Work in Progress: Reconciling VARA, Unfinished Works, and the Moral Rights of Artists

Alison B. Friedberg*

I. INTRODUCTION

Gaudi's La Sagrada Familia. Da Vinci's *Adoration of the Magi*. Mozart's *Requiem*. Korczak Ziolkowski's Crazy Horse Memorial. Thomas Aquinas's *Summa Theologica*. Unfinished works from diverse mediums are still attributed to the original artist today. The unfinished state of these works of architecture, painting, music, sculpture, and literature does not create a tenuous relationship to the original artist. Instead, unfinished works are often romanticized and cherished as works attributed to an author and to his reputation. The process of creating complex works of art of any medium can be obstructed by conflict, death, economics, or political strife. Despite these barriers that are often out of the control of the parties involved, the cultural property created, albeit unfinished, should belong to the author and should be protected by the author's moral rights.

In 1991, the Visual Artists Rights Act (VARA) went into effect.[1] VARA protects the noneconomic, personal rights of artists.[2] It reflects a

* © 2010 Alison B. Friedberg. J.D. candidate 2011, Tulane University Law School; B.A. 2008, Art History and International Studies, Emory University. The author would like to thank her family for their love and support as well as the members of the *Tulane Journal of Technology and Intellectual Property* for their hard work.

change in established U.S. copyright law by explicitly recognizing that artists of works of visual art have rights in their works separate from economic rights.[3] Case law since VARA's enactment reflected little expansion in the moral rights of authors until January 2010, when the United States Court of Appeals for the First Circuit in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* recognized that artists have rights in unfinished works.[4]

First, this Comment reviews the history of moral rights in the United States and abroad with specific emphasis on the U.S. moral rights statute—VARA. Next, this Comment traces the relationship between unfinished works and U.S. copyright law, *Le Droit Moral* in the United States and abroad, the legislative history of VARA, and U.S. case law on unfinished works. Finally, this Comment explores the future of VARA as a result of the First Circuit's decision in *Büchel* and VARA's official extension to unfinished works.[5]

II. HISTORY

In 1990, Congress passed, and President George H.W. Bush signed into law, the Visual Artists Rights Act of 1990.[6] Prior to this statute, United States copyright law provided little noneconomic protection to authors of works of visual arts.[7] Congress's relationship to the moral rights of artists nevertheless began with Article 1, Section 8, Clause 8 of the United States Constitution, which says Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8]

The Copyright Act of 1976 gave only economic protection to artists.[9] In 1979, California passed the California Art Preservation Act, making it the first state to pass legislation protecting the moral rights of artists.[10] This act was the result of California artists and lawyers lobbying

---

1. 17 U.S.C. § 106A(D)(1)-(2) (1990).
2. *Id.*
3. *Id.*
4. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 65 (1st Cir. 2010).
5. *Id.*
6. *See* Simon J. Frankel, *VARA's First Five Years*, 19 HASTINGS COMM. & ENT. L.J. 1, 2 (1996).
7. *See generally id.*
8. U.S. CONST. art. I, § 8, cl. 8.
9. Lauren Ruth Spotts, *Phillips Has Left VARA Little Protection for Site-Specific Artists*, 16 J. INTELL. PROP. L. 297, 306 (2009).
10. *See* Frankel, *supra* note 6, at 5.

for moral rights because of incidences such as the Alexander Calder sculpture conflict in the Pittsburgh airport.[11] The Pittsburgh airport repainted the Calder sculpture green and gold—Pittsburgh colors—and immobilized it.[12] The Airport Commission was allowed to repaint the sculpture because they owned the work.[13] This appalled and rallied those who supported the moral rights of authors.[14] Since California passed the act, eleven states have followed suit and passed some form of legislation protecting the moral rights of artists.[15]

In 1987, two congressmen advocated for moral rights of authors.[16] Senator Edward M. Kennedy and Representative Edward J. Markey lobbied for, but ultimately failed to achieve, the passage of the Visual Artists Rights Act of 1987.[17] In the meantime, in 1988, the United States adopted the Berne Convention for the Proliferation of Literature and Art in 1988 (Berne Convention), about one hundred years after Berne was initially enacted.[18] The Berne Convention protects the moral rights of authors and stipulates that if an author of a work initiates an action for a violation of moral rights, it is to be governed by the laws of the country where the protection is claimed.[19] When the United States first signed the Berne Convention, Congress believed that current federal and state laws complied with the requirements of the Berne Convention.[20]

