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Cover Page Footnote

J.D. Candidate, 2022, University of Georgia School of Law. I dedicate this Note to all the artists and creatives in the legal industry. I thank Professor Jean Goetz-Mangan for her guidance and constant support. I also thank my family for always pushing me forward.

DESTRUCTION, THE REBIRTH OF ART: ANALYZING THE RIGHT OF INTEGRITY'S ROLE IN MODERN ART

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I. INTRODUCTION

An owner generally dictates the future of their property through conditions, special limitations, trusts, and future interests.[1] Issues arise, however, when property owners exert unlimited posthumous control over such property to the detriment of its heirs. As a result, courts have regularly limited the posthumous control of an estate through the Rule Against Perpetuities[2] and other similar doctrines.

A recent movement towards the expansion of moral rights for artists poses similar concerns of control. The Visual Artist's Rights Act[3] ("VARA"), grants artists certain moral rights, defined as:

> rights of a spiritual, non-economic and personal nature that exist independently of an artist's copyright in his or her work and spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved.[4]

This expansion of law threatens to increase the rights of a creator without any thought to the interests of a subsequent owner.

In this Note, I argue that through VARA, Congress has haphazardly created new rights without concern for traditional United States legal doctrine. Further, these rights extend past the intended scope of intellectual property law and restrict the liberty and creativity of any subsequent owner-artist. Specifically, I am concerned about the creation of a legal tradition that subverts one artist's feelings over another artist's creative liberty.[5] As it stands, 17 U.S.C. § 106A creates a moral right of integrity[6] that is adverse to both traditional ownership doctrines and the Constitution. The circumstances Congress sought to remedy through VARA have been adequately addressed through remedial doctrines in contract, tort, and the breadth of intellectual property law.

The crux of my argument lies in constitutional concerns regarding both due process under the Fifth Amendment and freedom of expression under the First

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[1] LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND, 32-36 (1955).

[2] *Rule Against Perpetuities*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("No later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created.").

[3] 17 U.S.C. § 106A.

[4] Urbain Pottier v. Hotel Plaza Las Delicias, Inc., 379 F. Supp. 3d 130, 132 (D.P.R. 2019) (quoting Rivera v. Mendez & Co., 824 F. Supp. 2d 265, 267 (D.P.R.)).

[5] I analogize these circumstances with a similar concern of a testator's unchecked posthumous control of their property as explained by the Dead Hand Theory and addressed by the Rule Against Perpetuities.

[6] 17 U.S.C. § 106A.

Amendment. Specifically, I seek to show the grave implications that arise under VARA when an artist seeks to creatively destroy a work they own and unintentionally violates one's integrity. As a result, I call for an exemption to VARA for the destruction and creative rebirth of a work of art ("Creative Destruction"). I argue that destruction is a cornerstone of creativity, and any legislation limiting such creativity directly conflicts with the powers delegated to Congress in the Copyright and Patent Clause of the Constitution, in addition to both the First and Fifth Amendments.

First, I explain Creative Destruction and its place in art and creative development. Then, through a quick art history lesson, I show the underlying lines of destruction that flow through both artistic movements and works themselves. This section emphasizes the importance of destruction in the creative cycle and how the regulation of integrity may negatively affect it.

Next, I provide background on the relevant statutory and common law authorities, as well as an explanation of some legal principles discussed later in the Note. Also, I emphasize the strong public policy in favor of protecting destruction as a form of modern art. Finally, I close the section with a discussion of destruction's current role in both American and European art.

After developing the legal and social backgrounds concerning my argument, I begin my analysis with the consideration of remedial principles existing in law before VARA's enaction. These principles satisfy both constitutional and international concerns, while also providing protection specifically tailored to the United States.

Then, I will present an applied constitutional challenge showing that Congress acted outside of its scope through adopting the moral right of integrity. First, I explain how integrity poses a grave threat to a subsequent owner-artist's due process. Consequently, this also threatens to violate a subsequent owner-artist's First Amendment[7] rights and ultimately contravenes the scope of the powers conferred in the Copyright Clause.[8]

Finally, I provide solutions advocating for the legal protection of destruction as a creative process. This involves a balancing of interests and the provision of an exemption for creative destruction. Also, the Visual Artists Rights Act must be updated to satisfy the requirements of Due Process. This can be done through conditioning action on its registration or the receipt of notice.

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[7] U.S. CONST. amend. I.

[8] U.S. CONST. art. 1, § 8, cl. 8.

II. BACKGROUND

A. CREATIVE DESTRUCTION

The term "Creative Destruction" originated in economics as a theory proffered by Joseph Schumpeter, a political economist.[9] This theory maintains that the core of capitalist progression is the evolution and the continual revolution of goods from within.[10] At its core, Creative Destruction seeks a sustainable path towards innovation and creation.[11] Further, some scholars argue that creative destruction could be one of the biggest opportunities for a business's success in the history of commerce.[12] In light of its relevance and acknowledgment in the economic community, the application of Creative Destruction to artwork and its consumer market is a reasonable conclusion.

A famous example of Creative Destruction and its application to art hangs in the San Francisco Museum of Art and is entitled "Erased de Kooning Drawing" by Robert Rauschenberg.[13] As the title suggests, this piece was a Willem de Kooning sketch that had been erased by Rauschenberg over the period of a month.[14]

> Rauschenberg's usual account of *Erased de Kooning Drawing*'s origins begins with a simple challenge: he wanted to discover a way to make a drawing with an eraser. He had tried erasing one of his own drawings but found the results lacking. He became convinced that the only way to create a work of art through erasure would be to start with a drawing by an artist of universally recognized significance. His first and only choice was Willem de Kooning (1904–1997), a painter at the apex of

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[9] Philippe Aghion & Peter Howitt, *A Model of Growth Through Creative Destruction* 1 (NBER Working Paper Series, No. 3223, 1990), https://www.nber.org/system/files/working_papers/w3223/w3223.pdf.

[10] *See id.* (detailing that "[o]bsolescence does not fit well into existing models of endogenous growth.").

[11] Stuart L. Hart & Mark B. Milstein, *Global Sustainability and the Creative Destruction of Industries*, SLOAN MGMT. REV. (Oct. 25, 1999), https://sloanreview.mit.edu/article/global-sustainability-and-the-creative-destruction-of-industries/.

[12] *id.* at 25.

[13] Robert Rauschenberg, *Erased de Kooning Drawing*, S.F. MUSEUM MOD. ART (1953), https://www.sfmoma.org/artwork/98.298/.

[14] Preminda Jacob, *Banksy and the Tradition of Destroying Art*, CNN STYLE (Oct. 23, 2018), https://www.cnn.com/style/article/banksy-tradition-of-destroying-art/index.html.

> his powers who had recently reached the highest echelons of the New York art world.[15]

Thankfully for Rauschenberg, when acquiring this sketch, he disclosed his intentions to de Kooning, to which de Kooning consented.[16] As a result, he likely would not have a strong VARA suit for the destruction and infringement on his right of moral integrity.[17]

1. Examples.

The contemporary art movement brings forth a great opportunity for an interest in destructive art. One of the most prominent current forms of such destruction is the graffiti art movement. [18] This movement "has its origins in 1970s New York, when young people began to use spray paint and other materials to create images on buildings."[19] At its core, the graffiti art movement is disruptive to public spaces, and in most cases, illegal.[20] This disruption, however, is not a threat to the public and oftentimes poses opportunities for necessary social dialogue and change in communities.[21]

An example of graffiti art is shown through the Cabbagetown Community in Atlanta, Georgia and the Krog Street tunnel located therein.[22] As the city's population expanded in the 2000's, however, the community saw an influx of

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[15] Sarah Roberts, *Erased de Kooning Drawing*, S.F. MUSEUM OF MOD. ART (July 2013), https://www.sfmoma.org/essay/erased-de-kooning-drawing/.

[16] Rauschenberg, *supra* note 13.

[17] It is worth noting that this sketch was created in 1953, thus pre-dating the Visual Artists Rights Act. As a result, an actual VARA claim based on these circumstances deserves a more in-depth analysis that is beyond the scope of this note. In its relevant part, 17 U.S.C. § 106A(d)(2) states

> [w]ith respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 . . . the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

[18] *Graffiti Art*, TATE, https://www.tate.org.uk/art/art-terms/g/graffiti-art (last visited Oct. 13, 2021).

[19] *Id.*

[20] *See, e.g.*, N.Y. Penal Law § 145.60 ("No person shall make graffiti of any type on any building, public or private, or any other property real or personal owned by any person, firm or corporation or any public agency or instrumentality, without the express permission of the owner or operator of said property.").

[21] Lu Olivero, *Graffiti Is a Public Good, Even As It Challenges the Law*, N.Y. TIMES, (July 11, 2014, 6:15 PM) https://www.nytimes.com/roomfordebate/2014/07/11/when-does-graffiti-become-art/graffiti-is-a-public-good-even-as-it-challenges-the-law.

[22] Becca J G Godwin, *We Read All the Google Reviews of Krog Street Tunnel. It's Weird*, ATLANTA J. CONST. (Mar. 1, 2018), https://www.ajc.com/news/local/read-all-the-google-reviews-krog-street-tunnel-weird/e9KsmzItB2jqCkpead9fnJ/.

residents and, likewise, the gentrification of both its infrastructure and community.[23] A significant byproduct of this gentrification is the change in dialogue between life-long residents and artists and the competing interests of new residents and developers.[24]

Specifically, in 2014, a group of local artists painted over the iconic graffiti of the Krog Street tunnel to protest a private party to be held there.[25] The party organizer was accused of "swooping in to make money off public space and public art."[26] A resident commented on the situation saying, "It's one thing for a neighborhood to embrace something that is their own . . . It's another thing for an outsider to come in with something that is quintessentially for profit."[27] Painting over community artwork was an act of both performance and graffiti art, seeking to comment on the unjust appropriation of the community.[28] Through the act of destruction, the artists were able to voice their opinion that no outsider will profit off *their* work without credit or long-term interest in the community.[29]

Destructive works also find recognition in Japan, as a form of reverence for the piece itself,[30] and in France, as a form of performative commentary.[31] The Japanese example of Kintsugi focuses on the cycle of the physical piece itself.[32] Alternatively, the French example of destruction represents a social commentary on the ideals of art and what constitutes museum-quality work.[33] Both practices demonstrate the necessity of destruction as a way to creatively communicate an artist's viewpoint.

