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A SHATTERED VISAGE: THE FLUCTUATION PROBLEM WITH THE RECOGNIZED STATURE PROVISION IN THE VISUAL ARTISTS RIGHTS ACT OF 1990

I. INTRODUCTION

Congress passed the Visual Artists Rights Act of 1990 ("VARA"), which provides artists with three rights: "the right of attribution, the right of integrity, and, in the case of works of visual art of 'recognized stature,' the right to prevent destruction." One significant boundary on these rights is that they provide protection only to artists of visual works, a category that includes paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes. Within the boundary of visual art, exists a sub-boundary that applies to an artist's right to prevent the destruction of his or her work: the piece must be of “recognized stature.”


§ 106A. RIGHTS OF CERTAIN AUTHORS TO ATTRIBUTION AND INTEGRITY

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY. Subject to section 107 and independent of the exclusive rights provided in section 106, 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; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right; and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.


The Recognized Stature Provision of VARA, according to the district court in *Carter v. Helmsley-Spear, Inc.*, is "best viewed as a gate-keeping mechanism—protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature." The Recognized Stature Provision, however, may be too effective a gate-keeper. Art commentators, whether they are experts or lay persons, can provide only temporally-limited testimony concerning the recognized stature of a piece of visual art. In other words, they are not able to testify about the recognized stature of a piece of visual art in the future.

An initial example of the inherent fluctuation of the recognized stature of a piece of art is described in Percy Bysshe Shelley's poem *Ozymandias*. In the poem, the narrator tells of an encounter with a traveler "from an antique land" who tells him that a sculpture consisting of two "legs of stone" stands in the desert. On the pedestal of one of the "lifeless" stones are the following words: "My name is Ozymandias, King of Kings, / Look on my Works, ye Mighty and despair!" The sculpture, the traveler hints, was once the bold, well-crafted statement of a skilled artist, but now, after the passage of time, it lies in a desert of waste. Shelley's poem aptly illustrates the irony inherent in a situation where the power a piece of art once commanded no longer exists.

As Shelley illustrated in *Ozymandias*, recognized stature can diminish over time, but the converse can also be true. Recognized stature can increase over a period of time. An example is the critical estimation of Norman Rockwell's works.

Presently, many consider Rockwell to be "America's most beloved artist." "Ever since his first *Saturday Evening Post* cover appeared in 1916, Norman Rockwell has been a hit with the American public." Although the American public immediately accepted Rockwell, the art cognoscenti did

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7 Id.
8 Catherine Fox, *Rockwell, Seriously; Artist Moves Beyond Entertainment in Stimulating Show at the High, Atlanta J.-Atlanta Const.*, Nov. 5, 1999, at P1.
Recently, however, art critics have reappraised Rockwell's art, and today critics refer to him as "the great narrator of American art." Both the sculpture in *Ozymandias* and Rockwell's art illustrate the fluctuating nature of recognized stature—recognized stature can decrease or increase over a period of time.12

This Note, in demonstrating that the Recognized Stature Provision does not effectively protect great works of visual art because of the fluctuating nature of recognized stature, will examine (1) the passage of VARA, (2) the courts' interpretation of the Recognized Stature Provision, (3) the potential pernicious effects of the Recognized Stature Provision as interpreted by the courts, and (4) possible solutions to the dilemma that the Recognized Stature Provision poses for great works of visual art.

II. PASSAGE OF VARA

In March of 1989, the United States joined the Berne Convention following almost one hundred years of debate.13 The Berne Convention, which was created on September 9, 1886, in Berne, Switzerland, is a symbol for international protection for authors and artists.14 Commentators have noted that the Berne Convention "attempts to reconcile the policies of the various nations regarding international copyright protection."15 Although the Berne Convention is the "premier international copyright convention," the United States was at first reluctant to adhere to it because of questions concerning the requirements of Article 6bis.16 The primary question concerning Article 6bis was whether the United States would need to establish laws protecting moral rights.17 In the end, though, Congress

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10 Id.
11 Id.
12 See also 2 H.W. JANSON, HISTORY OF ART 23 (5th ed. 1995) (stating that "[l]ooking at great art is not such an easy task, for art rarely reveals its secrets readily. While the experience of a work can be immediately electrifying, we sometimes do not realize its impact until it has had time to filter through the recesses of our imaginations. It even happens that something that at first repelled or confounded us emerges only many years later as one of the most important artistic events of our lives.").
17 Id.
decided "that existing laws, both Federal and State, statutory and common, were sufficient to comply with the requirements of the Convention." Although Congress decided that joining the Berne Convention did not require it to establish new laws protecting moral rights, it concluded that joining the Berne Convention "did not end the debate about whether the United States should adopt artists' rights laws." Thus, the debate regarding whether the United States should enact artists' rights laws continued and ultimately culminated in House Bill 2690, the bill that eventually became VARA. In commenting on House Bill 2690, Professor Jane C. Ginsburg stated that the bill represents an important initiative in the domain of moral rights, an area that the Berne Implementation Act left open to future development. The prompt attention to artists' interests in securing attribution for and the integrity of their works that Congress has shown by this, and similar, bills should prove gratifying not only to the artistic community, but also to the American public that enjoys the benefits of access to artistic creations, and to our partners in the Berne Union.

