106A(a)(3)(B).

- (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.³⁵

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 [Title 17].³⁶

There are a few foreseeable problems with the way Congress has defined works of visual art. Specifically, the work having to be in 200 copies or less consecutively signed by the author and audiovisual works as well as electronic publications being excluded could cause one to think digital art and art within extended realities may not be covered. Furthermore, both lists are silent as to a required medium for the work leaving that as an open question as well. Fortunately, some courts and scholars have addressed a few of the concerns surrounding the definition.

C. VARA Jurisprudence—Works for Hire and Recognized Stature

Concerning the application of VARA to digital art, there is unsurprisingly scant caselaw. In fact, the Supreme Court has yet to hear a

35. 17 U.S.C. § 101.

36. *Id.*

case primarily concerning VARA. But in the post-Richard Serra world, artists have been able to cling to their VARA rights in a few noteworthy appellate court cases as they grapple with the definitions of “work of visual art” and “recognized stature.” Prominent cases include the following two—*Carter v. Helmsley-Spear, Inc.*³⁷, and *Castillo v. G & M Realty L.P.*³⁸

In *Carter*, three artists who called themselves the “Three J’s” were hired to create works of art inside an office building.³⁹ When new management took over the building, the Three J’s were asked to stop installing their works and to vacate the building.⁴⁰ The Three J’s then brought suit to enjoin the removal of their sculptures. The district court granted the injunction.⁴¹ On appeal, the Second Circuit looked extensively at whether the artists’ works were within the definition of a work of visual art. Specifically, the court considered whether the work was “applied art” and if it was “work-for-hire.”⁴² Both are explicitly excluded from the definition of “work of visual art.”⁴³

On the issue of applied art, the court stated that VARA does not exclude protection of works of art that merely incorporate elements of applied art.⁴⁴ In simpler words, mounting the artists’ sculptures to the floors of the building could not make the sculptures “applied art” because to hold so would render too much of VARA effectively useless.⁴⁵ However, regarding the work-for-hire issue, the Second Circuit held that the works were works for hire (and therefore not works of visual art) after using a five-factor test to determine whether the employee was within the scope of his or her employment.⁴⁶ Work for hire issues could conceivably

37. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

38. *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

39. *Carter*, 71 F.3d at 80.

40. *Id.* at 81.

41. *Id.*

42. *Carter*, 71 F. 3d at 84-85.

43. *Id.*

44. *Carter*, 71 F. 3d at 85.

45. *Id.* at 7-8. (“Applied art” describes “two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects.”).

46. 17 U.S.C. § 101(1) (A “work made for hire” is defined in the Copyright Act, in relevant part, as “a work prepared by an employee within the scope of his or her employment.”); *Carter*, 71 F.3d at 86 (citing *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992)) (“Aymes established five factors which would be relevant in nearly all cases: the right to control the manner and means of production; requisite skill; provision of employee benefits; tax treatment of the hired party; whether the hired party may be assigned

arise when applying VARA to XR art as well.

The newest case on VARA is *Castillo v. G & M Realty L.P.*⁴⁷ *Castillo* is also often referred to as “5Pointz” after the warehouse art gallery.⁴⁸ For roughly twenty years, both distinguished and up-and-coming artists from around the globe traveled to 5Pointz to create and display their aerosol art.⁴⁹ The building was set up in such a way that some works stayed on walls longer than others.⁵⁰ Some art was only displayed for a week while other works were up for years. When the building owner sought to put condos at that location, he had the walls whitewashed knowing a lawsuit was pending for the artists’ rights to maintain their works.⁵¹ The Supreme Court recently denied that building owner’s petition for cert to appeal a 6.75-million-dollar judgment against him for willfully destroying forty-five works of visual art.⁵² The maximum statutory damages of \$150,000 was awarded for each of the forty-five works.⁵³

In 5Pointz, the Second Circuit considered whether the works were of “recognized stature” under § 106A(a)(3)(B). Citing *Carter*, the court stated that a work of recognized stature “is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”⁵⁴ The court further clarified the most important component is quality, and the relevant community is the “artistic community,” namely, “art critics ... prominent artists, and other experts.”⁵⁵ After the court explained that it felt it had little business assessing the worth of a “purported work of visual art,” it stated “aside from the rare case where an artist or work is of such prominence that the issue of recognized stature need not be tried, expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature.”⁵⁶

The aforementioned cases answer a couple questions about what constitutes a work of visual art and what recognized stature means.

additional projects.”).

47. *Castillo* was originally referred to as “Cohen.” However, there was a change in plaintiffs prior to appeal.

48. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

49. *Id.*

50. *Id.*

51. *Id.* at 163.

52. *G&M Realty L.P. v. Castillo*, 141 S. Ct. 363 (mem.) (2020).

53. *Castillo*, 950 F.3d at 164.

54. *Id.* at 166.

55. *Id.*

56. *Id.*

However, left unanswered is whether the same standards and logic apply when considering digital art and art viewed in an alternative reality.