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[23] A Brief History of Cabbagetown, Atlanta, CABBAGETOWN, https://cabbagetown.com/history (last visited Oct. 20, 2021).

[24] *Id.* (showing the change from a working Mill town to a more urban environment including restaurants, lofts, and a diverse community).

[25] *Artists Paint Over Krog Street Tunnel Graffiti in Protest Over Party*, WSB-TV (Oct. 23, 2014, 12:28 PM EDT), https://www.wsbtv.com/news/local/grafitti-art-painted-over-well-known-atlanta-tunne/137252250/.

[26] *Id.*

[27] *Id.* (quoting Nathan Bolster, a community resident and photographer).

[28] Rhonda Cook, *Graffiti Artists Paint Over Their Work in Krog Street Tunnel Protest*, ATLANTA J. CONST. (Oct. 23, 2014) https://www.ajc.com/news/breaking-news/graffiti-artists-paint-over-their-work-krog-street-tunnel-protest/VMZdLiSejrN9RFOuCnc7cP/.

[29] *Id.*

[30] *See* Anonoymous, *Kintsugi*++, 34, 4 ISSUES SCI. AND TECH. 55, 55 (Summer 2018), available at:
https://www.proquest.com/docview/2177532016/fulltextPDF/FF96694D4376440FPQ/20?accountid=147007 ("As a philosophy it treats breakage as part of the object's history rather than as an error or a failure to be covered up or discarded.")

[31] Riding, *infra* note 36.

[32] *Id.*

[33] Riding, *infra* note 41.

The Japanese practice of Kintsugi finds beauty in the resurrection of broken pottery.[34] Kintsugi is a transformative process that mends accidentally broken pottery at its seams with gold lacquer.[35] Kintsugi emphasizes the life cycle of artwork and believes that its repair and mending is a meaningful and significant addition to the work itself.[36]

While Kintsugi is a practice grounded in repairing accidentally broken art, there seems to be little difference between its philosophies and creative destruction. All artwork has a cycle, and upon its physical destruction, the piece will gain a new meaning once more. In other words, the significance of this art is in the work itself and not its physical manifestation.

In France, destructive art makes more of a statement. Notwithstanding the vast protection of moral rights, French artists find ways to express destructive creativity and tempt their legal fate in the name of art. A significant French work of destruction is found in the story of Marcel Duchamp's work entitled "Fountain."[37] This work was a replica of a urinal and signed by Duchamp under the pseudonym "R. Mutt."[38] The piece itself is a part of the artistic movement of readymades.[39] This movement involved artists, who created pieces out of everyday objects.[40] Here, the everyday object was a urinal.

While the piece itself has a certain narrative and impact as intended by Duchamp, it took on a life of its own after its creation. In 1993, French performance artist, Pierre Pinoncelli, took a hammer to the *Fountain*.[41] As a result, Pinoncelli was incarcerated and subjected to a fine.[42] His attack "refocuses

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[34] Kelly Richman-Abdou, *Kintsugi: The Centuries-Old Art of Repairing Broken Pottery with Gold*, MY MODERN MET (Sept. 5, 2019), https://mymodernmet.com/kintsugi-kintsukuroi/.

[35] *Id.*

[36] Richman-Abdou notes:

> In addition to serving as an aesthetic principle, Kintsugi has long represented prevalent philosophical ideas. Namely, the practice is related to the Japanese philosophy of ***wabi-sabi***, which calls for seeing beauty in the flawed or imperfect. The repair method was also born from the Japanese feeling of ***mottainai***, which expresses regret when something is wasted, as well as ***mushin***, the acceptance of change.

Id. (emphasis in original).

[37] Sophie Howarth & Jennifer Mundy, *Marcel Duchamp Fountain 1917, Replica 1964*, TATE, https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573 (last updated Aug. 2015).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Alan Riding, *Conceptual Artist as Vandal: Walk Tall and Carry a Little Hammer (or Ax),* N.Y. TIMES (Jan. 7, 2006), https://www.nytimes.com/2006/01/07/arts/design/conceptual-artist-as-vandal-walk-tall-and-carry-a-little-hammer.html.

[42] *Id.*

attention on the perennial question of what defines art."[43] Pinoncelli intended his actions to rescue the *Fountain* from elitism and "restore it to its original use as a urinal."[44] Pinoncelli references to the *Fountain's* infancy, a time where its purpose was to comment on the superiority of art and push against classical art values.[45] Pinoncelli's public destruction attempts to revert the *Fountain* from its current status as a fixture on a pedestal in important museums to its original purpose of social commentary.[46]

The *Fountain* "tested beliefs about art and the role of taste in the art world . . . ."[47] Duchamp stated the work had been chosen "in part because he thought it had the least chance of being liked . . . ."[48] The work itself and its dramatic backstory are examples of modern movements and the "questioning of the structures of belief and value associated with the concept of art."[49] Regardless of its originally intended meaning, the *Fountain*'s destruction represents a movement in art away from tradition and towards more performative and conceptual work.

B. LEGAL FRAMEWORK

1. Common-Law Ownership of Property.

A property owner is granted the right to possess, use, and convey their property.[50] One's personal property consists of "[a]ny movable or intangible thing . . . subject to ownership and not classified as real property."[51] Under this basic understanding of ownership rights, one *should* be able to do as they please with their personal property; albeit subject to restrictions generally regarding waste,[52] public policy,[53] and law.[54] A large percentage of the time, an owner has absolute ownership over their personal property.

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Howarth & Mundy, *supra* note 37.

[48] *Id.*

[49] *Id.*

[50] *Owner*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[51] *Personal Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[52] In re Estate of Pace, 400 N.Y.S.2d 488, 492-93 (Sur. Ct. 1977) (finding a testator's provision for the razing of their home as "immoral, a waste, [and] against public policy . . .").

[53] Eyerman v. Mercantile Tr. Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (finding that "senseless destruction serving no apparent good purpose is to be held in disfavor. A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society.")

[54] *See e.g., Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978) (discussing government takings which limits personal property rights for government use in certain circumstances).

In the United States, property owners have wide discretion in governing their property through a bundle of rights, including "the right to possess and use, the right to exclude, and the right to transfer."[55] Until the 20th century, the right to destroy existed under the radar.[56] While it has not been outright disclaimed, the right to destroy is not explicitly protected by either common law or statute. Thus, it follows that inherently within an owner's absolute dominion over their possessions lies the opportunity for destruction.

2. Consumer Protection.

The Uniform Commercial Code (U.C.C.) governs a majority of United States jurisdictions, and most forms of art are goods under the U.C.C.[57] The U.C.C. is the result of a comprehensive push towards uniformity in commercial transactions.[58] The Code itself is advisory in authority; however, as of today, only Louisiana and Puerto Rico have failed to enact any U.C.C. provision.[59] While the U.C.C. is incredibly influential in state courts, it is important to remember that copyrights are governed under federal law and state law is likely preempted in those circumstances.[60]

Under U.C.C. Article 2 regarding the sale of goods, a consumer of a commercial product is afforded protection against misrepresentation and fraud.[61] A "good" is defined as "all things (including specially manufactured goods)

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[55] *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[56] *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 794 (2005) (emphasizing how "few scholars had devoted much attention to the right to destroy, while a great deal of attention has been lavished on some of the other property rights . . . [such as] the right to exclude, the right to alienate, the right to use, the right to testamentary disposition, the right to mortgage, and the like.").

[57] *See Uniform Commercial Code*, THE UNIFORM L. COMMISSION, https://www.uniformlaws.org/acts/ucc#:~:text=The%20Uniform%20Commercial%20Code%20(UCC,the%20interstate%20transaction%20of%20business (last visited Sept. 28, 2021) ("The Uniform Commercial Code (UCC) is a comprehensive set of laws governing all commercial transactions in the United States. It is not a federal law, but a uniformly adopted state law. Uniformity of law is essential in this area for the interstate transaction of business.").

[58] *Summary*, UNIF. L. COMM'N https://www.uniformlaws.org/acts/ucc (last visited Nov. 21, 2021).

[59] *Id.*

[60] *See 1844. Copyright Law – Preemption of State Law*, DEP'T JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-1844-copyright-law-preemption-state-law (citing Crow v. Wainwright, 720 F.2d 1224, 1225-1226 (11th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984))(setting forth a preemption test wherein the "states are precluded from enforcing penalties for copyright violations if the intellectual property at issue falls within the 'subject matter of copyright' as defined by federal law and if the claimed property rights are 'equivalent to' the exclusive rights provided by federal copyright law.")

[61] U.C.C. § 2-102.

which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."[62]

For any recognized good, the U.C.C. provides consumer protection through implied warranties.[63] Such implied warranties are either of fitness or merchantability.[64] These warranties largely concern a consumer's expectations as relied on upon through the merchant's marketing.[65]

3. State and Federal Legislation.

Many states protect against the destruction of artwork through historical preservation statutes.[66] This protection is likely a reflection of the localized emphasis on artistic culture and creation.[67] While an analysis of state law is important for a complete view of artwork protection, federal law ultimately preempts any such state-level protection.[68] Until the Visual Artists Rights Act, these individual state laws were the only form of moral rights protection in the United States.