As Professor Ginsburg pointed out, House Bill 2690 brought United States law into further compliance with the Berne Convention. That is, beginning in 1990, the year Congress enacted VARA, the United States recognized moral rights for the first time. Although prior to 1990 no federal laws had recognized artists' moral rights, many states, before the United States's enactment of VARA, had provided artists with protection. Thus, artists' moral rights, an idea that

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18 Id.
19 Id. at 8.
22 House Report 514 points out that efforts to protect artists through legislation had begun well before the debate regarding whether adherence to the Berne Convention required the United States to enact new laws to protect artists' moral rights. H.R. REP. NO. 101-514.
many found controversial and antithetical to United States copyright law, was not as foreign a concept as one might suppose. Despite state recognition of artists’s moral rights, however, the concept was controversial as the court in Martin v. City of Indianapolis noted. Commentators have lined up on both sides of the issue with some applauding VARA for providing artists with protection from actions impugning their integrity. Other commentators have critically denounced the effectiveness of VARA.

III. THE COURTS’ INTERPRETATION OF THE RECOGNIZED STATURE PROVISION

Upon the enactment of VARA, practitioners and artists voiced criticisms aimed at the practicalities of applying the Recognized Stature Provision. Specifically, the idea that the Recognized Stature Provision required “courts for the first time in copyright law to make distinctions based on aesthetic considerations” generated the most controversy. Although these criticisms concerning the practicalities of applying the Recognized Stature Provision seem sound, the courts that have interpreted the Recognized Stature Provision have adequately dealt with the practicalities of applying it.

A. THE CARTER TWO-TIERED TEST

A primary example of a court developing a practical approach to the Recognized Stature Provision is the Carter court’s two-tiered test:


24 192 F.3d 608, 611, 52 U.S.P.Q.2d (BNA) 1201, 1202 (7th Cir. 1999).
28 Id. at 1965.
For a work of visual art to be protected under this Section [17 U.S.C. § 106A(a)(3)(B)], a plaintiff must make a two-tiered showing: (1) that the visual art in question has "stature," i.e. is viewed as meritorious, and (2) that this stature is "recognized" by art experts, other members of the artistic community, or by some cross-section of society.

This "two-tiered" approach thus reduces the Recognized Stature Provision, requiring that a plaintiff establish two criteria for a work of visual art to be protected: (1) that the visual art has stature and (2) that the stature is recognized.

In Carter, the plaintiffs, three professional sculptors known as the "Three-J's" or "Jx3," brought suit after the defendants, the owner and the managing agent of the building in which the plaintiffs's art was installed, told the plaintiffs that they were to discontinue installing their art and that their art work would be removed from the building. The sculpture created by the plaintiffs consisted of "a number of sculptural elements including art work attached to the ceiling and the floor, interactive art, a vast mosaic covering the majority of the floor of the lobby and portions of walls and several sculptural elements, and the interior of three elevators that open into the lobby."

Holding that the art work was made for hire and thus excluded from the definition of visual art and, consequently, from VARA protection, the Second Circuit Court of Appeals reversed the district court. However, because the Second Circuit reversed only the District Court's holding regarding whether the art was a work made for hire, the District Court's two-tiered approach was affirmed on appeal.

The plaintiffs in Carter thus were required to make the "two-tiered showing." The District Court also determined that plaintiffs attempting to make the showing "generally, but not inevitably, will need to call expert

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30 Id.
31 71 F.3d 77, 80-81 (2d Cir. 1995).
33 71 F.3d at 88. Section 101(2)(B) of VARA excludes "any work made for hire" from the definition of a work of visual art.
34 861 F. Supp. at 325.
THE FLUCTUATION PROBLEM OF VARA

Consideration of the testimony of the expert witnesses who testified at trial leads to the conclusion that the Work is a work of recognized stature. For example, Professor Rosenblum testified that "this was [a] coherent ongoing program" and that he wants "everybody to go and see it." Further, Professor Rosenblum testified that the sculpture is "a work of art like almost nothing I've ever seen before" and that "the one thing that I know absolutely is that this is an incredible phenomenon and I want to see it again and learn more about it. And I am sure there are countless other people who would feel like me if they saw it." 36

Upon the testimony of plaintiffs's experts, the District Court determined that the art work installed in the defendants's lobby had stature and that its stature was recognized. 37 Thus, it appears that the Carter court had no appreciable, practical difficulties in applying the Recognized Stature Provision. Although the Carter court may have had no practical difficulties applying the Recognized Stature Provision to the facts, one must still face the fluctuation problem of the provision. Recognized stature, as illustrated by the poem Ozymandias and the critical estimation of Norman Rockwell, decreases and increases over time.

B. MARTIN V. CITY OF INDIANAPOLIS

In Martin, the defendant, the City of Indianapolis, demolished a sculpture titled "Symphony #1" that the plaintiff, Jan Martin, had created. 38 In 1984, the Indianapolis Metropolitan Development Commission had granted Martin permission to "erect a twenty-by-forty-foot metal sculpture" on land

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35 Id.
36 Id. (citations omitted).
37 Id.
38 Judge Wood joked that "in view of this controversy, a more suitable musical name might have been '1812 Overture.'" Id.
owned by his employer's chairman. Eight years later the City of Indianapolis purchased the land and demolished the sculpture without notifying Martin although the city had promised him that they would contact him in the event the sculpture was to be removed. Martin then brought suit. 39

In 1999, the Martin court stated that the only case defining and applying the Recognized Stature Provision was Carter. 40 The Martin court appeared satisfied with the two-tiered approach to determine 'recognized stature' that the District Court in Carter established. Indeed, the court stated that the District Court in Carter "presented an informative discussion in determining whether a work of visual art may qualify as one of 'recognized stature.'" 41 The court then went on to hold that the plaintiff's evidence regarding the 'recognized stature' of the art work was not hearsay and thus admissible. 42 The Carter and Martin courts, then, both appear satisfied with the two-tiered approach and do not seem to harbor concerns regarding the practicality of applying the Recognized Stature Provision.