Subsequent to signing Berne, visual artists complained of three problems from a lack of moral rights protections: (1) that their works were distorted and mutilated, (2) their works were not properly attributed, and (3) no profits were received from resale of their works.[21] Based on these complaints, perceptions of a lack of protection from the Berne Convention, and current federal and state law, Representative Edward J. Markey and Representative Robert Kastenmeier introduced the Visual Artists Rights Act of 1989 to the House and Senator Kennedy introduced a similar bill in the Senate.[22] "Thus, the Visual Artists Rights Act of 1989

11. *Id.*
12. *Id.*
13. *Id.*
14. *See id.*
15. *Id.*
16. *See* Spotts, *supra* note 9, at 306.
17. *Id.*
18. *Id.*
19. *See* Frankel, *supra* note 6, at 8.
20. *Id.*
21. *See* H.R. REP. No. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918.
22. *See* Spotts, *supra* note 9, at 307.

was enacted as the Visual Artists Rights Act of 1990 and took effect on June 1, 1991."[23]

III. THE VARA STATUTE

Under the Copyright Act, in which VARA is included, a "work of visual art" is defined as "a painting, drawing, print or sculpture, existing in a single copy, [or] in a limited edition."[24] The definition excludes several works that are copyrightable, such as motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, models, diagrams, and works made for hire and merchandising items.[25] The works that are excluded, such as audiovisual works and motion pictures, reflect collaborations because those who participate in these collaborations do not usually own the economic rights.[26] According to the legislative history, if these works were granted protection for moral rights, they might clash with their distribution and marketing mechanisms.[27]

The scope of VARA and the moral rights protected under VARA are rather limited. It includes works created after the statute's enactment on June 1, 1991 and only for the lifetime of the artist plus fifty years or for joint works, the lifetime of the last surviving artist plus fifty years.[28] The rights of an author cannot be transferred, but can be waived by a written agreement.[29] VARA grants three rights: (1) the right of attribution, (2) the right of integrity, and for works of visual art of recognized stature, (3) the right to prevent destruction.[30]

The right of attribution is the artist's "right to claim authorship of a work he or she created."[31] Under VARA, the author "shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create."[32] Under the right of attribution, the author "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."[33]

---

23. *Id.*
24. 17 U.S.C. § 101 (1992).
25. *See id.*
26. *See* H.R. REP. NO. 101-514.
27. *See id.*
28. *See* 17 U.S.C. § 106A.
29. *Id.* § 106A(E)(1).
30. *See id.* § 106A(a)(1)-(3).
31. Monica Pa & Christopher J. Robinson, *Making Lemons Out of Lemons: Recent Developments in the Visual Artists Rights Act*, 3 LANDSLIDE 22, 22 (2009).
32. 17 U.S.C. § 106A(a)(1)(A)-(B).
33. *Id.* § 106A(a)(2).

The right of integrity "allows artists to protect their works against modifications and destructions that are prejudicial to their honors or reputations."[34] Under VARA, an author has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right."[35] VARA also prohibits the "destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."[36]

IV. COPYRIGHT LAW AND UNFINISHED WORKS

Under the Copyright Act, copyright protection extends to "original works of authorship fixed in any tangible medium of expression."[37] When the law of copyright was created in the United States, industry, rather than culture, was a large focus of society.[38] Historically, U.S. intellectual property rights reflected more of an economic emphasis and did not include moral rights protections.[39] Under the Copyright Act, a work is "created" "when it is fixed in a copy . . . for the first time [and] where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time."[40] "A work is 'fixed' when it has been formed, 'by or under the authority of the author,' in a way that is 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.'"[41] "[T]he copyright holder has the exclusive right to publicly display the copyrighted work and to prepare derivative works based upon it."[42] An author can sue for copyright infringement under the Copyright Act to receive injunctive relief plus actual or statutory damages.[43] The legislative history also says that "[a]rtists' rights are consistent with the purpose behind copyright laws

---

34. Lilley v. Stout, 384 F. Supp. 2d 83, 85 (D.D.C. 2005) (citing H.R. REP. NO. 101-514, at 7, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919).

35. 17 U.S.C. § 106A(a)(3)(A).