The United States inherited a statutory system of intellectual property rights from England that functioned without any specific articulation of moral rights for artists.[69] Legal tradition also shows an absence of a *need* for moral rights protection and a system without binding precedent on the matter. Discussed below are relevant federal statutes applicable to artwork, specifically legislation governing trademark and copyright as codified through the Lanham Act[70] and the Copyright Acts of 1909 and 1976.[71]

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[62] U.C.C. § 2-105.

[63] U.C.C. §§ 2-314 to -315.

[64] *Id.*

[65] *Id.*

[66] N. MEX. STAT. §§ 18-8-1—19-8-8 (2011); UTAH CODE ANN. § 9-8-501 (1992); OKLA. STAT. ANN. TIT. 53, §§ 1.1-5.3 (2020); KAN. STAT. ANN. § 75-2714 (2010).

[67] California and New York, two major hubs of creativity, have legislated for the increased protection of those interests, but these state statutes are ultimately preempted by federal law. California Art Preservation Act, CAL. CIV. CODE § 987 (West 1994); Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1995). See also 11 other states with moral right legislation: CONN. GEN. STAT. § 42-116(2012), LA. REV. STAT. ANN. §§ 51:2151 to 51:2156 (2012), ME. REV. STAT. TIT. 27, § 303 (2011), MASS. GEN. LAWS ch. 231 § 85S (2012), NEV. REV. STAT. §§ 597.720, 730, 740, 750, 760 (2011), N.J. STAT., ANN. §§ 2A:24A-1 to 2A:24A-8 (West 2013), N.M. STAT. ANN. §§ 13-4b-1 to 13-4b-3 (2012), 73 PA STAT. ANN. §§ 2101-2110 (West 2012), and R.I. GEN. LAWS §§ 5-62-2 to 5-62-8 (2012).

[68] *See* U.S. CONST. art. IV, § 2 (establishing the Supremacy Clause which provides that the federal constitution, and federal law, generally takes precedent over state laws and even sometimes state constitutions).

[69] United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, U.S. COPYRIGHT OFF., 9–25 (Apr. 2019), https://www.copyright.gov/policy/moralrights/full-report.pdf.

[70] Lanham Act, 15 U.S.C. § 1051.

[71] Pub. L. No. 94-553, 90 Stat. 2541 (codified in 17 U.S.C. § 107 (1909) and amended in (1976).

The Lanham Act is a federal law protecting trademarks. Trademarks exist for consumer protection and to protect against the use by others of words or symbols in connection with the sale of goods or services when such use is likely to mislead consumers.[72] The Lanham Act protects an individual's "goods, services, or commercial activities [used in commerce] by another person . . . ."[73] The Act further requires distinctiveness and provides greater protection to artists with unique styles rather than artists with common styles.[74]

To bring a viable claim for trade dress infringement[75] a "mark" must be "distinctive."[76] A mark may be either inherently distinctive or have acquired a secondary meaning.[77] Section 43(a) provides civil liability for

> [a]ny person who, on or in connection with any goods or services... *uses* in commerce any *word, term, name, symbol,* or *device,* or any *combination thereof*, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which- (A)is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person. . . .[78]

Artwork can fall under almost all of these categories of trademark, and at the very least can be described as "any combination thereof."[79] Further, "[t]o be protected, a mark must be distinctive, that is, capable of distinguishing the product on which it used from those of others, either because it is inherently distinctive, or if merely descriptive has acquired distinctiveness through

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[72] Michelle Brownlee, Note, *Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157, 1171 (1993).

[73] 15 U.S.C. § 1125(a)(1).

[74] *Id.*

[75] *See* Linda Stevens & Mark S. VanderBroek, Protecting and Enforcing Trade Dress, A.B.A. 1 (Oct. 14–16, 2009), https://www.americanbar.org/content/dam/aba/events/franchising/2009/w7.pdf ("'[T]rade dress' means the overall appearance or image of something in commerce — how it is 'dressed' for sale.").

[76] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 775 (1992) (stating that "[o]nly nonfunctional, distinctive trade dress is protected under § 43(a)").

[77] Romm Art Creations Ltd. v. Simcha Int'l, Inc., 786 F. Supp. 1126, 1136 (E.D.N.Y. 1992).

[78] 15 U.S.C. § 1125(a) (emphasis added).

[79] *Id.*

secondary meaning."[80] Again, artwork, in every media, easily falls into this description.

A work of art can also receive trademark protection through its association with a good, service, or business to acquire secondary meaning.[81] Thus, an artist wishing to be recognized by law can do so by creating a business entity under which they sell their art. This satisfies the objective criteria of acquiring a secondary meaning.[82] Further, by cultivating a "distinct" style, the artist reaffirms the connection between their style and authorship of a particular work. Thus, an artist who sincerely wishes to protect and profit off of their art must undergo the requisite steps to do so, as other professionals do in their respective practices.

Issues may arise when an artist can claim protection under both the Copyright Act and the Lanham Act. This may preclude a trademark claim; however, the Copyright Act does *not* preempt the Lanham Act.[83] Instead, courts may opt to favor copyright protection over fears of inhibiting artistic discourse.[84] This is best exemplified in an allegation of trade dress infringement brought by the infamous Salvador Dali.[85]

There, the court dismissed the claim because the subject matter at issue was preempted by copyright; the case, however, is still an interesting study into whether trademark protection could be afforded to an aggrieved artist.[86] The artwork in question were works similar in style to artist Salvador Dali.[87] Dali's argument alleged that trade dress consisted of:

> the particular lines, unique figural constellation, colors, stylistic features and design of a certain subject in an image created by Dali... Thus, it is not Dali's signature that sets his artwork apart from similar creations by other artists, but rather his unique style and interpretation of a certain subject as expressed on paper.[88]

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[80] Mark Traphagen, *Stretching the Canvas Protection of Visual Artistic Styles in Works of Fine Art Under Section 43(a) of the Lanham Act*, 10 ENT. & SPORTS L., 3, 4 (1992).

[81] *Id.*

[82] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992) ("However, descriptive marks may acquire the distinctiveness which will allow them to be protected under the Act. Section 2 of the Lanham Act provides that a descriptive mark that otherwise could not be registered under the Act may be registered if it 'has become distinctive of the applicant's goods in commerce.'") (quoting Lanham Act, 15 U.S.C. §§ 1052 (e), (f)).

[83] *Id.* at 5–6.

[84] *Id.*

[85] Galerie Fürstenberg v. Coffaro, 697 F. Supp. 1282, 1289 (S.D.N.Y. 1988).

[86] *Id.* at 1290 (stating that the trade dress argument "endeavors to enforce what is at best a copyright claim through the mechanism of trademark protection.") (citation omitted).

[87] *Id.* at 1285 ("defendants created counterfeit versions of Dali's artwork by (1) reproducing a Dali work so it would appear to have an authorship it lacks...")

[88] *Id.* at 1289-90.

Here, while the court is hesitant to utilize all of their legal weapons in the intellectual property law toolbox, they ultimately decide based on a stronger argument "better suited for decision under the Copyright Act."[89]

The Copyright Act is a federal statute that details the exclusive rights inherent in copyright ownership, the rights to reproduce, make derivative works, distribute copies, publicly perform, publicly display, and to transmit digital audio.[90] These rights continue for a specific term of years, as infinite protection is not required to achieve the goals intended by the Patent and Copyright Clause.[91] The current version of the Copyright Act[92] is "the result of a careful, exhaustive legislative effort and compromise that seeks to balance the various competing interests of economic groups, authors, artists, and as well as to serve the general public interest."[93]

The 1976 Act contains fundamental improvements upon its 1909 ancestor. First, the 1976 Act extended the term of statutory protection from a "maximum term of 56 years to the life of the author plus 70 years."[94] Additionally, "[t]he 'manufacturing clause' appearing in section 16 of the 1909 Act . . . has been phased out."[95] This means that a copyrighted work is not preconditioned on its physical printing. Further, "[t]he judicial doctrine of 'fair use' has been codified in section 107," allowing for "[m]ore latitude [to be] given to second users who create transformative works and/or parody."[96]

When the United States became a member of the Berne Convention[97] in 1988, it became apparent Congress needed to amend the Copyright Act to find a source for Berne rights.[98] This resulted in VARA which brought "United States

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[89] Traphagen, *supra* note 80, at 6.

[90] 17 U.S.C. § 106.

[91] *See* Arlen W. Langvardt, *The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration*, 112 PENN. ST. L. REV. 783, 789 ("In stating that the 'exclusive right[s]' granted to creators must be for 'limited times,' the Framers envisioned the existence of a rich public domain made up of works whose copyrights had expired. The public would be free to borrow without restriction from public domain works and to use those works as the foundations of new creative endeavors.").

[92] *Id.*

[93] *The Copyright Act of 1976*, 4 WEST'S FED. ADMIN. PRAC. § 4001 (2021).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/ (last visited Nov. 21, 2021) ("The Berne Convention, adopted in 1886, deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms.").

[98] *Id.*

law into conformance with the . . . [t]ext of the Convention."[99] As discussed next, VARA confers authors of works of visual art certain moral rights in their work.

C. THE VISUAL ARTISTS RIGHTS ACT 1990

In 1990, Congress promulgated legislation protecting the moral rights of attribution and integrity under the Visual Artists Rights Act.[100] Facially, VARA appears as part of the United States' compliance with the Berne Convention; however, as evidenced by its name, the Visual Artists Rights Act only protects the narrow category of *visual art*.[101] International standards under the Berne Convention protect an array of artistic works, including literature, music, visual art, and expression.[102] In contrast, Congress' sole compliance with the Berne Convention was through its granting of moral rights to the author of visual work.[103]

The right of attribution gives an artist the right of authorship to their work.[104] This right, in my opinion, does not threaten the constitution or individual rights and need not be exhaustively discussed for this Note.[105] Conversely, the moral right of integrity is where Congress crosses the line to paternalistic monitoring of the subsequent owner's use of rightfully owned property.