D. Remedies

VARA remedies are the same as those available for copyright infringement.⁵⁷ They may include injunctive relief, monetary damages, defendant's profits, statutory damages, and possibly legal fees.⁵⁸ Injunctive relief provides the artist with the opportunity to prevent damage, destruction, or mutilation of the protected work if the danger is imminent. If the damage has already occurred and the artist can recover, a market value of the work will have to be determined. Statutory damages range from \$750 to \$30,000 per work.⁵⁹ However, up to \$150,000 may be awarded in the event of a willful violation, as was provided in the 5Pointz case.⁶⁰ It is also important to note that while federal copyright registration is required for statutory damages for copyright infringement, it is not required for statutory damages under VARA. This means an artist need not register every work of visual art in order to be eligible for the typically higher statutory award.

PART III

To determine VARA's applicability to XR art, it is important to understand the current status of technologies that can provide access to the art.

A. Augmented Reality

Augmented reality is defined as "an enhanced version of reality created by the use of technology to overlay digital information on an image of something being viewed through a device (such as a smartphone camera)."⁶¹ It is analyzed here first because it seems to be growing faster in popularity than VR. This is most likely because many smartphones already in consumers' hands are capable of creating the AR experience.

57. Flynn, *supra* note 3, at 248.

58. 17 U.S.C. §§ 502, 504, 505.

59. 17 U.S.C. § 504(c)(1).

60. 17 U.S.C. § 504(c)(2).

61. *Augmented reality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/augmented%20reality> (last visited Oct. 13, 2020).

For example, every iPhone post iPhone 6 was built AR-ready. In combination with AR-ready Android phones, reports show that twenty-six percent of active smartphones are capable of providing augmented reality features.⁶² This number will likely only rise.

Still, smartphones are not the only devices being created with AR capabilities. Vehicles have started to implement heads-up displays showing anything from the vehicle's speed, to directions, to the driver's destination, to incoming messages relayed from the driver's phone.⁶³ Other wearable AR devices, such as Microsoft's HoloLens series, have been developed to increase productivity in the workplace and allow workers to see what does not actually appear in reality.⁶⁴ For example, doctors may see the human anatomy overlaid on a patient's body, or an engineer may see the inner workings of an engine without ever opening it up.

Finally, smartglasses are rumored to become very popular in the coming decade. Some think smartglasses may be more popular than even smartphones.⁶⁵ Many of the biggest names in tech have already released smartglasses or have plans to develop them. Amazon, Facebook, Google, and Microsoft are all already in the game.⁶⁶ Smartglasses are perhaps one of the most important pieces of technology because they allow consumers to see an augmented reality with ease.

Moreover, there are a few AR mobile device applications which seem particularly relevant because they specifically bring artwork into AR. Apps such as World Brush, Superpaint, and Surreal AR allow users to create artwork in an augmented reality straight from their smartphones.⁶⁷

62. Ian Pilkington, *New Report Highlights 'Boundless Potential' of AR Mobile Gaming*, ARM BLUEPRINT (Mar. 9, 2019), <https://www.arm.com/blogs/blueprint/new-report-highlights-boundless-potential-ar-mobile-gaming#:~:text=VR%20vs.&text=On%20the%20other%20hand%2C%20the,new%20device%20support%20for%20ARCore>.

63. Bernard Marr, *Are You Ready for Augmented Reality in your Car?*, FORBES (Aug. 26, 2019), <https://www.forbes.com/sites/bernardmarr/2019/08/26/are-you-ready-for-augmented-reality-in-your-car/#473aec9b3144>.

64. *HoloLens 2*, MICROSOFT, <https://www.microsoft.com/en-us/hololens> (last visited Oct. 13, 2020).

65. Todd Haselton, *There's a race to replace our iPhones with smart glasses we wear everywhere*, CNBC (Nov. 11, 2019), <https://www.cnn.com/2019/11/11/smart-glasses-that-replace-phones-may-be-the-next-hottest-tech-trend.html>.

66. *Id.*

67. Mina Bradley, *Top 10 Art & Design AR Apps for iPhone*, VEER VR BLOG (Jan. 17, 2018), <https://veer.tv/blog/top-10-art-design-ar-apps-for-iphone/>.

Perhaps most importantly, art galleries have been hosting augmented reality art tours via mobile applications. The tours could foreseeably become very popular as digital art has far fewer limitations than traditional art, and it can be easily preserved. The works presented in art tours are also more likely to be works of visual art of recognized stature that could be protected by VARA than those created by any given person with a smartphone.

In October 2019, High Line Nine Gallery in New York City hosted one such augmented reality art tour featuring artists Shuli Sade and Richard Humann.⁶⁸ The art gallery was an empty space with blank white walls.⁶⁹ Visitors entered the gallery only to open up an application, Aery, on their smartphones or other devices. They walked through the museum looking at their phones to see pieces of art spread throughout the gallery.⁷⁰ The figure below shows an example of this new art from Sade.