36. *Id.* § 106A(a)(3)(B).

37. *Id.* § 102(a).

38. *See* Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 417-18 (2009).

39. *Id.* at 418.

40. 17 U.S.C. § 101.

41. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 51 (1st Cir. 2010) (citing 17 U.S.C. § 101).

42. *Id.* at 48 (quoting 17 U.S.C. § 106(5), (2)).

43. *Id.* (citing 17 U.S.C. §§ 502, 504).

and the Constitutional provision they implement."[44] The definitions of "fixed" and "created" under the Copyright Act lend themselves to an inclusion of unfinished works within the statute because the works cannot be transitory to be fixed and only a portion of the work has to be fixed to be created.

V. *DROIT MORAL* AND UNFINISHED WORKS

Moral rights originated in the civil law of nineteenth-century France, where they were termed *le droit moral*.[45] There are four main elements of *droit moral*: first, the right of disclosure, which gives the artist the sole right to decide when and if his work will be shown to the public; second, the right of attribution, which gives the artist the right to have his work credited to him; third, the right of integrity, which disallows anyone from modifying the artist's work without his permission; and fourth, the right of retraction, which permits the artist to stop distribution of or further changes to his work after publication.[46]

Moral rights have existed in European, and especially French, jurisprudence for centuries.[47] During periods such as classical Greece and high Renaissance Italy, moral rights existed to protect both an author's integrity and for the societal protection of the arts.[48] Unlike VARA, which only grants rights of attribution and integrity, many European countries recognize the moral right of disclosure.[49] The right of disclosure under French jurisprudence permits artists to renege on contracts and retrieve unfinished works that were already delivered to the recipient.[50] In addition, European moral rights are mostly inalienable and perpetual.[51]

In contrast with Europe, the United States did not have moral rights protections for artists until VARA in 1990. There are a few reasons for the delay in U.S. protection of moral rights of authors. First, the United States is a much younger country than those in Europe, with a more

---

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

45. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

46. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM. J.L. & ARTS 361, 365-66 (1998).

47. *Id.* at 363-64.

48. *Id.*

49. *See generally id.*

50. *See* Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 336 (1996).

51. *See* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 268 (2009).

recently developed art scene.[52] Second, there is a conflict between moral rights protections and U.S. law in that the common law of property stresses the complete control of one's property.[53] For example, under VARA, if an artist sold a sculpture to the lobby of an office building and the office building wanted to paint it different colors to better match the lobby, the artist could sue the office building for violations of rights of attribution and integrity and recover damages.[54] This moral rights protection conflicts with the common law of property because the common law of property insists that the office building should have control and say over the sculpture.[55]

Moral rights need protection because when an artist creates a work, he injects his personality into the work and thus "the artist's personality, as well as the integrity of the work, should therefore be protected and preserved."[56] Moral rights of an author are personal, rather than economic, for the artist and exist independently of the artist's copyright in his work.[57] More specifically, moral rights theory explains that moral rights need special protection for two reasons. The first is that the artistic creation is an extension of the artist.[58] Indeed, the Second Circuit explained this relationship in *Carter v. Helmsley—Spear, Inc.*, stating that moral rights "spring from a belief that an artist in the process of creation injects his spirit into the work."[59] The relationship between the artist and his creation is so intimate that to inject someone else's vision into the work can be likened to taking something from the original artist.

Second, works of art deserve separate treatment because they are unique and valuable.[60] Professor John H. Merryman, an expert on moral rights and a Professor of Law at Stanford, argues, "[T]here is more at stake than the concern of the artist. . . . There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted. . . . We yearn for the authentic, for contact with the work in its true version."[61] Thus, moral rights are not a momentary,

---

52. Swack, *supra* note 46, at 364.

53. Virginia M. Cascio, *Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under VARA*, 20 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 167, 170 (2009).

54. *See id.* at 170-71.

55. *See id.* at 171.

56. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

57. *Id.*

58. Adler, *supra* note 51, at 269.

59. *Carter*, 71 F.3d. at 81.

60. Adler, *supra* note 51, at 270.

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

dilettantish idea. Instead, protections of moral rights are enduring and necessary in order to capture our current society.