1. The Right of Attribution.

Unlike the right of integrity, attribution causes no harm to a subsequent owner. Attribution is simply the right to claim or disclaim an artwork as one's creation.[106] Authorship does not purport to restrict any action and seeks to

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[99] *Id.*

[100] 17 U.S.C. § 106A.

[101] 17 U.S.C. § 101 (specifying that "a work of visual art" consists solely of "a painting, drawing, print, sculpture" or "still photographic image produced for exhibition purposes only", and specifically excludes "poster[s], map[s], globe[s], chart[s]", as well as "any work made for hire" and works not protected by copyright.)

[102] Berne Convention for the Protection of Literary and Artistic Works, art. 2(1), Sept. 9, 1886, revised at Paris July 24, 1971 and amended Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986) (protecting "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.").

[103] 17 U.S.C. § 106A (representing the only section of the Code providing moral rights for creative works).

[104] *Id.* § 106A(a).

[105] The Right of Attribution is set forth in 17 U.S.C. § 106A(a) as "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;(2) 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."

[106] 17 U.S.C. § 106A(a).

protect both consumers and artists from the spread of misinformation as to the validity of the work itself.[107] As a result, the right of attribution does not necessarily *create* a new right for artists but merely codifies one that already existed.[108] In this Note, I refrain from arguing for any sort of restrictions on the moral right of attribution as it is harmless to any subsequent owner or consumer and does not affect creative destruction.

2. The Right of Integrity.

Subject to limited exceptions,[109] VARA grants artists the right to prevent distortion, mutilation, or any modification to their work that may be prejudicial to their honor or reputation.[110] Further, VARA states that *any* "intentional distortion, mutilation, or modification of that work is a violation of that right."[111]

This legislation broadly grants rights of control to the original artist without balancing other interests—specifically, that of the subsequent owner-artist. The right of integrity "concerns the prerogative of artists to protect their works from distortion, mutilation, transformation, or alteration without their consent, even if the artist no longer owns the work."[112] This is likely reflective of, and derivative from, the cultural appreciation of artwork in France.[113] In France, "[a] work of art is not merely an item that the artist sells, but an 'expression of his innermost being.'"[114]

Further, VARA allows for the continuance of such rights regardless of transfer in ownership, unless expressly waived by the author in a written instrument.[115] Together, these provisions create a framework of protection

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[107] Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 132–33 (1997).

[108] *See id.* ("The right of attribution gives an artist the capacity to insist that [their name be associated with their works] . . . by effectively imposing and enforcing a servitude on her work to that effect.").

[109] 17 U.S.C. § 113(d)(1) holds limited exceptions for cases in which "(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and (B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) . . . or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author that specified that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal."

[110] 17 U.S.C. § 106A(a)(3)(A).

[111] *Id.*

[112] JUDITH B. PROWDA ET AL., VISUAL ARTS AND THE LAW: A HANDBOOK FOR PROFESSIONALS 104 (2013).

[113] Swack, *infra* note 164.

[114] *Id.* at 101.

[115] 17 U.S.C. § 106A(e)(2).

surrounding the artist and their work while simultaneously neglecting any subsequent owner's interests and understanding of their purchase.[116]

The United States ratified the Berne Convention in 1988, after years of debate in Congress, by passing the Berne Convention Implementation Act.[117] The Visual Artists Rights Act was "greatly motivated by [the United States'] interest in protecting other forms of intellectual property overseas, especially computer software, which was subject to piracy."[118] Ultimately, to ensure compliance with the Berne Convention and secure protection for computer software, "the US would need to enact federal legislation granting moral rights to artists."[119]

D. INTERNATIONAL AGREEMENTS AND THE BERNE CONVENTION

The World Trade Organization has many agreements that govern the trade of goods, services, and, particularly relevant here, intellectual property.[120] Of these agreements, the General Agreement on Tariffs and Trade (GATT) and the Trade-Related Aspects of Intellectual Property Rights or (TRIPS) relate to artwork. Specifically, TRIPS sets minimum standards for the regulation of different forms of intellectual property.[121] TRIPS was a result of the inadequacy of GATT to properly protect certain intellectual property rights.[122] Like almost every agreement mentioned, these standards are also subject to the discretion of the various nations participating in the agreement.[123]

Section 1 details TRIPS' role concerning the Berne Convention and states:

> [(1)] Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this

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116 This brings very interesting implications in contract surrounding an unfair balance of bargaining power in favor of the artist, reliance on part of the purchaser, and various unfair contracting practices. Further, as an object of commerce, this implicates potential implied warranties.

117 Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

118 PROWDA ET AL., *supra* note 112, at 109.

119 *Id.*

120 *The WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Sept. 16, 2021).

121 *Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Sept. 16, 2021).

122 *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 300 [hereinafter TRIPS] (detailing its purpose and goals as a desire to reduce impediments to international trade, and to promote effective and adequate protection of intellectual property rights).

123 *Id.* at art. 1 (explaining that "[m]embers may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.").

> Agreement in respect to rights conferred under Article *6bis* of the Convention or of the rights derived therefrom.[124]

Further, TRIPS is only limited in copyright by "limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[125] This agreement is overwhelmingly geared towards the pharmaceutical sector.[126] Understandably, widespread and international trade agreements concerning intellectual property are overwhelmingly geared towards application in technology and pharmaceuticals.[127] However, because art is an inherently unique intersection of competing interests—most notably the underscored consumer—it is not fitting to govern a work solely from the scope of the artist's interests. Instead, one must take into account the totality of pre-existing agreements, like TRIPS, governing intellectual property to synthesize a totality of protection.

Responding to the need for internationally expanded copyright protection, the Berne Convention proposed a framework of protection and called for international support and compliance with its minimum provisions.[128] This Convention was held in 1988 with the intent to protect the rights of authors in their literary and artistic works.[129] It provided this copyright protection to a broad array of works "ranging from conventional works—such as books, motion pictures, and music—to new tech-nological works, including video cassettes and computer-related software."[130] The major provisions of the Berne Convention show an intent to spread a blanket, automatic protection over the *totality* of an author's creations.

This practice furthers a general framework for the ideal protection of art from the sole perspective of the artist. The Convention fails to take into account any alternative interest of the consumer. The individual who purchases the piece becomes the "economic owner" with an independent,[131] yet equally important interest in the artwork.

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[124] TRIPS, *supra* note 122, at 304 (stating that "[c]opyright protection shall extend to expression and not to ideas, procedures, methods of operation, or mathematical concepts as such.").

[125] *Id.* at 305.

[126] *Id.*

[127] *See Pharmaceutical Patents and the TRIPS Agreement*, WORLD TRADE ORG. (Sept. 21, 2006), https://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm (discussing the TRIPS agreement and its relation to pharmaceutical inventions).

[128] *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886),* WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Nov. 21, 2021).

[129] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, (codified as amended at 17 U.S.C. § 101), at 2.

[130] PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 1602 (Wolters Kluwer, 3d ed. 2021).

[131] *Id.*

E. INTEGRITY

1. The French "droit moral."

The right of integrity has its roots in the French doctrine of Droite Moral. Droite Moral is grounded in the belief of a natural right of property.[132] Initially, philosophers Immanuel Kant and Georg Wilhem Friedrich Hegel focused on the written word as a basis for moral rights.[133] Kant believed that personality rights were imbued in every man and were inherently conveyed through the artist's works.[134] Later, scholars expanded upon the philosophies of Kant and Hegel to form the base for the modern droite moral.[135] While European scholars pondered the application of moral rights to artistic expression, the United States had yet to codify copyright protection.[136]

In reviewing these philosophies, there is an interesting conflation of literary and visual works of art. As discussed above, Kant's theories mainly focused on literary works and are not immediately applicable to visual art without further discussion.[137] In the early 20th century, it seems like this conflation remained. Joseph Kohler created the dualist theory of *author's* rights directly from Hegel's philosophies, which stated that *artists* held both personal and economic interests in their work with each being protected under different categories of legal rights.[138] While this specific distinction between "artist" and "author" in early philosophies may be arbitrary, it is important to note their differences—especially in the context of creating more stringent protection for a whole class of work. The expansion and potential resolution of this discrepancy between artist and author has been fleshed out through centuries of French case law to assume protection over both.

In 1852, an upper court in Paris reversed a previous decision in favor of an artist for an award of *criminal* sanctions resultant from mutilation of the artist's

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132 Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 8-9 (1994) ("United States copyright law has been molded principally by classical utilitarianism . . . Continental copyright law, on the other hand, is a combination of natural rights and German idealism.").

133 Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 839, 841 (1990).

134 Netanel, *supra* note 132, at 17.

135 *Id.* at 20 (In the latter half of the 19th Century, Karl Gareis, Otto Freidrich von Gierke, and Josef Kohler expanded describing the philosophies of Kant and Hegel as the theoretical bases of moral rights).

136 *Id.* at 7, 21 (The United States Copyright Act was promulgated in 1976, about 100 years later than the scholars mentioned above).

137 *Id.* at 17 n. 67 (discussing Kant's distinction "which he categorized as action ('opera'), or an exercise of the author's powers, and works of art, which he depicted as corporeal objects ('opus') that are beyond the ambit of copyright protection").