The Martin court, however, expressed the idea that a discrepancy might exist between the Carter test and Congress's intent. 43 The discrepancy was that the test might "be more rigorous than Congress intended." 44 The Martin court, though, saw "no need for the purposes of this case to endeavor to refine that rule." 45 The two-tiered approach is sufficient, according to the court, for determining whether Martin's art had achieved 'recognized stature' despite the possibility that a discrepancy existed between Congress's intent and the two-tiered approach.

Although the Carter and Martin courts appear satisfied with the two-tiered approach to determine the 'recognized stature' of a work of art and although practitioners's and artists's complaints concerning the practicalities of applying the Recognized Stature Provision appear baseless, the most salient problem regarding the Recognized Stature Provision remains: 'recognized stature' fluctuates.

39 Id. at 610-11.
40 Id. at 612.
41 Id.
42 Id. at 613. Justice Manion, in dissent, stated that he believed Martin had not established the recognized stature of the art work: "A plaintiff cannot satisfy his burden of demonstrating recognized stature through old newspaper articles and unverified letters, some of which do not even address the artwork in question." Id. at 616.
43 Martin, 192 F.3d at 612.
44 Id.
45 Id.
C. FUTURE INTERPRETATION OF THE RECOGNIZED STATURE PROVISION

How the courts may interpret the Recognized Stature Provision of VARA in the future is an open-ended question. One commentator, in discussing both *Carter* and *Martin*, has noted that "[t]he few cases brought under VARA . . . reveal a predictably inconsistent application of the recognized stature/recognized quality standard." However, it is premature to posit that the Recognized Stature Provision is applied inconsistently by the courts because the Recognized Stature Provision has only been the focus of litigation in two cases: *Carter* and *Martin*. No appreciable evidence leads to the conclusion that the Recognized Stature Provision, as applied in *Carter* and *Martin*, will be applied inconsistently in the future. However, the Recognized Stature Provision may undergo modifications by the courts in the future.

Different circuits will likely develop different approaches to the provision. According to the *Martin* court, the Recognized Stature Provision's intended meaning is "open to argument and judicial resolution." The *Martin* court came to this conclusion after it noted that "[i]n spite of its significance, that phrase ['recognized stature'] is not defined in VARA . . . ." Thus, the *Martin* court hints that Congress's intent may have been to leave the courts room to craft their own approaches to the Recognized Stature Provision.

IV. THE POTENTIAL PERNICIOUS EFFECTS OF THE RECOGNIZED STATURE PROVISION AS INTERPRETED BY THE COURTS

Potentially, five pernicious effects could result from the Recognized Stature Provision as the courts have interpreted it. First, VARA’s purpose is to preserve works of art that “art experts, the art community, or society in general views as possessing stature.” But the Recognized Stature Provision, because it attempts to judge recognized stature, which often fluctuates over time, frustrates this preservative purpose. In other words,
future court decisions may allow works of art to be altered or destroyed that present-day art critics deem not to have ‘recognized stature’ but future art critics may revere. The converse may also occur. Courts may protect a work of art from destruction, causing its owner substantial costs, because art critics or a community thought the work had ‘recognized stature.’ But those same critics or that same community could change positions at some later time.

Second, because VARA does not describe when a work must have stature that is recognized, a possibility exists that plaintiffs planning to use VARA may be able to create ‘recognized stature’ by persuading the necessary group of people or by using other manipulative means.51

Third, the Recognized Stature Provision places expert witnesses testifying about the ‘recognized stature’ of a piece of art in a difficult position. The expert may be tempted to err on the side that preserves the art work because he or she believes that ‘recognized stature’ of the piece may develop in the future although it does not exist presently.

Fourth, judges and jurors may also think that it is better to err on the side that preserves art. And fifth, the phrase “recognized stature” is imprecise, which leads to a number of concerns regarding its meaning and application.

A. THE RECOGNIZED STATURE PROVISION FRUSTRATES THE PRESERVATIVE PURPOSE OF VARA

VARA serves a preservative purpose. According to Representative Markey in his introduction of House Bill 2690, the bill that became VARA,

Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.52

51 Robinson, supra note 27, at 1967.
Thus, VARA seeks to preserve works of art because art fulfills the role of conveying to future generations the culture at a specific time. However, not all works of art can be protected under VARA. VARA’s first limitation is that the art work must be visual. 53 The second limitation is that the art work has to have achieved recognized stature. 54

With the recognized stature limitation an advantage is gained: “[t]he advantages of the “of recognized stature” qualification include barring nuisance law suits, such as [a law suit over] the destruction of a five-year-old’s fingerpainting by her class mate . . . .” 55 Indeed, the Recognized Stature Provision is a superb “gate-keeping mechanism.” 56 Lawsuits over a matter such as a child’s fingerpainting would be absurd and should not be allowed. But the Recognized Stature Provision is actually an imperfect gate-keeper because ‘recognized stature’ has the ability to fluctuate greatly.

As the earlier examples of Shelley’s poem Ozymandias and the critical estimation of Norman Rockwell establish, ‘recognized stature’ can fluctuate over time. Although “[a] plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti,” a possibility exists that “art experts, the art community, or society in general” will misjudge the stature of a work. 57 One might argue that because great art often seeks to challenge its viewers in a way that may make them uncomfortable, they may misjudge the value of an artist’s work. But even if the art work does not disturb its viewers, the ‘recognized stature’ of a piece of art work can easily fluctuate.