Moral rights protection naturally includes unfinished works. The policy reasons behind moral rights protection for authors justify including unfinished works within the scope of works receiving moral rights protections. The necessity to protect the artist for injecting his spirit into the work and making something unique occurs at every stage of the creation process. The artist's ideas are reflected in continuous choices regarding the works.

VI. LEGISLATIVE HISTORY OF VARA AND UNFINISHED WORKS

Representative Robert W. Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, in his floor statement on the purpose behind VARA, explained that the policy behind moral rights protection for visual arts under VARA is that it meets a "special societal need, and that their protection and preservation serve an important public interest."[62] In addition, Representative Edward Markey explained that artists have a unique role in capturing a culture and documenting it for later generations.[63] He explained that artists depict truths "both beautiful and ugly."[64] An artist is a type of historian who delineates current events and ideas.[65] The public interest and societal need that the legislative history refers to is justified by including unfinished works within VARA. If the purpose behind the statute is to document the work for later generations, then having another person distort or mutilate the original author's unfinished work attaches his name to a work not wholly created by him for generations.

The House Report suggests that courts should use common sense and widely accepted principles of the artistic community to determine whether a work falls within the definition in 17 U.S.C. § 101 of a "work of visual art."[66] Use of common sense and widely accepted principles would indicate that works of visual art includes unfinished works. When an artist begins work on a painting, society does not wait until the last brushstroke to claim that the painting belongs to the artist.[67] Indeed,

62. H.R. REP. NO. 101-514 (1990).
63. *Id.* at 6916.
64. *Id.*
65. *Id.*
66. *Id.* at 6921.
67. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 51 (1st Cir. 2010).

various scholars agree that unfinished works have been accepted as art for centuries. The First Circuit in *Büchel* agreed with the article *Making Lemons out of Lemons* that "the history of art is full of sublime 'unfinished' works of art, such as Leonardo da Vinci's *Statute of a Horse* (begun 1488), Michelangelo's *Tomb of Pope Julius II* (begun 1505), or El Greco's *The Vision of St. John* (1608-14)."[68] In addition, Robert Storr, Dean of the Yale University School of Art, filed an affidavit in support of Büchel arguing that institutional "sponsorship belongs to the category of patronage and does not buy that institution or its public any degree of ownership."[69] Thus, the unfinished work does not become the property of the institution, because the institution is solely a patron.

The legislative history makes it clear that VARA applies to both finished and unfinished works. The history says that sculpture includes "castings, carvings, modelings, and constructions."[70] Similarly, photographs cover positives such as prints and negatives of photographic images.[71] If the legislative history says VARA includes constructions and photographic negatives, it must include unfinished works, which are several steps closer to completion in the creation process.

Lastly, the definition in 17 U.S.C. § 101 of "work of visual art" specifically excludes models and diagrams, which an unfinished installation certainly is not.[72] If the legislature wanted to exclude unfinished works, it would have specified that they were excluded from the definition of "work of visual art" along with models and diagrams.

VII. CASE LAW OF VARA AND UNFINISHED WORKS

In *Gilliam v. American Broadcasting Cos.*, decided under the Copyright Act, a group of writers and performers known as "Monty Python" sued to enjoin the American Broadcasting Company (ABC) from airing their BBC show with twenty-four minutes cut out for commercials.[73] The *Gilliam* Court explained that U.S. copyright law does not recognize moral rights of authors because it only validates economic rights in works.[74] The Court further explained that although only economic rights are recognized, decisions involving the author's personal

68. Pa & Robinson, *supra* note 31, at 24.

69. *Id.* (citing Memorandum of Law in Support of Defendant Christoph Büchel's Motion for Summary Judgment, Aug. 31, 2007 at 7, *available at* https://ecf.mad.uscourts.gov/cgi-bin/login.pl).

70. H.R. REP. NO. 101-514 (1990).

71. *Id.*

72. 17 U.S.C. § 101 (2006).

73. Gilliam v. Am. Broad. Co., 538 F.2d 14, 17-18 (2d Cir. 1976).

74. *Id.* at 24.

right to prevent distortion or mutilation of his work to the public are protected in other fields of law, such as contract law.[75] The United States Court of Appeals for the Second Circuit cited to cases which clarified that to alter an author's work makes the author subject to criticism for work he has not performed.[76] The Second Circuit granted a preliminary injunction preventing further broadcast of "Monty Python" shows on ABC.[77] Thus, courts prior to VARA recognized that an author's reputation can be affected by another person altering his work. This indicates that it is accepted that even if a work is unfinished, the author still has enough rights in the work to prevent another from altering it.