138 *Id.* at 22.

sculpture.[139] While the court ultimately ruled against the artist, the opinion recognized the deeply personal nature of an artist's connection to their artwork.[140] There, a subsequent owner mutilated their statute created by the artist.[141] The court reversed their finding of criminal sanctions for the mutilation, stating that criminal proceedings had been inappropriate for the mutilation of artwork but left open a possibility of civil remedies.[142]

Over twenty years later, French jurist, Andre Morillot, became the first person to *knowingly* use the phrase "droite moral" in a case before France's highest court.[143] That case decided a niche issue of whether the property rights inherent in copyright were community property between spouses.[144] The court held that copyright was community property but allowed the painter-husband to "retain[] his right to change the works or even 'suppress' them."[145] This doctrine of droite moral over many years has evolved and merged into the moral rights of attribution and integrity protected by The Berne Convention.[146] However, these rights became extremely watered down as a result of differences in society and law.[147]

2. U.S. Approach Moral Rights.

Moral rights in the United States find their origins directly in the Berne Convention.[148] Although now formally a part of the Berne Convention, the United States has been slower to previously accept moral rights into a doctrine as extensively as its international colleagues.[149] To date, VARA protects an artist's rights of integrity and attribution but fails to achieve the level of protection desired by the Berne Convention.[150] The United States has been hesitant to adopt

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139 Dalloz jurisprudence générale, recueil périodique et critique, 1852 [D.P.] II.159.

140 *Id.*

141 Clésinger et Laneuville c. Gauvin, Trib. corr. de Paris, 5 janvier 1850, Dalloz jurisprudence générale, recueil périodique et critique, 1850 [D.P.] III.14.

142 Dalloz jurisprudence générale, recueil périodique et critique, 1852 [D.P.] II.159.

143 Civ. Cass, 25 juin 1902 (Cinquin c. Lecocq) : Dalloz jurisprudence générale, recueil périodique et critique, 1903 [D.P.] 1.5.

144 *Id.*

145 *Id.*

146 United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, A REPORT OF THE REGISTER OF COPYRIGHTS 6 (Apr. 2019)

147 I say "watered down" because by the time the United States officially adopted these moral rights, the rights themselves had to conform to United States precedent in order to be fully embraced. This is evidenced by United States reluctance to formally adopt Berne Convention provisions. *Infra* section (e)2.

148 Berne Convention, *supra* note 129.

149 GOLDSTEIN, *supra* note 130, at 750 ("The United States ha[d] not adhered to the Berne Convention because of differences of certain copyright principles . . . The United States, the Soviet Union, and the People's Republic of China are the only major countries that are not parties to the convention.").

150 17 U.S.C. § 106A.

moral rights because compliance with the Berne Convention concerns differences in the requirements for "copyright formalities such as notice and registration."[151] These formal requirements of notice and registration both protect the consumer.

First, notice is fundamental to the due process rights of the consumer—without notice of liability a subsequent owner does not know what they can and can't do with the physical work. Further, the traditional copyright requirement of registration serves to provide such a notice that allows a prudent buyer to understand the extent of their liability.[152] The broad conferral of protection granted by the Convention sans notice or registration is not in line with the United States' more traditional approach that grants conditional protections only if the author requests it via legal action. Absent this action, protection will not be conferred, reflecting the United States' practice of conservatively granting individual rights.[153]

Further, moral rights recognize two complete and concurrent interests in property, breaking the sanctity of traditional property ownership.[154] Traditionally, the United States transfers complete ownership upon transfer of title.[155] With the implementation of VARA, a complete, new, independent, and potentially adverse interest is given to the creator that undermines conveyance of the traditional total transfer of property rights to the art owner.[156]

The Convention mandates automatic protection, that is, protection *inherent* within the artists' authorship of the work itself.[157] By creating a work that falls within Berne protection, an artist is entitled to such protection, regardless of

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[151] *Id.*

[152] United States Copyright Office, *Recordation of Transfers and Other Documents*, U.S. COPYRIGHT OFF. 2 (2016), https://www.copyright.gov/circs/circ12.pdf ("Recordation of a document in the Office may provide the advantage of 'constructive notice,' a legal concept meaning that members of the public are deemed to have knowledge of the facts stated in the document and cannot claim otherwise.").

[153] *See id.* § 106A(b) (providing moral rights only to the aggrieved artist).

[154] *Understanding Copyright and Related Rights*, WORLD INTELL. PROP. ORG. 9 (2016), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf ("Copyright protects two types of rights. Economic rights allow right owners to derive financial reward from the use of their works by others. Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work. The author or creator may be the owner of the economic rights or those rights may be transferred to one or more copyright owners. Many countries do not allow the transfer of moral rights.").

[155] Netanel, *supra* note 132, at 1.

[156] *Id.* at 38 ("A purchaser of a work of art, or publisher or producer, thus acquires the work or right to exploit a work subject to a duty to respect and possibly to promote the author's artistic expression.").

[157] Marian Nash (Leich), CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 2819 (detailing that "Article 5(2) requires automatic protection, that is, the enjoyment and exercise of rights may not be conditioned on the observance of any formality whatsoever.").

whether they took any formal steps to legitimize their work of art with their government.[158] Previously existing United States copyright law requires a party to have already applied for registration of their copyright before bringing an infringement suit.[159] With the adoption of VARA, this statute was amended to provide an exception to the long-standing requirement of registration for the moral rights of integrity and attribution.[160]

As it stands, the United States has placed overwhelming emphasis on the importance of moral rights that poses constitutional concerns regarding due process and, when applied to creative destruction, the freedom of expression. This is furthered by the fact that VARA only provides moral rights protection for visual artists.[161]

Another concern lies in the outright creation of rights themselves. This is based on an understanding that once rights are conferred, legal safeguards act to protect a citizen against unwarranted government intrusion of those rights.[162] As a result, it is understandable that an unlimited right of integrity would strike fear into the heart of any consumer-oriented market.

Before VARA's enactment, it was determined that the United States' pre-existing legal framework provided adequate protection to meet Berne convention requirements.[163] As shown below, contract, property, trademark, and copyright law predating VARA *and* the Convention provide ample protections for moral right concerns. Before the codification of these rights, the notions of attribution and integrity were not egregiously threatened.

III. ANALYSIS

A. WITH NO FOUNDATION THE HOUSE WILL FALL

Moral rights are without a common law foundation and do not sufficiently reflect United States society. While the United States was in its artistic infancy in the 18th and 19th centuries, upper and middle-class Europeans spent much of their leisure time enjoying, promoting, and purchasing art and music.[164] Thus,

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[158] *Id.*

[159] 17 U.S.C. § 411.

[160] 17 U.S.C. § 412 (providing an exception to certain remedies, specifically "[i]n any action under this title, *other than an action brought* for a violation of the rights of the author *under section 106A(a)*.") (emphasis added).

[161] This is notable considering the Berne Convention specifically intended protection to both Visual and Literary works.

[162] *See* Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 GA. L. REV. 343, 356 (1993) (discussing the limitations on the government's power regarding individual rights).

[163] Netanel, *supra* note 132, at 25.

[164] Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 381–82 (1997-1998).

the foundation of moral rights emerged out of centuries of artwork and its crucial role in society.[165] While this criticism is surely *not* the straw that breaks the camel's back, it shows policy considerations in opposition to the right of integrity.

In addition to analyzing the United States and French Art History, this section further shows strong policy considerations in favor of protecting an artist's right to creative destruction. Current art movements trend towards contemporary and performance art.[166] This art can employ destruction, and its symbolism can convey a variety of expressive ideas that are protected by law. As a result, a previous artist's right to integrity currently threatens this unique form of creativity and unearths various constitutional concerns.

1. A Quick Art History Lesson.

In its formative years, it makes sense that the newly formed American society would push back against *any* tradition reminiscent of their colonial rulers. In light of these ideological differences, one must not assume that what works in Europe can be instantly applied to America. The intent of a right of integrity is noble, but its execution pales in comparison to its European counterparts. The United States simply does not have the requisite social, cultural, or legal framework to suddenly establish blanket protection over any instance of visual creativity.

United States art has its origins in both European and Native American traditions.[167] Early colonial art mainly relied on artists from Europe and specialized in portraiture and landscapes.[168] In 1820, the United States developed a distinct artistic movement termed the Hudson River School.[169] This movement focused on romantic landscape paintings and patriotic art. A notorious example of Hudson River School Art is the painting of George Washington Crossing of the Delaware River.[170] Additionally, this period saw the growth of the rural American craft movement.[171] This artwork was reactionary against the industrial revolution and typically hand made.[172]

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165 *Id.*

166 Alina Cohen, *Our Prediction for Art in the 2020s*, ARTSY (Dec. 20, 2019) https://www.artsy.net/article/artsy-editorial-art-2020s.

167 Charlotte Jirousek, *The Development of Modern Art in the US*, ART, DESIGN, AND VISUAL THINKING, http://char.txa.cornell.edu/ART/FINEART/MODERNUS/modernus.htm (last visited Sept. 30, 2021).

168 David Jaffee, *Art and Identity in British North American Colonies, 1700-1776*, METRO. MUSEUM OF ART (Oct. 2004), https://www.metmuseum.org/toah/hd/arid/hd_arid.htm.

169 Jirousek, *supra* note 167.

170 Emanuel Leutze, *Washington Crossing the Delaware*, METRO. MUSEUM OF ART, https://www.metmuseum.org/art/collection/search/11417 (last visited Sept. 30, 2021).

171 Monica Obniski, *The Arts and Crafts Movement in America*, METRO. MUSEUM OF ART (June 2008), https://www.metmuseum.org/toah/hd/acam/hd_acam.htm.

172 *Id.*

Next, the 1850s brought a style produced under the influence of Europe, specifically the standards of the French Académie des Beaux-Arts.[173] As discussed later in the section on trademark protection, the period of Academism in Europe, specifically, France, distinguishes art as a professional trade. At this time, artists attended fine art schools, most notably the Académie des Beaux-Arts in France.[174] American artists flocked to Europe in hopes of learning from and competing with the global powers in the art arena.[175]

After World War II, United States art reflected the disillusionment of society with the Abstract Expressionist movement.[176] This period saw the likes of Willem de Kooning,[177] the creative destruction king himself, and Jackson Pollack[178]—famous for his innovative paint-splattering technique. Alongside Abstract Expressionism, post-war America birthed movements of the New York School,[179] Pop Art,[180] Op-Art,[181] Minimalism,[182] and Conceptual Art—discussed below.