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Sade has made the comparison of using AR, together with photography, to a paint brush. She declared, “[i]t’s a fabrication tool,” and “[i]t’s a medium.”⁷² Surely, this art is as protected as a painting made by a more traditional artist to be displayed in the same gallery, right? A hypothetical

68. Devin Gannon, *New virtual art exhibition at High Line Nine highlights multiple artists at once*, 6SQFT (Oct. 1, 2019), <https://www.6sqft.com/new-virtual-art-exhibition-at-high-line-nine-highlights-multiple-artists-at-once/>.

69. *Id.*

70. *Id.*

71. Shuli Sad. . .’s *Wild, Heterotopias*; courtesy of Related Companies

72. *Emerging Technologies: AR*, UNIT LONDON, <https://unitlondon.com/blog/130/> (last visited Oct. 13, 2020).

scenario similar to this situation is examined later, but this kind of new art shown is the origin for these questions.

B. Virtual Reality

Virtual reality is almost entirely distinct from augmented reality. It is defined as “an artificial environment which is experienced through sensory stimuli (such as sights and sounds) provided by a computer and in which one’s actions partially determine what happens in the environment.”⁷³ Immersion VR can simply be thought of as taking a person completely out of the reality in which he or she live and putting them into another by taking over his or her senses. Today, this is accomplished by placing a headset over the eyes. Often times the headset will be further equipped with speakers or headphones to engage the auditory senses as well.

If sight and sound are not enough, some tech companies have begun to develop outerwear that engages touch as well.⁷⁴ For example, TESLASUIT has developed outerwear to work in conjunction with the VR headset.⁷⁵ It provides haptic feedback, motion capture, and biometrics readings.⁷⁶ “From subtle touch sensations to feelings of physical exertion, users experience scenarios as though they’ve lived them.”⁷⁷ Being able to bring the senses of sight, sound, and touch into an alternative reality creates significant potential, especially in the context of art where those senses are the ones most commonly involved.

However, VR was almost exclusively developed with an eye toward gaming early on.⁷⁸ It was not until later that people started to realize VR’s potential impact was much broader. In 2016, Goldman Sachs laid out what it predicted to be the nine biggest industries to be impacted by the development of VR: videogames, live events, video entertainment, healthcare, real estate, retail, engineering, and military.⁷⁹ Education could

73. *Virtual reality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/virtual%20reality> (last visited Oct. 13, 2020).

74. See TESLASUIT, <https://teslasuit.io/> (last visited Oct. 13, 2020); BHAPTICS, <https://www.bhaptics.com/> (last visited Oct. 13, 2020).

75. TESLASUIT, <https://teslasuit.io/> (last visited Oct. 13, 2020).

76. *Id.*

77. *Id.*

78. Roya Bagheri, Note, *Virtual Reality: The Real Life Consequences*, 17 U.C. DAVIS BUS. L.J. 101, 105 (2016).

79. *Profiles in Innovation: Virtual & Augmented Reality*, GOLDMAN SACHS (Jan. 13,

predictably be added to this list as well.

Now, nearly all of the biggest names in tech are in the VR industry. If they are not yet, it is because they are behind or do not have plans to join. Google has its Daydream View product line.⁸⁰ Samsung has Gear VR, and Sony has PlayStation VR.⁸¹ Oculus (now owned by Facebook) is an extremely popular VR company with several VR lines. Other big tech names such as HP and Dell have VR products as well. Additionally, the VR industry has shown no signs of slowing down. Consumers with just about any one of these headsets can do everything from going to the theater with friends, to playing paintball, to visiting parts of the world recreated in the virtual reality.⁸²

Relevant to this Note, several art galleries already exist in VR, both as replicas of real-world art galleries and exclusively VR galleries.⁸³ With this technology, as opposed to AR, one does not even have to leave his or her home to perceive some of the greatest art the world has ever seen. Some of the biggest art museums in the world have already made themselves available for VR tours, including The Metropolitan Museum of Art (“The Met”) in New York City, The British Museum in London, and the Louvre in Paris.⁸⁴ One VR museum, The VR Museum of Fine Art, takes some of the most popular art of all time—from the Mona Lisa to The Statue of David—and puts it all in one place for display.⁸⁵

While almost none of the art displayed in these museums would likely be the subject of a VARA case, the question remains about whether VARA could apply to art within a VR art gallery displaying living artists’ works. As VR tours displaying older art become increasingly popular, those displaying newer art assumedly will as well. They are certainly already out there.⁸⁶

2016), at 7.

80. See GOOGLE, <https://arvr.google.com/daydream/> (last visited Apr. 21, 2021).

81. See SAMSUNG, <https://www.samsung.com/global/galaxy/gear-vr/> (last visited Apr. 21, 2021); see also PLAYSTATION, <https://www.playstation.com/en-us/ps-vr/> (last visited Apr. 21, 2021).

82. Scott Hayden, *10 Apps to Hang Out with Friends in VR*, ROADTOVR (Mar. 19, 2020), <https://www.roadtovr.com/10-apps-hang-friends-vr/>.

83. *10 amazing virtual museum tours*, VIRTUALTEACH, <https://www.virtualiteach.com/post/2017/08/20/10-amazing-virtual-museum-tours> (last visited Oct. 13, 2020).