As a result, under the Recognized Stature Provision of VARA, courts may allow a work to be destroyed because it has not achieved ‘recognized stature’ at that time. However, a later generation, with the benefit of time and social change, may perceive the work to have ‘recognized stature.’ Likewise, in applying VARA, a court may determine that a work has achieved ‘recognized stature,’ but, in truth, the court has only determined that the work has achieved ‘recognized stature’ at that time. A later generation may determine that the work is devoid of ‘recognized stature.’ The harm in this situation falls on the owner of the work who is forced to

55 Carter, 861 F. Supp. at 325.
56 Id.
57 Id.
maintain the work, an undertaking that could be costly and could lead art patrons to be overly wary. Thus, the Recognized Stature Provision of VARA frustrates VARA’s overall preservative purpose. Possibilities of fluctuation in critical appraisal increase the chance that a court will not provide VARA protection to a work of art that will later achieve ‘recognized stature’ or will provide VARA protection to a work of art that will later be judged to be devoid of any ‘recognized stature.’

B. VARA DOES NOT STATE WHEN RECOGNIZED STATURE MUST BE ESTABLISHED

Because VARA does not state when ‘recognized stature’ must be achieved, a possibility exists that plaintiffs seeking to preserve a work of art under VARA will be able to create ‘recognized stature,’ a value that fluctuates easily, by persuading the necessary group of people or by other manipulative means. According to the District Court in Carter,

VARA does not delineate when a work must attain “recognized stature” in order to be entitled to protection under this Section. Considering the purpose of this Section, the Court does not view this as unintentional. The test is whether the art work at issue is of recognized stature, not when it attained this status. The interpretation is wholly consistent with the preservative goal of this Section.

Under this reading of VARA, a plaintiff can strive to create recognized stature of his art work even after the filing of his complaint. The District Court’s analysis emphasizes the preservative nature of VARA. VARA, though, was not meant to preserve all works of art from destruction. Instead, its protection extends “only to those works of art that art experts, the art community, or society in general views as possessing stature.”

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58 See, e.g., Robinson, supra note 27.
59 See Robinson, supra note 27, at 1967.
60 861 F. Supp. at 325.
61 Id.
63 Id.
However, a plaintiff who is diligent and persuasive may be able to preserve a work of art that truly need not be preserved. Moreover, that preservation comes at a cost to the individual or corporation that must preserve the work. One commentator has noted that the attention surrounding the filing of a VARA suit may be enough to endow a work of art with recognized stature:

The publicity surrounding the filing of a VARA suit may alone be sufficient to provide evidence of recognized stature. While this deference to public opinion is laudable, it opens the judicial process to a significant risk of manipulation, where the connected or media-experienced plaintiff can manufacture ‘recognized stature’ overnight in the course of a trial.64

Because recognized stature fluctuates so easily, the mere filing of a VARA lawsuit can endow a work of art that truly lacks merit with recognized stature, which frustrates the overall preservative goals of VARA.

C. THE RECOGNIZED STATURE PROVISION PLACES EXPERT WITNESSES IN A DIFFICULT POSITION

Expert witnesses testifying about the ‘recognized stature’ of an artist’s work are placed in a difficult position. As the District Court stated in Carter, to show ‘recognized stature,’ “plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.”65 Judge Manion, in his dissent in Martin, went further in emphasizing the importance of expert testimony regarding ‘recognized stature.’ He stated that “[i]nstances where expert testimony on this point [recognized stature] is not necessary will be rare . . . .”66 Thus, expert witness testimony is an important component of a plaintiff’s case in establishing the ‘recognized stature’ of his or her art work.

Usually, then, a plaintiff suing under VARA will call expert witnesses to testify about the ‘recognized stature’ of his or her art work. These experts

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64 Robinson, supra note 27, at 1967.
65 861 F. Supp. at 325.
66 192 F.3d at 616.
will either be art experts such as art professors or artists, members of the art community like patrons or buyers, or individuals from society in general.67

The first two groups of experts have an inherent interest in art that may lead them to testify that a work of art has achieved ‘recognized stature’ when in reality the work has not. They may do this because the fluctuating nature of ‘recognized stature’ encourages them to attempt to forecast the work’s stature in the future.

Art experts and members of the art community share an affinity for the arts either because art relates to their profession or because they have a strong interest in it. This affinity may induce an expert witness to err on the side that preserves the work. Likewise, art experts or members of the art community may have a particular bias towards a certain type of art, a specific artist, or even a time period.68 One commentator noted that today the arts may not be highly esteemed by the public because the art profession is perceived to be elitist:

A recent study of baby boomers by the National Endowment for the Arts found that “many [baby boomers] simply [had] no interest in [the] arts [and] others [had] a real hostility toward them.” The Times suggested that part of the problem is that people are “suspicious of anything that smacks of too much elitism.”69

Thus, the potential problem of erring on the side that preserves art work that is overvalued by art experts and other members of the art community may not be a problem with society in general. This general disdain by the

67 861 F. Supp. at 325.
68 Carter presents an example of an expert witness having a bias against art from a certain time period. The expert, Mr. Kramer, appeared for the defense and testified that the plaintiffs’ sculpture had not achieved recognized stature. The Carter court discredited Mr. Kramer’s testimony after it was determined that Mr. Kramer disliked contemporary art: “Mr. Kramer testified on cross examination that he believes that ‘most of the art in the current scene is of shockingly low level’ and that ‘the very notion of quality in art has been discarded.’ From the record it is evident that he rejects contemporary art as intrinsically meritless. Mr. Kramer’s apparent disdain for contemporary art leads this Court to accord his opinion testimony significantly less weight than that of the other experts who testified . . . .” Id. at 326 n.13 (trial transcript citations omitted).
public may lead to a bias problem similar to the one expressed by Mr. Kramer in *Carter.*

Because expert witnesses are usually an integral part of a plaintiff’s effort to establish ‘recognized stature’ and because ‘recognized stature’ easily fluctuates, experts are faced with a challenging problem. Aware that ‘recognized stature’ of an art work is subject to fluctuation, expert witnesses may be tempted to err on the side that preserves the art work. This problem is further compounded by the positive or negative bias that art experts, the art community, or society in general may have toward a type of art, an artist, or even a specific time period as was the case in *Carter."