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[173] H. Barbara Weinberg, *Nineteenth Century American Painters at the École Des Beaux-Arts*, 13(4) AM. ART J. 66, 66 (1981).

[174] *See id.* (describing the École as "an essential training ground for American painters").

[175] *Id.*

[176] *See generally*, Gregory Gilbert, *Robert Motherwell's World War Two Collages: Signifying War as Topical Spectacle in Abstract Expressionist Art*, 27(3) OX. ART J. 311, 313–14 (2004).

[177] *Willem de Kooning*, MUSEUM MOD. ART, https://www.moma.org/artists/3213?locale=en (last visited Oct. 20, 2021).

[178] *Jackson Pollack*, MUSEUM MOD. ART, https://www.moma.org/artists/4675?=undefined&page=2&direction=fwd (last visited Oct. 20, 2021).

[179] Jirousek, *supra* note 167. Artists from the New York School include Rothko, Gottlieb, and Motherwell. New York School, TATE, https://www.tate.org.uk/art/art-terms/n/new-york-school (last visited Nov. 20, 2021); *Mark Rothko*, MOMA, https://www.moma.org/artists/5047 (last visited Nov. 13, 2021); *Adolph Gottlieb*, GUGGENHEIM, https://www.guggenheim.org/artwork/artist/adolph-gottlieb (last visited Nov. 13, 2021); *Robert Motherwell*, MOMA, https://www.moma.org/artists/4126 (last visited Nov. 13, 2021).

[180] Jirousek, *supra* note 167. Artists from the Pop Art movement include Andy Warhol, Roy Lichtenstein, Claes Oldenburg, Morris Lewis, and Jasper Johns. *Andy Warhol*, MOMA https://www.moma.org/artists/6246 (last visited Nov. 13, 2021); *Roy Lichtenstein*, MOMA, https://www.moma.org/artists/3542 (last visited Nov. 13, 2021); *Claus Oldenberg*, GUGGENHEIM, https://www.guggenheim.org/artwork/artist/claes-oldenburg (last visited Nov. 13, 2021) ; *Morris Lewis*, MD. INST. C. ART, https://morrislouis.org/ (last visited Nov. 13, 2021); *Jasper Johns: Mind/Mirror*, WHITNEY MUSEUM MOD. ART, https://whitney.org/exhibitions/jasper-johns (last visited Nov. 13, 2021).

[181] Jirousek, *supra* note 167. Artists from the Op-Art movement include Bridget Riley and Victor Vasalarely. *Bridget Riley*, TATE, https://www.tate.org.uk/art/artists/bridget-riley-1845 (last visited Nov. 13, 2021); *Victor Vasalarely*, GUGGENHEIM, https://www.guggenheim.org/artwork/artist/victor-vasarely (last visited Nov. 13, 2021).

[182] Jirousek, *supra* note 167. Artists from Minimalism include Ellsworth Kelly, Robert Grosvenor, Isamu Noguchi, Frank Stella. *Alex Palmer*, Why Ellsworth Kelly Was a Giant in

Europe similarly experienced artistic disillusion after World War II.[183] For instance, British artist Michael Landy destroyed "art he owned, paintings by friends like Gary Hume—who at first was horrified but then saw the point and went along with it."[184] Further, Pierre Pinonchelli in France was put on trial for smashing a urinal that was a copy the *Fountain*, by Marcel Duchamp.[185] Pinonchelli is quoted as saying, "I had killed the urinal. It was nothing more than a serialized object, without a past, no scars, all smooth."[186]

As demonstrated by Pinonchelli, destructive art is a prominent and emerging form of creativity and that deserves recognition. Destruction allows one to expressively and dramatically show their viewpoint as Pinoncelli did with the *Fountain* and places a piece of work in an entirely different light.

2. 21st Century Art Movements.

Conceptual art began in the 1920s but has resurfaced in recent modern art movements. Traditional conceptual art is called Dadaism and described as "attack[ing] the sacredness and permanence of the artwork itself, claiming that the art is in the idea and that once the concept has been expressed, the object is unimportant."[187] An essential notion behind conceptual art is the discussion and conversation an artist has with a viewer.[188] The artist attempts to provide the viewer with the elements required to understand the artists' viewpoint at that moment.[189]

Take, for example, the artist Banksy. Most recently, Banksy produced a piece of work that was destroyed upon sale at auction.[190] Unexpectedly, and ironically, the piece malfunctioned and only partially destroyed the art, leaving the rest

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the World of American Art, SMITHSONIAN MAG. (Dec. 28, 2015) https://www.smithsonianmag.com/arts-culture/why-ellsworth-kelly-was-giant-world-american-art-180957652/; *Robert Grosvenor*, PAULA COOPER GALLERY, https://www.paulacoopergallery.com/artists/robert-grosvenor#tab:thumbnails (last visited Nov. 13, 2021); Who is Frank Stella?, TATE KIDS https://www.tate.org.uk/kids/explore/who-is/who-frank-stella (last visited Nov. 20, 2021).

[183] Alina Cohen, *Our Prediction for Art in the 2020s*, ARTSY (December 20, 2019, 10:27 AM), https://www.artsy.net/series/decade-art/artsy-editorial-art-2020s.

[184] Lawrence Pollard, *Destroying Art for Art's Sake*, BBC (Oct. 27, 2009, 8:13 GMT), http://news.bbc.co.uk/2/mobile/entertainment/8325665.stm.

[185] *Id.*

[186] Pierre Doze, *Pierre Pinonchelli: He's 77 & Back*, ISSUE MAGAZINE, https://issuemagazine.com/pierre-pinoncelli-hes-77-and-back/#/ (last visited Oct. 2, 2021).

[187] Jirousek, *supra* note 167.

[188] *MoMa Learning*, MOMA https://www.moma.org/learn/moma_learning/themes/media-and-performance-art/participation-and-audience-involvement/ (last visited Nov. 19, 2021).

[189] *Id.*

[190] Preminda Jacob, *Banksy and the Tradition of Destroying Art*, CNN STYLE (Oct. 23, 2018), https://www.cnn.com/style/article/banksy-tradition-of-destroying-art/index.html.

hanging in strings under the frame, half-shredded.[191] This is ironic because Banksy had intended the piece to destroy as a demonstration of materialism and criticism of the wealthy. As a result of its half-shredded state, the artwork's value increased dramatically, thus thwarting Banksy's intent.[192]

Banksy's piece exemplifies the use of destruction in an artist's creative expression. The entire purpose of the piece hinged on its destruction, and without it, the work ceases to express the conversation and ideas as intended. Further, Banksy is not a stand-alone artist. Many other lesser-known artists seek similar artistic dialogue.[193]

The 21st century is in its artistic infancy, but scholars have interesting predictions regarding what the new century will bring creatively. Most notably, there is a strong belief that "the pendulum will swing back to abstraction."[194] Additionally, the emphasis on 19th and early 20th century French art will transfer to a focus on more international perspectives.[195]

For example, when the Museum of Modern Art opened a new collection, they "paired Faith Ringgold's apocalyptic painting of race and violence in America . . . with Pablo Picasso's Les Demoiselles d'Avignon (1907)."[196] The pairing allowed viewers to connect Picasso's fractured planes with Ringgold's image of a shattered society.[197] The decision to curate two distinct works to create a social dialogue between the two exemplifies the Contemporary Art movement.

B. AMPLE PROTECTION AFFORDED

1. Trademark Protection.

Protection under the Lanham Act takes into account the interests of the consumer unlike VARA's sole emphasis on the artist. The standard of protection under the Lanham Act protects against consumer confusion when there is a "sufficient similarity between the products to scrutinize the evidence for proof of confusion," for protection of stylistic similarity.[198] This standard "requires a showing of a 'likelihood of confusion' by a reasonably prudent buyer."[199]

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[191] Scott Reyburn, *Banksy Painting Self-Destructs After Fetching $1.4 Million at Sotheby's*, N.Y. TIMES (Oct. 6, 2018) https://www.nytimes.com/2018/10/06/arts/design/uk-banksy-painting-sothebys.html (last visited Nov. 19, 2021).

[192] *Id.*

[193] *See* Timothy Bogatz, *12 Street Artists (Not Named Banksy) Your Students Should Know*, ART EDUC. U. (2018) (listing twelve additional modern street artists).

[194] Cohen, *supra* note 166.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] Romm Art Creations Ltd. v. Simcha Int'l, Inc., 786 F. Supp. 1126, 1137 (1992).

[199] Christina Saunders, *Incidental and Intentional Uses of Trademarks and Service Marks in Artwork*, 41-SEP COLO. LAW. 51, 51– 52 (2012) (quoting 15 U.S.C. § 1114(1)).

Further, courts applying this standard utilize "an expansive interpretation" in determining whether confusion has occurred.[200] Essentially, under this standard, an artist's right of attribution is already protected against any subsequent owner artist who wishes to creatively destroy their work. If the modified work is substantially similar to the original piece, an artist may have a cause of action under the Lanham Act.[201]

2. Protection under Contract.

Traditionally, the sale of intellectual property was governed by contract law, altered by "the special nature of a contract for artistic . . . property."[202] Regardless of any imbalance in bargaining power, anyone can create a contract for their services; in fact, contracts for the sale of goods are standard in commercial transactions, and as mentioned above are largely governed by the U.C.C.[203] If the sale of art at its core is a commercial transaction, then why is it necessary to bestow additional rights simply upon creation of "art?"[204]

A common argument is that the destruction of work destroys some intrinsic right in the creator and that the harm incurred by an artist when their work is destroyed outweighs an owner's absolute rights.[205] Two instances in case law where a breach of contract *failed* to adequately protect an artists' work represent examples of sub-par lawyering on the part of an artist representing themselves pro se, or inadequate legal representation.[206] In the first instance, *Vargas v. Esquire Magazine, Inc.*, the plaintiff, a fifty-one-year-old artist from Peru who resided in the United States for thirty-two years, brought suit against the defendant alleging breach of contract through fraud and misrepresentation.[207]

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[200] Anheuser-Busch, Inc. v. Balducci Publ'n., 28 F.3d 769, 774 (8th Cir. 1993).