84. *Id.*

85. *Id.*

86. See *VR Art Platform*, VRALLART, <https://vrallart.com/> (last visited Oct. 13, 2020);

PART IV

The goal of Part IV is to take the essence of VARA as discussed in Part I and the limited rights granted by VARA in Part II and apply them to the technology outlined in Part III. Fortunately, as mentioned above, this Note is not the first to try to address the issues presented by VARA with respect to new technology. Currently, most articles examine whether VARA can apply to digital art. However, the meaning of digital art is not necessarily clear. It could include only art that is displayed using digital technology. It could also include only art that was created using technology but is displayed on paper or a similar medium. Finally, it could mean art that is both created and displayed using technology.

The following articles seem to use the last definition. Still, XR art may not fit into this definition, because it can only be viewed within either a reality that blends technology with the real world or a different, virtual reality entirely. Even then, XR could be just a different subset of digital art apart from works viewable only from a single vantage point, as XR art is seemingly dimensionless. Regardless, these publications are well worth addressing as they provide a good analytical framework for determining whether a new kind of art can fit under VARA's umbrella. Generally, scholars are split on VARA's application to digital art. In addition, the cases for and against VARA's application will include some arguments relating to the purpose of moral rights. Both sides will be presented.

A. The Case for Applying VARA to Digital Art

Gibbons

In 2010, Associate Professor Llewellyn Joseph Gibbons of the University of Toledo College of Law authored an article on digital works of photographic art for the *North Carolina Journal of Law & Technology*.⁸⁷ His article addressed two primary questions. First, it asked whether “a completely digital work of visual art may be classified under VARA as a ‘painting, drawing, print, or sculpture,’ or ‘a still photographic

See also India Block, *Space Popular launches virtual reality art gallery*, DEZEEN (May 11, 2020), <https://www.dezeen.com/2020/05/11/space-popular-virtual-reality-art-gallery/>.

87. Llewellyn Joseph Gibbons, *Visual Artists Rights Act (“VARA”) and the Protection of Digital Works of “Photographic” Art*, 11 N.C. J.L. & TECH. 531 (2010).

image produced for exhibition purposes only.”⁸⁸ Second, it examined whether digital works can meet VARA’s additional requirements mentioned in Part II. That is, whether the digital works can be “a limited edition of fewer than 200 copies, individually signed, and consecutively numbered by the artist.”⁸⁹

First, Professor Gibbons stated, “the most analogous to an eligible digital work of art is a ‘photographic image produced for exhibition purposes only.’ Therefore, one must evaluate whether a digital visual work embodied in a digital medium meets the statute’s definition of a photographic image and thus benefits from VARA’s protection.”⁹⁰ Following a thorough investigation of VARA’s text and legislative history, Professor Gibbons concluded digital visual works could sufficiently fall under the definition.⁹¹ Regarding production of the work, he also looked to the law’s history. “The process by which the work of visual digital art was created is immaterial as long as the final embodiment for which the artist is claiming protection under VARA is for exhibition purposes only.”⁹² VARA’s history is, indeed, pretty clear regarding the produced term. Next, a broad interpretation for exhibition purposes could be employed because it is “consistent with the legislative history and the purposes of VARA.”⁹³ He later additionally affirmed, “[t]he artist merely has to produce the work for exhibition purposes and not for some ancillary purpose.”⁹⁴ Professor Gibbons’s conclusion, particularly regarding digital photographic works, is perfectly logical. However, things are less clear when the digital work is not of the photographic nature but instead is of the painting, drawing, print, or sculpture nature.

He also addressed the question of “whether the aid of a machine or device in order to perceive the work is permissible under VARA,” because VARA does not indicate one way or the other.⁹⁵ He posited that “[n]one of these [paintings, drawings, sculptures, and photographs] requir[ing] the aid of a machine or device to be visually perceptible. . . seems to indicate that a literal reading of VARA would not apply its protection to purely

88. *Id.* at 532.

89. *Id.*

90. *Id.* at 535-36.

91. *Id.* at 552.

92. *Id.* at 538. (citing H.R. Rep. No. 101-514, at 11 (1990)).

93. Professor Gibbons also briefly noted the possibility of a narrow interpretation limiting exhibition to display in museum, art galleries, or other art-centered locations.

94. *Id.* at 545.