**D. JUDGES AND JURORS ARE PLACED IN A DIFFICULT SITUATION**

The problem that exists with expert witnesses being placed in a difficult position also exists with judges and jurors. Judges and jurors, when making decisions regarding the ‘recognized stature’ of a work of art, are working with a standard that fluctuates over time. This fluctuation may induce the judge or the jurors to preserve a work of art that has not yet achieved ‘recognized stature’ because they feel that it will achieve ‘recognized stature’ in the future. Likewise, judges or jurors with an established bias may use the fluctuation inherent in ‘recognized stature’ to allow a piece of art to be destroyed because they think that ultimately the work will be deemed worthless although it presently has ‘recognized stature.’

Judges trying to forecast the existence or non-existence of ‘recognized stature’ are further aided by the *Martin* court’s proclamation that the meaning and application of the Recognized Stature Provision is “open to argument and judicial resolution.” Thus, judges struggling with the belief that a work of art that presently has not achieved ‘recognized stature’ will eventually achieve it, may be able to structure the definition and application of the Recognized Stature Provision to suit their view. The opposite is also true—judges may be tempted to use the fluctuating nature of ‘recognized stature’ to permit the destruction of a work of art that, in their view, will ultimately be determined to have no ‘recognized stature’ although at present it has ‘recognized stature.’ Leaving such an option open to judges tempts

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70 861 F. Supp. at 326.  
71 Id.  
72 192 F.3d at 612.
them to use the inherent fluctuation of ‘recognized stature’ to preserve or destroy a work of art as they choose.

E. THE PHRASE RECOGNIZED STATURE IS IMPRECISE

At the core of all of the potential pernicious effects of the Recognized Stature Provision is the imprecision of the phrase recognized stature. The phrase’s imprecision further adds to its tendency to fluctuate easily over time because the more imprecise it is the more easily it changes. As the Martin court noted, VARA does not define what constitutes ‘recognized stature’ despite the phrase’s significance. This lack of explanation concerning such an important component of VARA leads to four concerns: (1) VARA does not state whether a minimum number of individuals must recognize an art work’s stature; (2) VARA does not state whether the individuals have to perform an affirmative act to acknowledge their recognition of the art work’s stature; (3) VARA does not state whether there are gradations of ‘recognized stature’; and (4) VARA does not state whether recognized stature differs according to the type of visual art involved.

1. VARA Does Not State Whether A Minimum Number of Individuals Must Recognize an Art Work’s Stature. According to VARA, the author of a work of visual art has the right “to prevent any destruction of a work of recognized stature...” The phrase recognized stature, as Congress used it, is imprecise, in part, because it does not state how many individuals must recognize the stature of a work of art. As the phrase is used, a court could interpret it to mean that a minimum number of individuals is necessary or that recognition could come from only one individual.

2. VARA Does Not State Whether the Individuals Have to Perform an Affirmative Act to Acknowledge Their Recognition of the Art Work’s Stature. A further dimension to the imprecision of the phrase recognized stature arises when one focuses on the verb recognize. The word is a verb, which connotes a species of action. However, VARA fails to explain whether the individuals who recognize the stature of a piece of art must undertake a specific species of action. A commonly used dictionary states as one of its definitions of the word recognize the following: “to acknowledge or take notice of in some definite way: as (a) to acknowledge with a show of appreciation, (b) to
acknowledge acquaintance with, (c) to admit the fact of.” This definition describes different species of action. For example, acknowledging an art work's stature “with a show of appreciation” likely requires a manifestation of appreciation while admitting “the fact of” stature requires less of the individual performing the action. Although VARA could simply require that an individual “admit the fact” of an art work’s stature, it could, under judicial interpretation, require a more specific act such as acknowledging the work’s stature “with a show of appreciation.” VARA uses the phrase recognized stature ambiguously because it does not state the type of action the individual who recognizes an art work’s stature must perform.

3. VARA Does Not State Whether There are Gradations of Recognized Stature. Under VARA, whether a work of art has achieved ‘recognized stature’ appears to be an all-or-nothing undertaking. However, because recognized stature fluctuates over time, it advances and recedes through stages. Thus, a work of art that at one time is on the verge of attaining ‘recognized stature’ and then at a later point achieves it has undergone a development. This development proceeds in stages. Although ‘recognized stature’ fluctuates by evolving or devolving through stages, VARA does not seek to account for these gradations. Because VARA does not account for these stages, it ignores the fluctuating nature of ‘recognized stature.’

4. VARA Does Not State Whether Recognized Stature Differs According to the Type of Visual Art Involved. VARA seeks to protect visual art. Visual art includes paintings, drawings, prints, sculptures, or still photographic images. These different media have different disciplines, styles, histories, movements, and prominent figures. Although these types of visual art may differ greatly, VARA seems to apply the same test for each. This approach does not, for example, take into account the large sizes of some sculptures, which are very difficult to move and thus arguably more prone to destruc-

75 WEBSTER’S NEW COLLEGIATE DICTIONARY 957-58 (1st ed. 1980).
76 Id.
77 Id.
79 The converse is also true: a work of art can be on the verge of losing its recognized stature at one point and have completely lost its recognized stature at a later point in time. This devolution would also proceed in stages.
tion by their owners. Because VARA seeks to apply the same Recognized Stature Provision to the many different types of visual art, it will inevitably prevent judges and jurors from taking into account differences that logically ought to be significant.

