

## NOTES

### Whitewashed Histories: VARA, *Kerson*, and the Concealment of Slavery’s Legacy

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#### I. OVERVIEW

For over twenty years, Sam Kerson’s murals decorated the Vermont Law School’s Chase Community Center’s walls.<sup>1</sup> The murals depicted the enslavement of Black people in America as well as Vermont’s role in the abolition of slavery.<sup>2</sup> While the premise of the murals sounds noble, many of the law school’s students—particularly its Black students and students of color—found Kerson’s style and depiction of Black people in the murals to be derogatory and complained to the school to have them removed.<sup>3</sup> The students alleged that Kerson depicted Black people as “cartoonish” and “similar to ‘Sambos,’” while also coloring the white enslavers’ and abolitionists’ skin green, thus removing whiteness from its role in the evils of American slavery.<sup>4</sup> In an attempt to mitigate the situation, the law school placed plaques next to the murals to explain the artist’s intent and the work’s meaning.<sup>5</sup> However, that did little to comfort the students or persuade them to admire Kerson’s murals.

Eventually, the law school decided to cover the murals with white panels.<sup>6</sup> This decision prompted Kerson to sue, alleging that the Vermont Law School violated his rights under the Visual Artists Rights Act of 1990 (VARA).<sup>7</sup> Kerson requested a preliminary injunction from the United

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1. *Kerson v. Vermont Law School*, 79 F.4th 257, 260-61 (2d Cir. 2023).
  2. *Id.* at 259.
  3. *Id.* at 261.
  4. *Id.*
  5. *Id.*
  6. *Kerson*, 79 F.4th at 261.
  7. *Id.* at 261-62.

States District Court for the District of Vermont to force the law school to remove the panels and continue displaying his murals.<sup>8</sup> The Vermont district court denied his request because Kerson failed to establish how covering the panels violated his rights under VARA.<sup>9</sup> Kerson then appealed to the Second Circuit. The United States Court of Appeals for the Second Circuit held that the Vermont Law School did not violate VARA by concealing the murals, as the plain meaning of the statute's violations does not include concealment. *Kerson v. Vermont Law School*, 79 F.4th 257, 273-74 (2d Cir. 2023).

## II. BACKGROUND

Congress added the Visual Artist Rights Act of 1990 to the Copyright Act to balance and recognize an artist's right to protect certain aspects of their work along with an art buyer or owner's right to exert control over what is essentially their property.<sup>10</sup> VARA imbues a visual artist with moral rights.<sup>11</sup> Those moral rights are the right of attribution, integrity, and the right to prevent the destruction of visual artworks of "recognized stature."<sup>12</sup> The statute outlines the rights of attribution and integrity as being an artist's right of authorship and to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."<sup>13</sup> The statute's third prong of preventing an artwork's destruction only applies to protect works of "recognized stature."<sup>14</sup>

In *Castillo v. G&M Realty*, the Second Circuit Court of Appeals outlined a work of "recognized stature" as one that is acknowledged (recognized) by its relevant community as being one of high value, quality, and caliber (leading to its stature).<sup>15</sup> In this context, the relevant community is usually made up of those who constitute the "art world"—art critics, historians, gallerists, artists, museum curators, etc.<sup>16</sup>

To prove liability under VARA, a plaintiff must show two factors:

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8. *Id.* at 262.

9. *Id.*

10. *Id.* at 263, 273.

11. *Kerson*, 79 F.4th at 263.

12. *Id.*; see also 17 U.S.C. §106A(a).

13. 17 U.S.C. §106A(a); see also *Kerson*, 79 F.4th at 263 (citing *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 165 (2d Cir. 2020)).

14. *Kerson*, 79 F.4th at 263.

15. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020).

16. *Id.*

- 1) That the defendant made an intentional distortion, modification, or mutilation to the artist's work *and*
- 2) That the changes resulted in prejudice to the artist's reputation or honor.<sup>17</sup>

Both factors work in conjunction. If a plaintiff fails to prove the first factor, they cannot move on to the second factor.<sup>18</sup> The Second Circuit also noted that not all changes to an artwork are understood as violations under VARA; only changes that affect and impact an artist's reputation or honor count.<sup>19</sup>

VARA also has exceptions.<sup>20</sup> The Court notes two: the "passage of time exception" and the "public presentation exception."<sup>21</sup> The passage of time exception details that any deterioration that occurs to a work of art due to time passing or the way its materials naturally age is "not a distortion, mutilation, or other modification described in [the statute]."<sup>22</sup> The public presentation exception details that a work has not been modified, distorted, or destroyed under VARA if it is changed by how it is presented, such as changes in lighting, placement, or preservation, so long as gross negligence is not the cause of the change to the work.<sup>23</sup>