95. *Id.*

digital works of art.”⁹⁶ However, he felt a “better reading” of VARA would use the Copyright Act’s definition of “copies.”⁹⁷ It states that copies are “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁹⁸ Using this argument, Gibbons stated that “one must also read into VARA the possibility of a VARA work as one capable of being perceived with the aid of a machine or device.”⁹⁹

Regarding the second question of whether digital works can be limited editions of 200 or fewer copies signed individually and consecutively numbered by the artist, Professor Gibbons suggested that they could be. Initially, he examined whether the “copies” created as a part of the digital production process would necessarily count against the 200 copy limit.¹⁰⁰ He did not think they would because “[t]he other copies are mere reproductions . . . [that] do not change the legal status under the original work,” and “there is a clear intention in the 1976 Copyright Act to excuse these essential reproductions necessary to use a digital work.”¹⁰¹ Further, “the original is the signed and numbered copy on the physical media storing the digital work.”¹⁰²

Next, Professor Gibbons looked at VARA’s “signed and numbered” requirement.¹⁰³ He stated, “the signature is the visible manifestation that the artist recognizes paternity in this particular embodiment of the work as original ‘art,’ as differentiated from numerous other possibly identical or indistinguishable embodiments that are mere identical reproductions of the work and not protected under VARA.”¹⁰⁴ After examining the definition of signature under the General Provisions Act of the United States Code and its common law meaning, Professor Gibbons suggested electronic signatures, in addition to physical markings, could be consistent with the literal reading of VARA.¹⁰⁵

In conclusion, Professor Gibbons stated, “[t]he language of the statute

96. *Id.*

97. *Id.* at 545-46.

98. 17 U.S.C. § 101.

99. *Gibbons*, at 546.

100. *Id.* at 541.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 544.

and its legislative history is sufficiently robust so that some digital works of visual art will be protected, while other equally creative and artistically significant works will fall outside of VARAs protection.”¹⁰⁶

Mucinskas

Professor Gibbons was not the only scholar looking for an answer to this question. Then-student Kristina Mucinskas authored a note prior to Professor Gibbons’s article with a similarly thorough analysis “to explain how digital artists can gain moral rights protection for their art.”¹⁰⁷ Her analysis involved, after a review of digital arts and moral rights, a two-part inquiry.¹⁰⁸ “A two-prong test determines whether a work of art is eligible for moral rights protection. The positive prong defines a work of visual art and the negative prong lists exclusions from moral rights protection.”¹⁰⁹

Regarding the positive prong, Mucinskas began by determining whether digital art can fit into a definition of one of the protected works. She suggested it could fit into either. She stated, “[d]igital technologies serve as tools to create the painting, drawing, or photographic image that exists in digital form rather than in a traditional physical form.”¹¹⁰ Mucinskas is seemingly concluding here—and legislative history arguably supports—that the digital nature of the end product may be irrelevant to fitting digital art into this accepted category. She then examined whether the art could be a still photograph “for exhibition purposes only.”¹¹¹ Like Professor Gibbons would later conclude, Mucinskas thought that if the intent to display exists when the photo is produced as opposed to when the image is snapped then still photographic images could satisfy the exhibition purposes requirement as well.¹¹²

Second, Mucinskas looked at the “negative prong,” or what has been explicitly excluded from being a “work of visual art.”¹¹³ Specifically, she acknowledged “[t]he exclusion of motion pictures and audiovisual works

106. *Id.* at 551.

107. Kristina Mucinskas, Note, *Moral Rights and Digital Art: Revitalizing the Visual Artists’ Rights Act?*, 2005 U. ILL. J.L. TECH. & POL’Y 291, 292 (2005).

108. *Id.* at 301.

109. *Id.*

110. *Id.* at 305.

111. *Id.*

112. *Id.* at 306.

113. *Id.* at 307.

poses the largest barrier to moral rights protection for digital art.”¹¹⁴ One of the benefits of creating digital art is the ability to add sound and movement, but an artist may consider avoiding those features if he or she hopes for VARA’s security. She further mentioned the exclusion of function objects, advertising materials, and publications from VARA’s protections.¹¹⁵ Regarding the “limited editions” requirement, Mucinskas stated that “digital art can fulfill the statutory requirement of a limited edition [copy] even though additional copies may temporarily reside on the computer of the person who owns the limited edition copy.”¹¹⁶ As would later be the case with Professor Gibbons, this conclusion is drawn from an interpretation of copyright law generally.¹¹⁷

Mucinskas then briefly analyzed what rights an artist might have under the DMCA.¹¹⁸ She noted, “the DMCA provides an alternative means of moral rights protection for digital art. However, moral rights protection under the DMCA has its own limitations.”¹¹⁹ Specifically, the rights of attribution and integrity under the DMCA are limited to removals or alternations that promote, assist, or hide copyright infringement.¹²⁰ Furthermore, perhaps the biggest reason the DMCA would be ineffective in this context is that it is limited to the copyright owner. Without such ownership, an artist would be unable to prevent modifications to the work under the DMCA.

Mucinskas concluded, “[t]o receive moral rights protection under VARA, digital artists must acquiesce to a traditional conception of the art object as unique and enduring.”¹²¹ She further stated, “[f]or digital artist who reject the limitations of VARA, the DMCA provides an alternative, but limited, means of moral rights protection.”¹²² Finally, “[m]oral rights thus have a role in protecting digital art, but artists must choose to claim them.”¹²³

In addition to the arguments made from Mucinskas and Professor Gibbons, a court could reasonably look to the purpose of providing artists

114. *Id.*

115. *Id.* at 307-08.

116. *Id.* at 309.

117. *Id.*

118. *Id.* at 310.

119. *Id.*

120. *Id.*

121. *Id.* at 315.