V. POSSIBLE SOLUTIONS TO THE DILEMMA THAT THE RECOGNIZED STATURE PROVISION POSES FOR GREAT WORKS OF VISUAL ART

Possible solutions to the fluctuation problem of the Recognized Stature Provision ought to provide a standard for preserving or permitting the destruction of works of visual art that does not fluctuate. One commentator has proposed “the establishment of a national registry of highly significant art” as a possible solution to the problems VARA poses. Although a national registry would likely be a viable solution to the fluctuation problem because it provides a standard or set of standards that do not fluctuate, it is not the only possible solution.

At least seven additional solutions exist that may directly address the fluctuation problem. The solutions are as follows: a work of art will be preserved if (A) it has received, sua sponte, textual acknowledgment of its contribution or substantial likelihood of contribution to society before the lawsuit is initiated, (B) it has received, sua sponte, objective acknowledgment of its contribution or substantial likelihood of contribution to society before the lawsuit is initiated, (C) it has passed a test consisting of questions that seek to establish whether or not society has a significant interest in preserving the work, (D) an impartial panel deems it worthy of preservation (E) the market determines that the work is monetarily valuable, (F) the work of art has retained ‘recognized stature’ over a ten year period, and (G) the work of art has attained an extremely well-defined form of ‘recognized stature.’

83 See Carter, 71 F.3d at 83-4; Martin, 192 F.3d at 615.
84 Robinson, supra note 27, at 1972.
A. SOLUTION NO. 1: A WORK OF ART WILL BE PRESERVED IF IT HAS RECEIVED, SUA SPONTE, TEXTUAL ACKNOWLEDGMENT OF ITS CONTRIBUTION OR SUBSTANTIAL LIKELIHOOD OF CONTRIBUTION TO SOCIETY BEFORE THE LAWSUIT IS INITIATED

Sua sponte textual acknowledgment of a work's contribution to either society in general or a more specific society like an artistic community cures the fluctuation problem because textual acknowledgment is not subject to fluctuation. Unlike the Recognized Stature Provision which can fluctuate over time, a work has either received textual acknowledgment of its contribution or substantial likelihood of contribution or it has not. Therefore, sua sponte textual acknowledgment will not frustrate the preservative purpose of VARA because the standard does not fluctuate.

In addition to addressing the concern regarding the preservative purpose of VARA, sua sponte textual acknowledgment of a work of art's contribution or substantial likelihood of contribution does not put expert witnesses, judges, or jurors in a difficult situation. As discussed earlier, expert witnesses, judges, and jurors, in working with the Recognized Stature Provision, are presented with an option to preserve or destroy the work of art at their will. This option arises because 'recognized stature' fluctuates. This fluctuation, when combined with the imprecision of the phrase recognized stature, allows expert witnesses, judges, and jurors too much room to be influenced by their own biases. Sua sponte textual acknowledgment, however, does not present this problem because it is a more precise standard. Thus, expert witnesses will testify about textual acknowledgment, something that does not fluctuate, not 'recognized stature,' which does fluctuate, and...

85 The textual acknowledgment standard, in order to escape the criticism that the Recognized Stature Provision has faced because of Congress's failure to define it adequately, must sufficiently define what textual acknowledgment constitutes. 192 F.3d at 612. For example, a viable definition of textual acknowledgment might state that textual acknowledgment must come from either an artistic journal, a newspaper, a book, a magazine, or an internet site. Because the standard requires sua sponte textual acknowledgment, intentional manipulation is impossible. Additionally, the textual acknowledgment standard must define what contribution or substantial likelihood of contribution means. This phrase, for instance, could be defined as meaning that the art work must have provided an insight or made an observation about its subject matter that is original, creative, and indicative of artistic talent.

86 861 F. Supp. at 325. In addition to the sua sponte textual acknowledgment standard's non-fluctuating nature, it also serves as a gate-keeper against frivolous lawsuits because textual acknowledgment is not so easily acquired that a mother could bring suit for the destruction of her five-year-old's fingerpainting. Id.
judges and jurors will not have the option to attempt forecasting the eventual 'recognized stature' of a work of art.

B. SOLUTION NO. 2: A WORK OF ART WILL BE PRESERVED IF IT HAS RECEIVED, SUA SPONTE, OBJECTIVE ACKNOWLEDGMENT OF ITS CONTRIBUTION OR SUBSTANTIAL LIKELIHOOD OF CONTRIBUTION TO SOCIETY BEFORE THE LAWSUIT IS INITIATED

*Sua sponte* objective acknowledgment of a work of art's contribution or substantial likelihood of contribution is a standard that is substantially similar to the textual acknowledgment standard because it too requires an external comment on the work of art that is not subject to fluctuation. However, objective acknowledgment is a broader standard because it encompasses all textual and non-textual objective acknowledgments of a work of art's contribution. Therefore, the only real difference between the first and second proposed solutions is that the second encompasses non-textual as well as textual acknowledgments.

This broader standard will likely prove more useful to artists since they can still employ textual acknowledgments of their art work under it. In addition to textual acknowledgments, artists can also employ non-textual acknowledgments like an oral news report on National Public Radio, a video documentary, or a segment on the nightly news. Objective acknowledgments, like textual acknowledgments, will not fluctuate and thus not pervert the preservative purpose of VARA by allowing works of art that will ultimately be deemed worthy of preservation to be destroyed simply because they are not presently deemed worthy of preservation.

Objective acknowledgment will also not put expert witnesses, judges, or jurors in difficult situations because it does not fluctuate and thus does not present the option to attempt to forecast the art work's future status. Because *sua sponte* objective acknowledgment is required, manipulation by the plaintiff is highly unlikely, and, of course, the phrases *objective acknowledgment and contribution or substantial likelihood of contribution* will need to be defined extensively in order for the standard to be precise and thus less likely subject to fluctuation.