In *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, the First Circuit Court of Appeals determined that partially covering an unfinished art installation was not an intentional modification of the work in violation of VARA.<sup>24</sup> In that case, artist Christoph Büchel sued the Massachusetts Museum of Contemporary Art alleging in one of his claims that the museum distorted his unfinished work by partially covering it with tarps—violating his integrity rights under VARA.<sup>25</sup> The First Circuit found that the action of partially covering the unfinished installation did not violate VARA as covering the work is not an intentional modification, noting that if it found covering the work as an intentional distortion, the museum could still be liable for an integrity violation if it covered the work to hide it from the public before its debut.<sup>26</sup>

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17. *Kerson*, 79 F.4th at 269.

18. *Id.*

19. *Id.*

20. *Kerson*, 79 F.4th at 264; *see also* 17 U.S.C. §106A(a).

21. *Kerson*, 79 F.4th at 264; *see also* 17 U.S.C. §106A(c)(1)-(2).

22. *Kerson*, 79 F.4th at 264; 17 U.S.C. §106A(c)(1).

23. *Kerson*, 79 F.4th at 264; 17 U.S.C. §106A(c)(2).

24. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 62 (1st Cir. 2010).

25. *Id.* at 61.

26. *Id.*; *see also Kerson*, 79 F.4th at 270.

Despite Congress's intentions and efforts when enacting VARA, the line between an artist's interest in their artwork and a property owner's interest in the work can quickly become blurred, especially because VARA does not create a mandate for art owners or artists to preserve art "at all cost and without due regard for the rights of others."<sup>27</sup> Determining what interest outweighs the other is largely left to the courts to decide through statutory interpretation, contextual analysis, and reference of prior decisions.

### III. COURT'S DECISION

In the noted case, the Second Circuit adhered to VARA's two-step test of determining liability and found that the law school's concealment of Kerson's murals does not violate his artistic rights under VARA. The Court began its analysis by interpreting the plain meaning of the statute's language as well as the district court's dictionary definitions and understanding of the terms "modification" and "destruction." In his claims, Kerson alleged that Vermont Law School's covering of his murals amounted to destroying them, or at least an intentional modification of them in violation of VARA.<sup>28</sup> In order to understand whether the law school's actions violated Kerson's VARA rights, the Court relied mainly on the district court's examination of the plain meaning of "modification" and "destruction" and applied them to the context of this case and to VARA's intended purpose.

VARA prevents the destruction of a work of "recognized stature" and gives the work's artist the ability to exercise this right of protection.<sup>29</sup> Of the multiple definitions of "destroy," the Court concluded that the word means to ruin or damage a work of art beyond visibility, discernibility, or reparability.<sup>30</sup> It is focused on the physical changes made to a work of art.<sup>31</sup> In this context, the panels covering the murals do not touch the murals nor do they destroy them. The murals are left intact; they are merely hidden from view.<sup>32</sup> Therefore, the murals are not ruined beyond discernibility and the panels do not destroy them under VARA.<sup>33</sup> Kerson responded with an expert's opinion that the potential conditions behind the panels risked the durability of the murals, potentially leading

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27. *Id.* at 273 (citing *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80 (2d Cir. 1995)).

28. *Kerson*, 79 F.4th at 261.

29. *Id.* at 266; *see also* 17 U.S.C. §106A(a)(3)(B).

30. *See also Kerson*, 79 F.4th at 266.

31. *Id.*

32. *See id.*

33. *Id.*

to their destruction over time.<sup>34</sup> The Court found that arguing for the potential of destruction would broaden VARA's reach unduly.<sup>35</sup>

Then in analyzing the meaning of "modification," the Court turned to how the word is used in VARA's phrasing. The statute only gives artists the right to prevent the intentional modification or distortion of their work, and through that language the Court inferred that modification is similar to a change or alteration done to the artwork that affects how it is perceived.<sup>36</sup> Again, the Court found that the panels covering the murals do not modify them within VARA's understanding of the word because the murals are completely covered and therefore there is nothing visible to inform a viewer's perception of the work.<sup>37</sup> The panels do not change the murals' content nor its characteristics. They simply hide the murals from the public—like a tarp covering a work of art before its premiere, which the Court already determined in *Büchel* was not a modification of the work under VARA.<sup>38</sup> Therefore, the law school's panels neither destroyed nor modified Kerson's murals and Kerson failed to prove the first factor of VARA's two-step test.<sup>39</sup> Because he failed to prove the first factor, the Court found that he also could not demonstrate how the covering of his murals affected his reputation because there was no distortion or modification to his murals in the first place.<sup>40</sup>

#### IV. ANALYSIS

Who is the intended consumer of a work of art? Congress argues through its enacted VARA that art is for both the artist, in that the statute protects an artist's work from being intentionally changed or destroyed, and for the public, since the statute also protects the public's interest in the artwork and art as a whole. The courts, however, prove that while VARA attempts to balance those interests, an artist's interest is protected only up to a point—and rightfully so.