[201] *See* Sally Beauty Co., Inc. v. Beautyco, Inc., 304 F.3d 964, 972 (10th Cir. 2002) (considering the following factors in determining substantial similarity: "(1) the degree of similarity between the marks; (2) the intent of the alleged infringer in using the mark; (3) evidence of actual consumer confusion; (4) the similarity of products and manner of marketing; (5) the degree of care likely to be exercised by purchasers; and (6) the strength or weakness of the marks.").

[202] Swack, *supra* note 164, at 380.

[203] Note, this is the Uniform Commercial Code and *not* the Universal Copyright Convention.

[204] I put "art" in quotation marks here because at its core, art is subjective. There is no standard for defining what is and what is not art, creating a grave potential for the over-protection of art in the name of moral rights, and ultimately, a restriction of the very creativity copyright law wishes to encourage. Further, as mentioned above in my discussion of the Erased de Kooning, the artistic *process* is equally as important as the work itself and serves as an important tool for development of technique and artistic movements.

[205] Swack, *supra* note 164, at 369.

[206] Vargas v. Esquire, Inc., 166 F.2d 651 (7th Cir. 1948); Crimi v. Rutgers Presbyterian Church in City of New York, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

[207] Vargas, 166 F.2d at 652–53.

There, the case turned on "whether the contract [was] void because plaintiff failed to know what it contained."[208] This a common argument to void a contract; however, as the court explained in *Vargas*, contracts are to be construed from their plain language unless there is ambiguity.[209] Absent ambiguity, parties to a contract are bound to its plain language unless there is proof of fraud or other malice.[210] Ultimately, the plaintiff-artist's claim failed because the contract was "written in plain and ordinary language and is readily understandable."[211] *Vargas* is a clear example of inadequate drafting resulting in harm to an artist's interest.

Another case from New York details a similar failure to properly contract.[212] There, a Church hosted a competition where twenty artists competed for the opportunity to have their artwork implemented as a fresco mural for the Church.[213] The plaintiff-artist brought suit when the church redecorated and painted over his mural without notice 10 years later.[214] Ultimately, the church was the proper owner of the artwork through both contract *and* copyright.[215]

As a result, the court held "the claim . . . that an artist retains rights in his work after it has been unconditionally sold where such rights are related to the protection of his artistic reputation, [was] not supported by the decisions of our courts."[216] Similar to *Vargas*, the plaintiff-artist here failed in the contract to adequately protect his interests. Under the law of contracts, mistakes generally cannot be judicially remedied simply because the party is not satisfied with its outcome.[217] The two artists here were deprived of legal recourse *not* because it did not exist, but because the party, or their lawyer, failed to protect their interests through contract drafting.[218]

The most surefire way to protect one's art is by having the purchaser sign a contract stating they will not destroy the art in the future. Not only does this

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[208] *Id.* at 654.

[209] *Id.* Ambiguity may be resolved through parol evidence; however, facts here did not warrant an inquiry into ambiguity.

[210] *72. Principles of Contract Interpretation*, U.S. DEP'T. JUSTICE (Sept. 2013), https://www.justice.gov/jm/civil-resource-manual-72-principles-contract-interpretation.

[211] *Id.*

[212] Crimi, 89 N.Y.S.2d at 814.

[213] *Id.*

[214] *Id.* at 815.

[215] *Id.* at 819.

[216] *Id.*

[217] *See, e.g.,* Aluminum Co. of Am. v. Essex Grp., Inc., 499 F. Supp. 53, 64 (W.D. Pa. 1980) (stating the general rule that "[r]elief can only follow if the mistake was mutual, if it related to a basic assumption underlying the contract, and if it caused a severe imbalance in the agreed exchange.").

[218] *See* Swack, *supra* 164, at 384 (discussing the two cases wherein the parties signed a standard contract form rather than a contract individualized and negotiated to suit their specific needs).

provide adequate notice to the purchaser, but contracts are available to every individual regardless of differences in bargaining power.

3. Tort Action.

Additional protection can be found through the general tort of defamation. Defamation is a general tort that allows actions for the protection of one's reputation.[219] Defamation can remedy an injury caused by either publishing a severely altered rendition of the work under the artist's name or falsely attributing authorship to the artist of a poor-quality product reproduced from their work without knowledge or assistance.[220]

A common argument against defamation as adequate protection is the requirement of proof of damages for an artist to recover.[221] That is, harm to one's reputation is quite difficult to meet the "injury" requirement, akin to that of federal standing.[222] This argument is poorly based since it seems to believe that proof of an injury is a factor that should not be required to bring a case in court under other legal actions. Standing requires the presence of a concrete and particularized injury that is also actual or imminent.[223] Absent injury, an individual cannot prove standing, cannot sustain their case in court.[224]

C. DUE PROCESS VIOLATION

From the artist's perspective, it seems the scales of justice are tipped in their favor. This is understandable in Europe, but not so much in the United States. The United States places much more emphasis on the value of the consumer and their economic rights in commercial transactions.[225]

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[219] *See Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as "[m]alicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.").

[220] Swack, *supra* note 164, at 361.

[221] *See, e.g.*, Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp. 3d 429, 454 (S.D.N.Y. 2018) ("Generally, a plaintiff in a defamation action must prove special damages, which consist of 'the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation.'")(quoting Nunez v. A–T Fin. Info., Inc., 957 F.Supp. 438, 441 (S.D.N.Y. 1997)).

[222] *See 35. Standing to Sue*, U.S. DEP'T JUSTICE, https://www.justice.gov/jm/civil-resource-manual-35-standing-sue (last visited Nov. 19, 2021) (explaining the general requirements for standing).

[223] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

[224] *Id.* at 560 ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

[225] *Bureau of Consumer Protection*, FED. TRADE COMMISSION. https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection (last visited Oct. 2, 2021).

Given the Court's concern with balancing interests and ensuring an opportunity for fair and just proceedings, VARA violates a subsequent owner-artist's right to Due Process. The Fifth and Fourteenth Amendments provide that no person shall be deprived of "life, liberty, or property without due process of the law."[226] VARA violates this right by depriving a subsequent artist-owner of their creative and property interests as guaranteed by procedural due process and the right to adequate notice.

Traditionally, the due process clause is understood to minimally provide procedural and substantive protections against the government's deprivation of an individual's rights to life, liberty, or property. Specifically, due process provides two procedural requirements: adequate notice, and an opportunity to be heard before an impartial tribunal before such deprivation of life, liberty, or property.[227]

Courts analyze due process claims through the balancing test outlined in *Mathews v. Eldridge*.[228] This test balances the relevant interests involved including, (1) the private interest at stake in the administrative action; (2) the risk of erroneous deprivation of this interest through procedures used, and the value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and burdens that additional or substitute procedural requirements would entail.[229]

VARA allows for civil action without notice to the subsequent owner. Subsection (b) states that "[o]nly the author of a work of visual art has the rights . . . [of attribution and integrity] . . . , whether or not the author is the copyright owner."[230] Further, § 411(a) of the Copyright Act states that "[e]xcept for an action brought . . . under section 106A(a) . . . [,] no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made."[231] The statute explicitly exempts VARA from the requirement of registration before obtaining an award from the court.[232]

This is directly shown through *Carter v. Helmsley-Spear, Inc.*, in which the Second Circuit explained that "[c]opyright registration is not required to bring an action for infringement of the rights granted under VARA, or to secure statutory

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226 U.S. CONST. amends. V, XIV.

227 *See* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951)(stating that the "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."); *see also* Dusenbery v. United States, 534 U.S. 161, 122 (2002)(quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993)which held that an individual whose property interests were at stake is entitled to "notice and an opportunity to be heard.").

228 Mathews v. Eldridge, 424 U.S. 319, 334–35 (1975).

229 *Id.*

230 17 U.S.C. § 106A(b).

231 *Id.* § 411(a).

232 *Id.*

damages and attorney's fees."[233] Without registration, the ability of a subsequent owner to accurately ascertain their liability is greatly diminished. A flea-market art-find could result in a lawsuit under VARA without none the wiser. Thus, VARA's exclusion of registration could become a constitutional impediment to a subsequent owner's due process.

Further, the exemption of registration means that these rights are given to any person who wishes to create visual art.[234] This does not create protection specifically for professional artists, but for art in totality. If an artist wants to protect their work, they should go through proper procedural steps to do so and treat the purported sanctity of their work as it deserves.

In other words, there are certain requirements to be a professional in many different trades, why should artistry be any different? Professional artistry finds its roots in the guild system, similar to other professional trades.[235] A prospective artist generally starts as an apprentice working under a professional in hopes of becoming a master artist through training.[236] At that point, I believe, the master artist may be granted the protection afforded by the right of integrity, for their work will be sufficiently distinct as to provide notice to any subsequent artist-owner who may wish to employ creative destruction techniques. Further, the burden of supplying notice would be minimal compared with such deprivation. The lack of adequate procedural requirements for VARA protection poses serious threats to a subsequent owner's due process. Without notice, an artist interested in creative destruction is unduly burdened with potential VARA liability.

D. INTEGRITY EXCEEDS THE SCOPE OF CONGRESSIONAL POWER

Congress is granted the power under the Patent and Copyright Clause to "promote the Progress of Science and the Useful Arts."[237] Current American movements in art support the conclusion that destruction is a necessary component of artistic and creative progression, both personally for an artist and culturally for the nation as a whole.[238] The right of integrity threatens this artistic process regarded by some as important as the creation of art itself. As a result,

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[233] 71 F.3d 77, 83 (2d Cir. 1995) (citing, 17 U.S.C. §§ 411, 412).