122. *Id.*

123. *Id.*

with the rights of attribution and integrity more generally. The purpose of creating the rights—to be consistent with foreign law and to promote the arts—can be found in the legislative history.

These rights are analogous to those protected by Article 6bis of the Berne Convention, which are commonly known as “moral rights.” 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. Artists’ rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: To promote the Progress of Science and useful Arts.¹²⁴

However, to promote the progress of useful arts is a broad purpose. The legislative history is not exceedingly clear as to the specific purpose for each right, only that both rights working together encourages artists to create. An argument for applying VARA to XR art could be that it would be true to that broad purpose. It would encourage artists to continue to create within new platforms that may come around. This could also have the ancillary effect of continuing the advancement of science in that developers may be more apt to perfect virtual and augmented realities if they know society is taking them seriously by including them in the law.

B. The Case Against Applying VARA to Digital Art

Indeed, some scholars have been more skeptical of VARA’s application to digital art.¹²⁵ One went as far as to state that “VARA fails to protect anything falling outside its narrow definition, and many types of art, ‘digital art’ for example, are left without VARA protection.”¹²⁶ Even the aforementioned authors acknowledged their hypotheses are unanswered and still subject to doubt. The opposing case is clear.

First, Congress was well aware of artists’ ability to create works using some technology at that time, yet it is absent from the definition of “works of visual art.”¹²⁷ The phrase “any method now known or later developed,

124. H.R. Rep. No. 101-514, at 5 (1990) (citing U.S. Const. art. I, § 8 cl. 8).

125. See Note, *Visual Artists’ Rights in a Digital Age*, 107 HARV. L. REV. 1977 (1994).

126. Brian T. McCartney, “Creepings” and “Glimmers” of the Moral Rights of Artists in American Copyright Law, 6 UCLA ENT. L. REV. 35, 42–43 (1998).

127. See H.R. Rep. No. 101-514, at 9.

and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” is repeated on several occasions throughout copyright law, yet it is noticeably nonexistent in VARA.¹²⁸ Further, Congress specifically excluded most works of art created using technology, such as motion pictures, audiovisual works, and electronic publications.¹²⁹ The only included kind of work that possibly involves the use of technology is a photographic image, but even those images are limited to being still and produced for exhibition purposes only.

In addition to the textual arguments, VARA’s legislative history suggests its text should be read narrowly.

The definition of a work of visual art is a critical underpinning of the limited scope of the bill. As Representative Markey testified, “I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered. [T]his legislation covers only a very select group of artists.”¹³⁰

Further, at least half of Congress’ logic in specifically excluding non-limited editions and works created using technology is extendable to digital art.

Motion pictures and other audiovisual works are generally produced and exploited in multiple copies. They are leased for theatrical and non-theatrical exhibition, licensed for broadcasting, shown on airplanes, and sold as videocassettes. Each market has its own commercial and technological configuration that affects how the work will appear when presented. In contrast, the works of visual art covered by H.R. 2690 are limited to originals: works created in single copies or in limited editions. They are generally not physically transformed to suit the purposes of different markets. Further, when an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies

128. 17 U.S.C. §§ 101-02.

129. 17 U.S.C. § 101. (“A ‘work of visual art’ does not include...”)

130. H.R. Rep. No. 101-514, at 10-11.

is altered.¹³¹

Even given the assumption that digital works of visual art would be *generally not physically transformed to suit the purposes of different markets*, it is not the case that digital works of art cannot be replaced unless that is somehow managed by the artists. Still, common sense would suggest that it is not nearly as difficult to replicate a deleted copy of a digital work of art as it is to replicate a traditional work of art.¹³²

The legislative history is silent as to works of art created in digital mediums, something Congress was aware of. Congress' silence in combination with its aforementioned intent to keep VARA narrowly defined could plausibly suggest that Congress only had traditional works of visual art in mind when drafting. In addition to this, the excerpt from the legislative history in the case for VARA regarding the law's purpose could also be read narrowly. One could easily say that the purpose of VARA is to prevent the modification or destruction of works of art because the artist's work and honor embodied within the piece cannot be replicated. But that may not be true in the digital world. If a work is truly deleted and gone forever, then the artist may have a case, but that may rarely be true in the world today.¹³³ Data is almost never actually gone. At least the right of integrity may serve a little purpose if the work can just be retrieved from a data backup.

131. *Id.* at 9.

132. H.R. Rep. No. 101-514, at 9 (emphasis added).

These critical factual and legal differences in the way visual arts and audiovisual works are created and disseminated have important practical consequences. They have led the Congress to consider the claims of these artists separately, and have facilitated the progress of legislation to protect the rights of visual artists. H.R. 2690 therefore acknowledges and is premised on these distinctions. It responds to comments on the issue of visual artists' rights elicited at the Subcommittee's earlier hearings. Those hearings revealed a consensus that *the bill's scope should be limited to certain carefully defined types of works and artists, and that if claims arising in other contexts are to be considered, they must be considered separately.*

133. It is worth noting that what constitutes modification or destruction of XR digital works may be a difficult question. For example, refusing access to AR art by banning AR technologies within the area effectively prevents the art's display without modifying or destroying the file itself. However, this scenario seems inconsistent with the purpose of the right of integrity because the work is effectively gone in a similar way to whitewashing a VARA-protected work.