In another case decided prior to VARA, *Dumas v. Gommerman*, the United States Court of Appeals for the Ninth Circuit reasoned that the Copyright Act of 1976 provides that copyright exists from fixation, not publication.[78] The court therefore determined that copyright under the Copyright Act of 1976 exists for works in progress.[79] The United States District Court for the Southern District of New York, in *Playboy Enterprises, Inc. v. Dumas*, reiterated its stance that the Copyright Act protects works in progress.[80] Similarly, the same court in *Zyware, Inc. v. Middlegate, Inc.*, held that in the Copyright Act, there is "no requirement that a work be complete before it is protected by the Copyright Act or before a copyright can be assigned."[81] Certainly works in progress include unfinished works. Courts generally assume that copyright protection applies to works in progress or unfinished works. VARA is part of the Copyright Act and thus protects unfinished works.

In *Carter v. Helmsley-Spear, Inc.*, decided under VARA, three sculptors sued the owners of a commercial building to prevent removal of their artwork from the building.[82] The sculptors worked together on a number of projects including a one-year agreement with the building's management company to design sculptures and installations for their commercial building.[83] The management company later went into

---

75. *Id.*
76. *Id.*
77. *Id.* at 25.
78. Dumas v. Gommerman, 865 F.2d 1093, 1097 (9th Cir. 1989) (citing 17 U.S.C. 102(a) (1976), *rev'd on other grounds by* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739, 742 n.8 (1989).
79. *Id.* at 1097; *see also* 17 U.S.C. § 101 (1976).
80. Playboy Enters., Inc. v. Dumas, 831 F. Supp. 295, 314 (S.D.N.Y 1993) (citing *Gommerman*, 865 F.2d at 1097).
81. Zyware, Inc. v. Middlegate, Inc., No. 96 Civ. 2348(SHS), 1997 WL 685336, at *4 (S.D.N.Y. Nov. 4, 1997).
82. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 80-81 (2d Cir. 1995).
83. *Id.* at 80.

bankruptcy and was taken over by defendant, Helmsley—Spear, Inc., who told the artists it would no longer accept their artwork and would remove their artwork that was already in the building.[84] The Second Circuit determined that the plaintiff's sculptures were works made for hire and therefore outside the scope of VARA.[85] Because the works were made for hire, the court did not consider whether VARA entitled the sculptors to complete the "unfinished" portion of the work.[86] Based on this statement by the Second Circuit and its analysis throughout the opinion involving unfinished sculptures, one could infer that the Second Circuit in *Carter* assumed that VARA applied to unfinished works.[87]

In *Flack v. Friends of Queen Catherine, Inc.*, the United States District Court for the Southern District of New York held that VARA applies to works that are "impermanent or intermediate" if it falls within the definition of a "work of visual art." [88] Similarly, *Lilley v. Stout*, a case in the United States District Court for the District of Columbia, held that "VARA does not pose a *per se* bar to protection for preparatory works."[89] Preparatory works and intermediate works can be likened to an unfinished work. VARA can be assumed to apply to unfinished works since it has been applied to preparatory and intermediate works throughout the existence of the statute.

In *Phillips v. Pembroke Real Estate, Inc.*, the United States Court of Appeals for the First Circuit held that the plain language of VARA does not apply to site-specific works when the park manager-defendant Pembroke moved the artist-plaintiff's site-specific sculptures from their park.[90] The First Circuit in *Phillips* believed that applying VARA to site-specific works conflicted with the common law of property and was not in accord with policy or statutory language of VARA.[91] Site-specific works are distinguished from unfinished installations under VARA in that unfinished installations do not conflict with the common law of property and thus the statute need not clearly mention that installations are specifically included due to the conflict with the common law.[92] More specifically, site-specific art, unlike installations, are designed to

84. *Id.* at 81.
85. *Id.* at 88; *see also* 17 U.S.C. § 101 (1992).
86. *Carter*, 71 F.3d at 88.
87. *Id.*; *see also* Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 51 (1st Cir. 2010) (citing *Carter*, 71 F.3d at 83-88).
88. Flack v. Friends of Queen Catherine, Inc., 139 F. Supp. 2d 526, 532 (S.D.N.Y. 2001).
89. Lilley v. Stout, 384 F. Supp. 2d 83, 88 (D.D.C. 2005).
90. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 131, 143 (1st Cir. 2006).
91. *See id.* at 142-43.
92. *See id.* at 142.