[234] 17 U.S.C. § 411(a).

[235] Mark Cartwright, *Medieval Guilds*, World Hist. Encyclopedia (Nov. 14, 2018), https://www.worldhistory.org/Medieval_Guilds/.

[236] *Training and Practice*, ITALIAN RENAISSANCE LEARNING RESOURCES, http://www.italianrenaissanceresources.com/units/unit-3/essays/training-and-practice/ (last visited Nov. 19, 2021).

[237] U.S. CONST. art. 1, § 8, cl. 8.

[238] *See Why is Contemporary Art Important?*, IESA, https://www.iesa.edu/paris/news-events/contemporary-art-importance (discussing various reasons why contemporary art is important).

integrity exceeds the scope of authority afforded to Congress by the plain text of the Constitution.

Article I of the U.S. Constitution grants Congress the power "to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[239] At issue here is the interpretation of the term "promote" and the context with which Congress is to "promote the Progress of...the useful Arts."[240]

First, the term "promote" is not ambiguous. Its plain-language meaning is "to contribute to the growth or prosperity of" as defined by Merriam Webster's dictionary.[241] Further, texts discussing the Clause's development suggest that the Framers "did not wish to vest in Congress plenary powers over patents and copyrights, but rather wanted to" externally limit the exercise of Congressional powers to the ends of promoting progress.[242] This means that the Clause itself is not a positive grant of power, but a limitation on power Congress might seek to exert so as not to hamper the promotion of the progress of useful sciences and art.

Resulting from this understanding, the right of integrity acts to chill the creative process. As discussed in Section II.a.1., destruction holds a niche, but important, presence in art and creativity. Just as the creation of an initial piece of art should be protected, the later creative destruction of the same piece should likewise be protected—regardless of whether the destructor is the original artist or a subsequent owner. The right of integrity acts as a threat to any artist wishing to explore creativity through destruction. Consequently, this right also acts as a deterrent to creativity and is therefore plainly outside of the scope of powers conferred under Article I of the Constitution.

E. FIRST AMENDMENT IMPLICATIONS

A final criticism regarding the right of integrity lies in its First Amendment implications. As discussed above, integrity has the potential to deter creative destruction and is outside of the goals enumerated in the Copyright Clause. As a result, this deterrence of creative destruction can potentially chill one's rights as granted by the First Amendment.

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[239] *Id.*

[240] *Id.*

[241] *Promote*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/promote (last visited Oct. 15, 2021).

[242] Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress As A Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1811 (2006).

A court's analysis of First Amendment claims depends on whether the regulation at issue is content-based or content-neutral.[243] Here, the regulation is facially content-neutral and would be subjected to an intermediate scrutiny inquiry by the court.[244] Intermediate scrutiny requires the government to make showings that (1) the law is narrowly tailored, (2) the law serves a substantial government interest, and (3) that it leaves open ample alternative channels of communication.[245] Under this inquiry, the right of integrity violates the First Amendment by unduly restricting one's right to free expression through destruction.

In an intermediate scrutiny inquiry, the analysis hinges on two elements: the narrow tailoring of means to ends and the presence of substantial government interest.[246] The government interest here is the promotion of artistic progress and protection of the artist's interests. Other interests at play concern the context of United States participation in the Berne Convention, such as security of protection for other forms of intellectual property of more national concern.

As established above, the government's means of protecting artist's interests are not narrowly tailored to its ends as intended by the Copyright Clause. A narrowly tailored regulation would have employed a balancing of interests and would reflect the art history and current art culture of its society. Destruction plays an important role in both performance art and transformative works, and it helps to communicate an artist's criticism of society, politics, cultural norms, and artistic movements as a whole.

The final inquiry of intermediate scrutiny is whether the government has left open ample alternative channels of communication.[247] In theory, this objective is achieved. An artist who wishes to partake in creative destruction can seek consent from the original artist like Robert Rauschenberg.[248] However, the balance of power against a lesser-known artist can act as an obstacle for such

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[243] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that a government may impose reasonable restrictions on speech "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'") (quoting Clark v. Cmty. For Creative Non–Violence, 468 U.S. 288, 293 (1984)).

[244] *Id.* (describing intermediate scrutiny).

[245] *Id.*

[246] *Id.*

[247] Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see also* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) ("While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (internal citation omitted).

[248] 17 U.S.C. § 106A(e) (stating that "rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author.").

consent. As a result, this final inquiry is likely satisfied as it leaves alternative channels of communication; issues arise, however, when artists attempt creative destruction on the work without knowledge of such consent requirement.

This brings to light the implications brought by a special type of regulation, termed a "total medium ban," in which a specific type of communication is completely prohibited by law.[249] One can argue that the right of integrity consists of a total medium ban against creative destruction. These types of bans are disfavored by the Supreme Court as they limit speech by "suppress[ing] too much speech."[250]

In brief, the right of integrity has the potential to unduly restrict one's right to free expression through destruction. It may even follow that integrity could pose a total medium ban on such expression. This grave issue can be remedied by the protection of creative destruction as a respected component of creativity and art as a whole.

IV. CONCLUSION

While attribution has an important place in law,[251] its counterpart, integrity, is a frivolous expansion of copyright law that infringes on absolute ownership traditions. Europe has a longstanding history and connection with art. This cultural connection created years of case law studying the specific issue of an artist's integrity. In contrast, the United States has only a few niche cases scattered among the lower courts.[252]

Of course, there are certain restrictions to destruction, like protection given to historical landmarks,[253] but for the most part, an owner is conferred absolute ownership in their personal property. VARA takes this tradition and egregiously threatens the ability of an owner to exercise their rights of absolute ownership.

Absent expansive case law detailing why the United States *would* need this protection, its outright and blanket conferral seems reckless and ill-conceived. This is furthered by the fact that VARA was rushed through the procedural

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[249] City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

[250] *See id.* ("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.").

[251] PROWDA ET AL., *supra* note 112, at 102 ("The European Commission (EC) has stated that moral rights protect consumers by verifying that works are authentic . . . (i.e. there is economic value in the right of paternity)".).

[252] *See, e.g.,* Flack v. Friends of Queen Catherine Inc., 139 F. Supp. 2d 526, 529 (S.D.N.Y. 2001), Martin v. City of Indianapolis, 982 F. Supp. 625, 630 (S.D. Ind. 1997), Lubner v. City of Los Angeles, 45 Cal. App. 4th 525, 528 (1996) (representing the small pool of cases specifically concerned with both destruction and the right of integrity).

[253] Art Preservation Act, Cultural and Artistic Preservation Act, Cal. Civ. Code §§ 987, 989 (West 1994).

process as a bill and was tacked onto the back of the confirmation federal judgeships.[254]

Moving forward, the solutions are to either entirely repeal VARA or to create an exception to the right of integrity for creative destruction for the purposes tailored to evolving artwork and fostering creativity. This exception must take into account the difference between creative and alternate forms of destruction. I believe this inquiry should turn on the intention and purposes of destruction rather than the subjective opinion of the artist.[255]

Further, VARA creates inequality in artistic commerce in favor of the original artist while failing to protect any subsequent artist-owner. VARA also imposes liability on any subsequent artist-owner who may wish to creatively manipulate their lawfully owned property. This directly opposes the United States' longstanding protection of consumers and owners. Finally, VARA is a threat to creativity and the natural cycle that is a work of art. If one is never given the ability to improve on past developments, whether art, philosophy, literature, etc., then there would be a stagnation of creativity.

One might argue that the right of integrity protects works significant to the development of the useful arts and sciences.[256] I reply, however, that creative destruction can be distinguished from the protection of historical artwork under preservation statutes. The artist in question here is under the assumption that the work of art purchased is *not* a historical or protected work of art. As a result, they would have no idea, or notice, of the potential for legal liability conditioned upon its destruction.

The United States has a deeply rich and unique culture, both in art and history, concerning insurgency and rebirth from destruction. As shown through the arguments above, a traditional balancing of interests shows a discrepancy to account for such history and the potential ramifications that a right of integrity may pose to the progression of American art. Additionally, the government interests asserted here are neither substantial nor significant enough to overpower the concern and protection of freedom of expression. The right of integrity also directly conflicts with the promotional power conferred to Congress by the Copyright Clause and raises procedural concerns under the Due Process Clause. This threatens a subsequent owner-artist's Due Process rights under the Fifth Amendment by providing for legal recourse without adequate notice of one's liability.

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[254] *See* Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1935–36 (2000) (describing VARA's hurried passage into law).

[255] Or at the *very least*, the statute should provide the minimal procedural requirements of the Fifth Amendment.

[256] *See* Burton Ong, Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights, 26 COLUM. J.L. & ARTS 297 (2002-2003) (advocating in favor of moral rights).

To preserve the integrity of the Copyright Clause, I propose an amendment of VARA to specifically afford protection to destructive processes that further artistic progress and development. In the absence of such an amendment, I implore the judiciary to take a narrow approach in interpreting the right of integrity and to employ a balanced analysis that accounts for all material interests present. Finally, and most importantly, there is an immediate need to integrate a requirement of notice. This would aid a subsequent owner-artist in comprehending their full scope of legal liability when deciding to partake in creative destruction.

Moving forward, I urge Congress to first and foremost consider the entire breadth of an artist's rights under the Constitution. Since any regulation of art threatens First Amendment rights, Congress must delicately navigate such issues to both promote progress and protect individual rights. When crafting such legislation, Congress must consider a national approach and take into account American ideals over any international influences. While the right of attribution is a step forward in protecting creative processes, the right of integrity threatens to chill creative destruction.