In the noted case, the Second Circuit established the decision that there are limits to the narrow protections VARA grants artists. VARA protects against physical damage to an artwork as well as reputational damage to its artist, but it cannot command artwork to be displayed

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34. *Id.* at 273.

35. *Id.*

36. *Id.* at 264, 268.

37. *Id.* at 268.

38. *Büchel*, 593 F.3d at 61; *see also id.* at 270.

39. *Kerson*, 79 F.4th at 273-74.

40. *Id.* at 272.

forever.<sup>41</sup> The Court's decision aligns with the First Circuit's decision in *Büchel*, where it determined that covering an artwork does not lead to a VARA violation, the same way it would not be a violation if the establishment covered the work to hide it from public view.<sup>42</sup> In that line of thinking, the law school's covering of the murals leaves Kerson and those who remember the murals in a perpetual state of anticipation for the day when they may be revealed again to the public. The panels also act as a shield, protecting Black law students from seeing their ancestors' pain caricaturized with no accountability and for the sake of performative social justice.<sup>43</sup>

VARA places significant emphasis on the intentionality behind a work's distortion.<sup>44</sup> While Kerson may view his work's concealment as a destruction, it is not as though the public has not seen and never will see his murals, as there are articles written about the murals and images of them circulating online. Without the Internet, the court's decision could have been more devastating to Kerson and would have toed the line of invalidating Congress's intent with VARA. By appearing online, though, the murals are immortalized, archived, and have a wider reach than at the law school.

The murals' concealment from the public aligns with the law school's intention to make its students of color more comfortable in the wake of George Floyd's murder.<sup>45</sup> While VARA outlines an artist's moral rights, the Court inadvertently outlined a kind of moral rights for the public as well through its decision to permit the concealment of artwork under VARA. Kerson's art style premised the issue between him and the law school because the students found his work to be a derogatory interpretation of many of their painful collective histories. And while Kerson considers those murals to be one of his most prominent works, the work itself was suspect in its origins and execution due to Kerson being a(nother) white man wrongfully depicting American history.<sup>46</sup>

In an interview with CNN, Kerson claimed that: "The mural has no existence without its relationship to the viewer . . . by being covered, it's

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41. *Id.* at 260.

42. *Id.* at 270; *see also* *Büchel*, 593 F.3d at 61.

43. *See Kerson*, 79 F.4th at 260.

44. *See generally* 17 U.S.C. §106A(a).

45. Jenna Russell, *In Vermont, a School and Artist Fight over Murals of Slavery*, N.Y. TIMES (Feb. 21, 2023), <https://www.nytimes.com/2023/02/21/us/vermont-law-art-slavery.html>.

46. *Id.*; *see generally Kerson*, 79 F.4th at 261.

made dysfunctional . . . .”<sup>47</sup> Kerson’s argument asserts that art must be seen, or consumed, in order to exist. If that is the case, does the Court’s decision completely negate Congress’s intentions for VARA? Kerson would argue that the Court’s allowance of his work to be concealed has essentially destroyed his work in violation of the statute since the cultural connection to a work of art can only be established through its visibility to the public.<sup>48</sup> According to Kerson, art must be consumed in order to be valued; the artist’s work must be seen for the work and its message to have value. In some ways, he is not wrong; the integral aspect of visual art is that it is a visual medium. A viewer must see a work of art in order to recognize it as such.<sup>49</sup> Kerson’s argument suggests that he had an audience or viewer in mind when painting his murals even if that viewer is not made clear in his work. He asserts that by covering his work with panels, Vermont Law School and the Second Circuit court have denied him, his work, and his intended viewers the full artistic conversation and experience. In being so focused on asserting his artistic rights under VARA, though, Kerson ignores the preferences of the communities centralized in his work.