create a relationship between the artistic creation and the surrounding area.[93]

VIII. THE NOTED CASE

The First Circuit's recent decision in *Büchel*, which interpreted VARA to include unfinished works, reflects a major step toward greater moral rights for artists. The facts of this case are perhaps best expressed by William Patry, who believes that it was truly a shame that a conflict ensued and a potentially meaningful work was left unfinished.[94] Massachusetts Museum of Contemporary Art (MASS MoCA) solicited Christoph Büchel, a Swiss artist, to create a work of installation art for Building 5, an enormous exhibition space spanning the length of a football field.[95] Büchel proposed, and the museum agreed, to an installation entitled "Training Ground for Democracy" where a village would be constructed and visitors could walk within the installation.[96] The *New York Times* described Büchel's works, including "Training Ground for Democracy," as "elaborate" and "politically provocative environments."[97] MASS MoCA agreed to fund the project, which Büchel was to direct, but no agreement was formalized in writing as to the scope or cost of the project.[98] However, the parties did agree that once the installation was complete and once the exhibition ended, Büchel had sole title to copyright in the installation.[99] Conflict regarding budget erupted between the parties during the creation of the installation.[100] MASS MoCA thought Büchel's instructions were unclear and his financial demands excessive, while Büchel thought the museum compromised his vision and ignored his intentions.[101] After the conflict emerged, the museum continued work on the project and made decisions without Büchel's express consent.[102]

Eventually, disagreements between MASS MoCA and Büchel became irreparable and the Museum sued Büchel, seeking a declaration

---

93. Spotts, *supra* note 9, at 301.

94. 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:18 (2009).

95. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 41-42 (1st Cir. 2010).

96. *Id.* at 43.

97. *See* Randy Kennedy, *Artist Rights Act Applies in Dispute, Court Rules*, N.Y. TIMES, Jan. 28, 2010, *available at* http://www.nytimes.com/2010/01/29/arts/design/29artist.html.

98. *Büchel*, 593 F.3d at 43.

99. *Id.* at 43-44.

100. *Id.* at 44.

101. *Id.*

102. *Id.* at 45.

that it could present the unfinished installation to the public.[103] The museum invested tremendous expense and time into the Büchel installation and wanted to ensure it was not fruitless.[104] Büchel counterclaimed, seeking a declaratory judgment and an injunction preventing the museum from displaying his unfinished work.[105] He sought damages for the museum's distortions and modifications to his work and for allowing the public to see his work (while partially covered in tarps) as they passed through on the way to another exhibit.[106]

The First Circuit held that VARA extends to unfinished works that are "works of visual art" under the Copyright Act.[107] VARA is to be read in light of the definitions in the Copyright Act because VARA is part of the Copyright Act, which states that the definitions in 17 U.S.C. § 101 control, unless otherwise stated.[108] The Court analyzed the plain language of the statute to determine whether VARA included an unfinished work.[109] The definition of "work of visual art" in 17 U.S.C. § 101 lists what is included in the statute and what is excluded.[110] "Training Ground for Democracy" is an unfinished sculptural installation, which is not one of the works excluded from the definition of "work of visual art."[111] The First Circuit decided that an "*unfinished* version of a sculpture existing in a single copy" fell within what is included as a "work of visual art."[112]

The definition section in the Copyright Act also defines when a work is created and when a work is fixed. The First Circuit held in *Büchel* that based on these definitions, the protections of the Copyright Act apply to unfinished works.[113] Thus, VARA is read to include unfinished works that are "fixed" and, if completed, would be protected under the statute.[114]

In addition to the plain language of the statute and case law, the First Circuit in *Büchel* explained that the legislative history of VARA was