7 Similar to the textual acknowledgment standard, the objective standard serves as a gate-keeper against frivolous law suits since objective acknowledgment is almost impossible to attain for works of art that plainly do not warrant preservation. See id.
C. SOLUTION NO. 3: A WORK OF ART WILL BE PRESERVED IF IT HAS PASSED A TEST CONSISTING OF QUESTIONS THAT SEEK TO ESTABLISH WHETHER OR NOT SOCIETY HAS A SIGNIFICANT INTEREST IN PRESERVING THE WORK

The preservation test, which operates much like any grading system, has many benefits. The two most obvious benefits include uniformity among federal circuits and the easy application of the test to determine whether a work of art will be preserved. The test will result in uniformity among the circuits because it will consist of a straightforward series of requirements that the work of art must fulfill. Although some of the questions will require judicial resolution and thus some minor differences among the circuits will develop, the overall tenor of the test will encourage uniformity. The test will also be easy to apply due to the limited number of requirements and their succinctness.

In addition to uniformity and easy application, the preservation test will not fluctuate like the Recognized Stature Provision because the test will apply requirements that do not fluctuate. Absent fluctuation, VARA’s preservative purpose will not be subverted. The test will not be subject to manipulation either because neither a plaintiff nor a defendant will have any influence over the requirements in the test. The test will also not put expert witnesses, judges, or jurors in difficult positions because the questions will not present them with the option of forecasting the status of the work of art. Instead, as indicated, the test will consist of objective questions that do not incorporate standards that fluctuate. Finally, the test will be precise because it will not include phrases or words like recognized stature that are subject to widely divergent meanings or applications, but if the test must employ such words of phrases, they will be defined extensively.

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88 The test will consist of questions similar to the following: (1) What form of visual art is the work?, (2) What artistic traditions does the artist follow? (3) Is the art work original and innovative? and (4) What formal training has the artist undergone?

89 An additional benefit arises from the ease of application of the test: litigants will be able to apply the test themselves to their situation and determine how the court will very likely decide the case. This knowledge will encourage settlement among litigants because the party that will likely lose in court will serve its interest better through settlement than through litigation.

861 F. Supp. at 325.
D. SOLUTION NO. 4: A WORK OF ART WILL BE PRESERVED IF AN IMPARTIAL PANEL DEEMS IT WORTHY OF PRESERVATION

The impartial panel standard calls for an impartial panel of individuals from the community to determine whether a work of art meets its standard for preservation. These individuals are similar to court-appointed expert witnesses. Courts, pursuant to Federal Rule of Evidence 706, may appoint expert witnesses. Likewise, courts under the impartial panel standard are able to appoint individuals to a panel that serves only to determine whether the work of art is worthy of preservation.

Under the impartial panel standard, the panel applies the worthy of preservation standard. Thus, this solution calls for a standard within a standard—the worthy of preservation standard within the impartial panel standard. Additionally, the panel's findings are not dispositive; instead, the panel is similar to an expert witness. The jurors or the judge in a bench trial are free to disagree with the panel's findings regarding the work of art. Under such a scenario, the factfinder could reject the panel's finding concerning whether the work of art is worthy of preservation and make an independent determination.

The worthy of preservation standard avoids the problems of the Recognized Stature Provision because it does not fluctuate. The standard avoids fluctuation because in deciding whether a work of art is worthy of preservation the panel or factfinder does not attempt to determine the status of the work of art in the future. Unlike forecasting the 'recognized stature' of a work of art, the panel or factfinder determines whether the work of art is worthy of preservation at the time when their decision is made. In addition, the impartial panel standard is not subject to manipulation by a litigant because, as indicated, the factors the factfinder relies on are static. Thus, a plaintiff cannot create artificial circumstances in which a factfinder is duped into believing that a work of art is worthy of preservation when it is not. Expert witnesses, judges, and jurors are not placed in a difficult position because they are not asked to predict the future status of the work.

92 The worthy of preservation standard will require the panel or factfinder to focus on factors like the work's form of visual art, style, originality, and intended audience. These factors do not fluctuate over time and are not subject to manipulation.
Finally, the impartial panel standard is precise because it requires the factfinder to focus on concrete factors such as the form of visual art of the work.

E. SOLUTION NO. 5: A WORK OF ART WILL BE PRESERVED IF THE MARKET DETERMINES THAT THE WORK IS MONETARILY VALUABLE

Under the monetary value standard, a work of art is preserved from destruction if it has a certain monetary value. The required monetary value will change for the different forms of visual art. The monetary value standard is the standard most similar to the Recognized Stature Provision Standard because monetary value, like recognized stature, fluctuates over time. In spite of the fluctuating nature of monetary value, the monetary value standard avoids the other problems arising from the Recognized Stature Provision. Because the required monetary value will be set, it will not be subject to manipulation by litigants. Expert witnesses, judges, and jurors will not be placed in a difficult position either because they will have a concrete value that the work must attain. They will not be able to forecast the likely monetary value of the work in the future because the standard will require that the work of art be preserved only if it has presently attained the required monetary value. Additionally, the monetary value standard is precise because it provides the factfinder with concrete factors on which to base the decision on whether the work ought to be preserved.

9) The required values would be set after legislative findings determined the range within which the majority of works of art worthy of preservation fall.

94 The monetary value standard does not seek to protect artists from economic harm caused by the destruction of their art work. VARA does not protect artists from economic harm. Shaw v. Rizzoli Int’l Publ’ns, Inc., 1999 WL 160084, at *7 51 U.S.P.Q.2d(BNA) 1097, 1104 (S.D.N.Y. 1999).