C. The Analytical Framework for New Art Forms

From the above scholarship both for and against VARA's application to digital art, the analytical framework for determining whether a recognized piece of art is under VARA's umbrella can be reasonably reduced to the following statutory interpretation inquiry: (1) Determine whether the art clearly fits within one of the kinds of art listed in the positive and negative prongs of work of visual art, (2) If the first step was unsuccessful, use the Copyright Act's other text and VARA's legislative history to determine whether the art is more likely to fit within the positive or negative prong, and (3) Determine whether the art can be a limited edition of fewer than 200 copies signed and consecutively numbered by the artist.

D. Applying the Framework to Hypotheticals One and Two

In the following hypotheticals, some assumptions are made. First, the artist is still living. Second, the artist has not waived his or her VARA rights. Third, the work is not a work made for hire. Fourth, the work satisfies the recognized stature requirement.

Hypothetical One – Augmented Reality Mural

Imagine just having bought the latest pair of smartglasses on the market. Walking down the street while looking through said glasses, there are directions laid over the road, text messages passed from a phone, and a to-do list for the day. You look up at a nearby building and instead of the dirty windows, you see that the building is covered with a huge mural created by an esteemed XR artist. Perhaps the owners of the building wanted to show its features or send a message. Anyone who walks by the building can see the mural using an application on any AR-capable device. Over the course of five years, the mural develops recognition. People come from all over the world to look through their devices toward the building. Pictures of the mural make the news and experts vouch for their peer's excellent work. Then, the owners of the building sell it to a new property group that decides it does not like attracting all the tourists anymore, so they have the mural taken down and destroyed (or deleted) without forewarning the artist. Does the mural fit within VARA's coverage? If so, can the artist successfully bring a right of integrity claim under VARA?

First, an analysis of the positive prong is required. Proponents of

protecting the artist will claim that the text is clear. Murals, as well as “works created on canvas, and the like,” have been held to be “a subset of paintings.”¹³⁴ Again, paintings are explicitly covered under VARA.¹³⁵ Further, the mere fact that the mural is in digital form does not mean that it is not a mural. Even if a court were to say that it was no longer a mural, it may nevertheless be a “still photographic image . . . for exhibition purposes” also covered under VARA.¹³⁶ Photographic image seems to imply that the use of technology for production is okay so long as the artist intends for the image to be produced *for exhibition*. Furthermore, a court could also choose to read these two options less exclusively. That is, a court could reasonably determine that a digital painting (here, a mural) produced for exhibition purposes using technology is a work of visual art.

For the opposing view, a painting, drawing, print, or sculpture is tangible and in a traditional medium. It does not require anything but the naked eye to see. Therefore, a digital mural is not really in the class of the items listed. A digital mural is the opposite in that it is intangible and requires the aid of a device to perceive it.¹³⁷ As mentioned above, Congress usually indicates whether the law includes mediums that are not expressly listed. Regarding the second option, the mural does not seem to actually be a photographic image, and paintings are listed in separate subsections of the definition indicating Congress intended the options to be read exclusively.

Second is an analysis of the negative prong. The mural is clearly not a poster, map, globe, chart, technical drawing, diagram, or model. It is not applied art as it has never served, nor will it serve, a utilitarian function.¹³⁸ Motion pictures are defined as “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”¹³⁹ The mural is not that either as it contains no auditory component or series of images. Last, the mural is not a “audiovisual work, book, magazine, newspaper,

134. *Hunter v. Squirrel Hill Assocs., L.P.*, 413 F. Supp. 2d 517, 519 (E.D. Pa. 2005) (citing *Pollara v. Seymour*, 344 F.3d 265, 270 (2d Cir. 2003)) (“The term ‘painting’ includes murals, works created on canvas, and the like.”).

135. 17 U.S.C. § 101.

136. *Id.*

137. As mentioned in Part III, it is conceivable gloves or other outerwear which triggers the nerve endings of the fingers or elsewhere may allow a user to “feel” art which exists in XR.

138. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84–85 (2d Cir. 1995).

139. 17 U.S.C. § 101.

periodical, data base, electronic information service, electronic publication, or similar publication.”¹⁴⁰ Those who claim that digital art is not covered would likely suggest that the mural belongs in the list of exclusions alongside the rest of the digital works.

If the above analysis were to be insufficiently conclusive to a court, it could look to legislative history for guidance. This could lead it to punt the question to professionals, because Congress seemingly wanted to leave the future debate about works of visual art to art experts. It also possibly indicated a tolerance for art forms yet to be discovered or flushed out.

The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. *Artists may work in a variety of media and use any number of materials in creating their works.* Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.¹⁴¹

Leaving the decision as to whether the digital mural is a work of visual art to art experts would logically lead one to assume that the question will be answered affirmatively. It seems unlikely that an art expert would conclude a work is not a work of visual art merely because it is in digital form. The tiebreaker likely goes to the artist here.