---

103. *Id.* at 41.
104. *Id.* at 45.
105. *Id.* at 41.
106. *Id.* at 46.
107. *Id.* at 48.
108. *Id.* at 51.
109. *Id.*
110. 17 U.S.C. § 101 (1992).
111. *Büchel*, 593 F.3d at 51.
112. *Id.*
113. *See id.*; *see also* Dumas v. Gommerman, 865 F.2d 1093, 1097 (9th Cir. 1989); Zyware, Inc. v. Middlegate, Inc., No. 96 Civ. 2348 (SHS), 1997 WL 685336, at *4 (S.D.N.Y. Nov. 4, 1997); Playboy Enters., Inc. v. Dumas, 831 F. Supp. 295, 314 (S.D.N.Y. 1993).
114. *See Büchel*, 593 F.3d at 51.

in line with their conclusion.[115] The court stated that common sense also supported the conclusion that VARA extends to unfinished works because moral rights protect the personal nature of an author's work, which does not exist solely upon completion of the work.[116] Thus, the First Circuit held that VARA protects unfinished works that fall within the definitions in the Copyright Act.[117] The First Circuit's decision was bold in its choice to read VARA expansively and promote moral rights in unfinished works, but was based on a clear understanding that throughout copyright law and VARA, unfinished works were included with finished works.

IX. FUTURE OF VARA AND UNFINISHED WORKS

The VARA statute and American ideas on the scope of moral rights of authors are likely to change post-*Büchel*. This decision pervaded blogs, newspapers, and Web sites, as well as conversations in both the art and intellectual property worlds. As a result of this decision, artist's moral rights will expand, but a subsequent increase in conflicts between institutions and artists will probably result.

A positive shift in VARA protection as a result of the *Büchel* opinion is that courts might overrule the *Phillips v. Pembroke Real Estate, Inc.*, court and extend VARA to site-specific works. Both artists and experts view site-specific works as closely tied to their surrounding area and removal from that sight would destroy their meaning.[118] For example, if the sculpture of Lincoln in his chair at the Lincoln Memorial-situated with other monuments to George Washington and Franklin Delano Roosevelt-was moved from Washington D.C. to Philadelphia, the original capital of the United States, the meaning and purpose of the monument would be altered. Even though the First Circuit in *Büchel* distinguished their case from *Phillips*, both cases were First Circuit opinions. After *Büchel*, the First Circuit might be more inclined to expand VARA to include site-specific works as well. Site-specific works more closely resemble "works of visual art" than items of property. More specifically, site-specific works are comparable to a painting, drawing, print or sculpture which are "work[s] of visual art"

115. *Id.*
116. *Id.* at 51-52.
117. *Id.* at 52.
118. *See* Laura Flahive Wu, Massachusetts Museum of Contemporary Art v. Büchel*: Construing Artists' Rights in the Context of Institutional Commissions*, 32 COLUM. J.L. & ARTS 151, 161 (2009).

rather than a poster, technical drawing, or a work made for hire which are excluded from "work[s] of visual art."

A potential problem with the First Circuit's decision in *Büchel* is that at the time of VARA's enactment, the legislature indicated that the statute was supposed to be read narrowly.[119] According to the House Report, VARA was supposed to be limited in nature while still protecting both the interests of visual artists and copyright owners and users.[120] Indeed, Representative Markey testified during the arguments for the passage of VARA that the statute should only cover a select group of artists.[121] For these reasons, the intent of the legislature could be considered to exclude unfinished works. However, for all of the aforementioned reasons, including the House Reports and plain language of the statute, it seems that despite Congress's intent to construe VARA narrowly, unfinished works are to be included within the statutes protection.

As a result of *Büchel* and extending VARA to unfinished works of art, artists might become arrogant in negotiations with museums. Prior to *Büchel*, many artists were unaware of VARA, confused about VARA claims, and few victories for artists existed.[122] As a result of the mass amounts of press coverage surrounding the *Büchel* decision, artists might be more aware of VARA and more inclined to spend money on litigation for moral rights violations.[123] Encouraged by this victory, artists might be more aware of their specific rights under VARA and unlikely to waive any rights under the statute. Museums, on the other hand, might become more astute at negotiating contracts with artists. Artists should be wary of museums pushing contracts at artists quickly, in hopes of getting them to waive their rights.

It follows that as a result of the *Büchel* decision, an increase in contracts between artists and museums might result. Museums might pursue claims under breach of contract suits rather than under VARA

---

119. H.R. REP. NO. 101-514 (1990).

120. *Id.* at 6920.

121. *See id.* at 6921.