95 Although it is true that under the monetary value standard a plaintiff could commit a fraud on the court by persuading someone to make a sham offer for the work of art that meets the required value for preservation, the manipulation would be illegal and unethical. Under the Recognized Stature Provision, however, a plaintiff can lawfully attain ‘recognized stature’ at any point in the litigation. 961 F. Supp. at 325. The ability to attain the required ‘recognized stature’ at any point during the litigation encourages plaintiffs to manipulate ‘recognized stature’ by creating artificial hype for the work of art they wish to preserve from destruction.
F. SOLUTION NO. 6: A WORK OF ART WILL BE PRESERVED IF IT HAS RETAINED RECOGNIZED STATURE OVER A TEN YEAR PERIOD

The primary benefit from the ten year standard is that it allows the courts to continue using the Recognized Stature Provision and partially corrects the fluctuation problem. Although the stature of a work of art will likely fluctuate for more than ten years, the ten year period provides the factfinder with a sample of time that allows determination of 'recognized stature' with more accuracy. The factfinder, under the ten year standard, will be provided with evidence from three hearings that occur over the ten year period. Ideally, the hearings will occur in the first, fifth, and tenth year. At these hearings the parties will present evidence of the presence or absence of 'recognized stature' of the work of art. After the parties present their evidence, the judge will rule.

The ten year standard, in addition to only partially correcting the fluctuation problem of the Recognized Stature Provision, fails to correct satisfactorily the other potential problems of the Recognized Stature Provision. Under the ten year standard, a plaintiff can manipulate 'recognized stature' by artificially inflating the art work's stature through self-promotion that does not reflect the true preservative value of the work. The solution also places expert witnesses and judges in a difficult position because they are rendering evaluations based on a standard that fluctuates. The imprecision of the phrase recognize stature, of course, remains a problem under the ten year standard because the recognized stature standard remains in place. Thus, the ten year standard provides a large sample of time in which to measure recognized stature, but the standard's similarity to the Recognized Stature Provision remains a downfall.

G. SOLUTION NO. 7: A WORK OF ART WILL BE PRESERVED IF IT HAS ATTAINED AN EXTREMELY WELL-DEFINED FORM OF RECOGNIZED STATURE

Using an extremely well-defined version of the Recognized Stature Provision will only partially correct the fluctuation problem because

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96 The ten year standard only partially corrects the fluctuation by trying to account for the fluctuation that recognized stature usually undergoes over time. Expert witnesses and judges, then, are still working with a fluctuating standard.
'recognized stature' fluctuates in some degree no matter how well-defined it may be. The fluctuating nature of 'recognized stature' will also still place expert witnesses, judges, and jurors in awkward positions because it provides them with an opportunity to attempt to forecast the work's 'recognized stature' in the future. However, a well-defined version of 'recognized stature' will at least prevent manipulation by the plaintiff and will add more precision to the amorphous phrase.

A plaintiff suing under VARA to prevent the destruction of a work of visual art, under a well-defined version of the phrase recognized stature, will not be able to manipulate 'recognized stature' because the phrase will "delineate when a work must attain 'recognized stature' in order to be entitled to protection." For example, the statute could provide that a plaintiff, to prevent the destruction of a work of visual art, must provide evidence of the work's 'recognized stature' before the filing of the complaint. Under such a provision, a plaintiff could not use the filing of the VARA suit to create 'recognized stature.' Adding precision to the phrase will also answer questions like whether a minimum number of individuals must acknowledge the stature of a work of art in order for the court to hold that it must be preserved or whether there are gradations of recognized stature.

VI. CONCLUSION

Visual artists, according to the Recognized Stature Provision of VARA, have the right "to prevent any destruction of a work of recognized stature." Recognized stature, according to the district court in Carter, "is best viewed as a gate-keeping mechanism—protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature." The Recognized Stature Provision, however, is an ineffective gate-keeper because 'recognized stature' fluctuates over time

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97 Again, adding precision to the phrase recognized stature will cause a partial decrease in fluctuation, but because recognized stature inherently fluctuates, the decrease will likely not eliminate the ability of expert witnesses, judges, and jurors to attempt to forecast recognized stature.
98 Carter, 861 F. Supp. at 325.
99 A well-defined version of recognized stature would also answer questions such as, whether the individuals acknowledging a work of visual art must perform a certain type of act of acknowledgment or whether recognized stature changes according to what type of visual art is involved in the litigation.
101 Carter, 861 F. Supp. at 325.
as Percy Bysshe Shelley's poem *Ozymandias* and the critical estimation afforded Norman Rockwell illustrate. The fluctuating nature of 'recognized stature' frustrates the preservative goal of VARA, allows plaintiffs to manipulate 'recognized stature,' and places expert witnesses, judges, and jurors in a position that allows them to attempt to forecast 'recognized stature.' Additionally, the imprecision of the phrase recognized stature contributes to the inherent fluctuation of recognized stature and raises numerous important questions such as whether 'recognized stature' should differ according to what type of visual art is involved in the litigation.

'Recognized stature,' in short, is a faulty standard that artists, buyers, expert witnesses, judges, jurors, and society ought to have an interest in seeing amended. Moreover, as this Note attempts to illustrate, numerous potential solutions exist. Although these solutions may contain faults of their own, they limit the fluctuation problem of the Recognized Stature Provision. The fluctuation problem's pernicious effects will likely lead to significant problems in the future. The solutions attempt to prevent or at least mitigate these problems. Unfortunately, ignoring the fluctuation problem will, in all probability, conclude with the noble face of art being reduced to "a shattered visage."102

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102 Percy Bysshe Shelley, *supra* note 6, at 672.