Last, the XR mural must still be a piece that can be a limited edition of fewer than 200 copies signed and consecutively numbered by the artist. Adopting the Gibbons and Mucinskas takes on this requirement, and given the lack of opposing arguments, it seems highly likely that the muralist would be able to sufficiently sign this mural. The numbering requirement is also probably not in question in this hypothetical because there is only one mural. Moreover, even if the artist were to create a copy of this mural for a building elsewhere (e.g., a different branch of the same company),

140. 17 U.S.C. § 101 (emphasis added).

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. *A public performance or display of a work does not of itself constitute publication.* Further, read in light of the surrounding terms, “electronic publication, or similar publication” would likely be limited to text or numerical-based items.

141. H.R. Rep. No. 101-514, at 11 (1990) (emphasis added).

he or she could probably still digitally number the work. Each of VARA's requirements likely being satisfied, a court could reasonably decide that the mural in this hypothetical is a work of visual art. Therefore, the digital muralist could likely bring a right of integrity claim under VARA for its destruction.

Hypothetical Two – Virtual Reality Sculpture

Now, instead of smartglasses, imagine someone putting on a virtual reality headset at home. In this virtual reality, the person visits an art gallery. As opposed to a famous museum, such as the Louvre Museum in Paris, this gallery exists exclusively within the virtual reality. Well recognized XR artists often submit works for exhibition in this gallery, but only the best works are chosen. One esteemed XR artist creates a particular piece, a sculpture, using exclusively XR software. The sculpture is submitted to the XR gallery for exhibition and is stored on the gallery's server. It is an instant attraction, one that brings consumers to the XR art industry just to witness it. Later, the gallery receives a slightly different sculpture in the same field. The gallery ownership likes a particular feature of the new sculpture, so it edits the former sculpture's only existing file to reflect a couple modifications. However, it leaves the artist's signature marking on the sculpture for exhibition. As it turns out, the public despises the modifications and heavily criticizes the artist. Does VARA cover the sculpture as a work of visual art? If so, can the artist successfully use VARA's rights of attribution and integrity to recover?

Beginning with the question of whether the sculpture fits within the positive or negative prong, this looks pretty similar to the first hypothetical. Sculptures are clearly listed as works of visual art.¹⁴² However, there are a few key differences. First, VR art is different from AR art in that the real reality holds no place in its perception. Where the mural of the first hypothetical was laid over a real-world building, the XR sculpture needs no real-world component for viewing. This fact would not matter for a literal reading of the text but does seem ever further fetched when trying to apply congressional intent. Second, the general rule of thumb may be that whatever is uploaded to a virtual reality may be governed by the same standards as in the real world.¹⁴³ If that is true,

142. 17 U.S.C. § 101.

143. Jonathan M. Purov, *Virtual Reality May Create Novel IP Issues In The Real World*, LAW 360 (Mar. 28, 2016), <https://www.law360.com/articles/769479/virtual-reality-may->

Hypothetical Two is even less difficult than Hypothetical One because there would be no reason not to apply VARA. However, it seems likely that a distinction will eventually need to be drawn between the laws of virtual realities and the real world.

With that assumption in mind, an analysis of the second prong is required. The work of art here is similar to the first AR mural. Making sure that the sculpture does not become something like a motion picture or audiovisual work is crucial for the artist here. For example, making a sculpture that moves or changes may be all it takes to forgo VARA rights. Similarly, providing a sound component with the work within the VR may make it an audiovisual work. Proponents may argue that Congress really only intended those terms to exclude movies and the like. Still, it seems likely that the VR sculpture does not fit neatly within any portion of the negative prong.

The legislative history portion of the analysis likely ends the same way as Hypothetical One. That is, the court could end up looking to art experts for help. It seems probable that expert testimony would confirm that art is no less a work of visual art solely because it exists only in a virtual reality. Furthermore, the signed and numbered limited-edition requirement of VARA seems even clearer here. If artists are able to create the art in the VR just as they are in the real world, they assumedly would be able to sign or mark it as well. As mentioned by Professor Gibbons, signature requirements are broadly construed and should be easy to meet. However, if the artist were to make copies of the sculpture for other VR art galleries, consecutive numbering would be required for VARA compliance.

As it stands, it appears that a court could reasonably find that the XR artist is entitled to recover against the gallery for the modifications resulting in harm to his or her reputation. The XR artist could likely successfully bring a VARA claim under the right of attribution.

CONCLUSION

At the end of the day, there are more questions than answers when trying to apply the Visual Artists Rights Act to digital works, specifically the subset of works created or existing within extended realities. However, an analytical framework using statutory interpretation can be developed from scholars attempting to answer the question of whether digital art is

generally covered by VARA. Extending that framework to a couple of hypotheticals involving works existing within extended realities led to the conclusion that a court could reasonably find that XR artists are entitled to the moral rights of attribution and integrity that VARA provides. This would be consistent with the legislative history and the overall purpose of VARA as well.