122. *See* Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999) (holding that the artist satisfied all the VARA requirements because he was the author of a "work of visual art," the work was of recognized stature, and it was purposely ruined when the City destroyed the sculpture Martin created for the city. Martin received damages from the city for the action); *see also* Hunter v. Squirrel Hill Assocs., 413 F. Supp. 2d 517 (E.D. Pa. 2005) (holding that repairers failure to make repairs timely and properly, which caused plaintiffs mural to become wet was grossly negligent under VARA, but the claim was filed outside the statute of limitations so it was dismissed).

123. *See* Rikki Sapolich, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 IDEA 453, 482 (2007).

now that VARA extends to unfinished works. Currently, several art institutions such as The Institute of Contemporary Art in Boston and Yale University Art Gallery require signed agreements before an installation begins.[124] Other institutions such as the Mattress Factory in Pittsburgh and the Museum of Contemporary Art in San Diego do not require artists to sign agreements before they start an installation.[125] Subsequent to the Boston Globe calling the MASS MoCA/Büchel conflict "the ultimate how-not-to guide in the complicated world of installation art," more museums and art institutions might require contracts before commencing an installation.[126] However, MASS MoCA Museum Director Joe Thompson appears steadfast in his belief not to require contracts before installations despite the complicated mess of the Büchel installation.[127] Thompson believes if you start requiring contracts "[y]ou risk losing the magic that makes this possible."[128] VARA requires waivers to be in writing but the legislative history appears to reflect a preference for all agreements to be in writing.[129]

Another result from the *Büchel* decision is the negative attention MASS MoCA received. Even though Büchel is probably guilty of being unclear, difficult, and lofty, most of the attention in light of the recent decision and the District Court decision has been negative for MASS MoCA.[130] According to the article *Making Lemons with Lemons*, MASS MoCA "damaged itself in the eyes of art critics, patrons, and the public" when it showed Büchel's unfinished installation to the public.[131] Ken Johnson, the art critic from the *Boston Globe*, referred to the way MASS MoCA dealt with the Büchel installation as "sad, dumb, and shameful."[132] Roberta Smith in the *New York Times* wrote "[w]hen a museum behaves badly, it's never pretty. But few examples top the depressing spectacle at the Massachusetts Museum of Contemporary Art."[133] Unfavorable views

---

124. *See* Wu, *supra* note 118, at 167.

125. *Id.*

126. Geoff Edgers, *Dismantled*, BOSTON GLOBE, Oct. 21, 2007, *available at* http://www.boston.com/ae/theater_arts/articles/2007/10/21/dismantled/.

127. *See* Wu, *supra* note 118, at 168.

128. *Id.* at 167-68 (citing Jacquelyn Lewis, *Joe Thompson on a Future Without* Büchel, ARTINFO, Sept. 27, 2007, *available at* http://www.artinfo.com/articles/story/25709/newsmaker_joe_thompson.)

129. *See* H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6930.

130. *See* Pa & Robinson, *supra* note 31, at 24.

131. *Id.*

132. *Id.* (citing Ken Johnson, *MASS MoCA Has Mishandled Disputed Art Installation*, BOSTON GLOBE, July 1, 2007, *available at* http://www.encyclopedia.com/doc/IP2-8712534.html).

133. *Id.* (citing Roberta Smith, *Is It Art Yet? And Who Decides?*, N.Y. TIMES, Sept. 16, 2007, *available at* http://www.nytimes./2007/09/16/arts/design/16robe.html?ex=1347595200&en=9993a2f302bab9c9&ei=5088&partner=rssnyt&emc=rss).

toward other museums or harsher critiques of their practices might occur post-*Büchel*.

X. CONCLUSION

Donn Zaretsky, author of the Art Law Blog and lawyer for Büchel in district court, said that the First Circuit's decision in *Büchel* reflects "[a] good day for artists' rights."[134] It took twenty years for a pivotal VARA decision and over two hundred years for a genuine moral rights victory in the United States. The ramifications post-*Büchel* for authors of "works of visual art" are uncertain. What is certain is that moral rights for authors are long-standing and critical to preserving our culture. Hopefully, the *Büchel* decision will have positive impacts on artists' rights and greater protections for them, along with more widespread court acceptance.

134. Donn Zaretsky, *Reversed*, ART L. BLOG (Jan. 27, 2010, 11:59 PM), http://theartlaw blog.blogspot.com/2010_01_01_archive.html.