Art is incredibly expansive and imaginative, so it is not necessarily Kerson’s imaginings that are problematic—it is his lack of commitment to portraying the entire truth of American slavery and his claiming the flawed work as one of “social justice.”<sup>50</sup> But justice for whom? Kerson intentionally chose the colors of his murals, with their bright greens, pinks, yellows, and made oblique the reference to whiteness in his creative depiction of skin tones. What stands out starkest in his murals are not the green backdrops and colorful garments, but the brown skin of those enslaved and abused. Their skin color bears the scars, trauma, and humiliation of enslavement as the green- and pink-skinned enslavers maintain a separateness from the evilness of their actions—as well as a separateness from whiteness.<sup>51</sup> Should Vermont Law School’s Black students’ painful heritage, and Kerson’s derogatory caricatures, continue

47. Stephanie Becker, *Vermont Law School Can Hide a Controversial Mural Depicting Slavery, Court Rules*, CNN (Aug. 26, 2023, 1:17 PM), <https://www.cnn.com/style/vermont-law-school-slavery-mural-lawsuit/index.html>.

48. Elizabeth M. Bock, *Using Public Disclosure as the Vesting Point for Moral Rights Under the Visual Artists Rights Act*, 110 MICH. L. REV. 153, 166 (2011).

49. See also *id.*

50. *Kerson*, 79 F.4th at 260.

51. *Id.* at 261; see also, Claire Voon, *Second Judge Rules that Vermont Law School Did Not Violate Artist’s Rights in Covering Up Problematic Murals*, ART NEWSPAPER (Aug. 23, 2023), <https://www.theartnewspaper.com/2023/08/23/judge-rules-vermont-law-school-did-not-violate-vara-covering-up-problematic-murals>.

to slam them in the face as they attempt to also learn the laws that allowed and justified their ancestors' enslavement in the first place? While the answers to these questions were not the Court's focus, it rightfully gave the law school and other art owners a loophole to maintain a balance between respecting art and artists and achieve dominance over an artist's moral rights by simply concealing their work.

If the court had found that concealing artwork was also a violation of VARA, it would have disrupted the balance Congress sought when enacting the statute.<sup>52</sup> There must be a balance. VARA respects an artist's right to protect their work and reputation, but to expand those rights to the point of preventing art owners from covering artworks goes too far and gives artists and the statute too far of a reach into what art owners can do with their property—beyond what Congress intended when implementing the statute.<sup>53</sup>

While Congress may have conceived VARA as a way to prevent the frivolous destruction or distortion of an artist's work, Kerson's case and arguments show that the statute can also function as a double-edged sword to artists.<sup>54</sup> When pushing VARA forward, several members of Congress recognized art's importance as a reflection of the nation's culture as well as art's function as a kind of cultural archive.<sup>55</sup> VARA's implementation also recognizes how much of themselves an artist puts into their work. That artistic dedication is felt throughout the noted case's opinion and in how Kerson desperately grasped at the protections he assumed he had under VARA.

The court, at times, seemed purposefully obtuse in how it rebuffed Kerson's arguments. His arguments do have some merit, though. Kerson asserted that the court needed to analyze its understanding of "modification" alongside how the specified modification affected his reputation, which the court disagreed with.<sup>56</sup> The court erred slightly in this because in looking at the overall intent and purpose of VARA, its goal is to protect artists' reputations.<sup>57</sup> By focusing solely on how the statute utilizes the word, the court ignored VARA's overall intentions. That is not to say the court's analysis was incorrect. It concluded that the statute's language implies that an artist's reputation is protected through the prevention of the artwork's "destruction" or "modification," which aligns

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52. See also *supra* note 10.

53. *Supra* note 10; see also *Kerson*, 79 F.4th at 273.

54. See generally *supra* note 12.

55. 17 U.S.C. §106A(a).

56. *Kerson*, 79 F.4th at 267.

57. *Bock*, *supra* note 48, at 166.



with VARA's goals, because, while "modify" and "destroy" can have metaphorical meanings when applied to art and reputations, VARA's use of those words is very narrow—or at least, the courts apply them very narrowly. Kerson's understanding of VARA placed too much emphasis on art and "self," whereas the court's understanding focused more on an artwork's relationship to the spaces and contexts around them, which is more in line with Congress's intent. If the court had focused solely on the reputational aspect of VARA, perhaps it would have arrived at a different conclusion, expanding VARA's reach but also muddying its analysis and application.

Vermont Law School's Black students no longer have the false perceptions of their ancestors' pain looming over them. One possible good that could have come from Kerson's murals is that while reminding Black students of their ancestors' pain, it should have also reminded them that they belong at the law school. Their places were hard-earned and well-deserved. With the panels now covered, the Second Circuit established that while VARA's language may seem broad, it is applied in courts very narrowly, because concealing an artwork is not the same as destroying or modifying it under the statute. In the future, plaintiffs must bring a specific set of facts and circumstances in order to satisfy the courts' standards of proving liability under VARA. Although the noted case may have been a loss for Kerson and other artists seeking to sue under VARA, it teaches art owners how to establish proper boundaries in the midst of VARA's balancing act.

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