

# MURAL ©ONTROVERSY

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## INTRODUCTION

Controversies about murals in public and semi-public spaces are a staple of American life. Complaints have run the gamut from aesthetic displeasure to political antipathy and cultural hostility.<sup>1</sup> This history is fraught with community discord, major shifts in social understandings, and swings in currents of thought. One of the most recent disputes involves the covering of a two-panel mural by Samuel Kerson installed at Vermont Law and Graduate School in 1993.<sup>2</sup> The two-panel mural is located in a lounge area on the second floor of the school’s Chase Community Center. The recent

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\* Professor of Law, New York Law School. Thanks to my friend and onetime Georgetown colleague Gerry Spann for reading and commenting on this essay. I also extend my thanks to New York Law School for its continued support of my writing efforts and to those colleagues who participated in a discussion of this project at a gathering on November 8, 2022. Additional, extremely helpful suggestions were made by participants at the Thirteenth Annual NYU Tri-State Region IP Workshop at NYU School of Law on January 13, 2023. Finally, I thank the staff of the Vermont Law Review for their careful and thoughtful editing of this essay.

1. Two histories of public murals reflect both satisfaction and discord with artists’ work. *See generally* KARAL ANN MARLING, *WALL-TO-WALL AMERICA: A CULTURAL HISTORY OF POST OFFICE MURALS IN THE GREAT DEPRESSION* (1982); GLENN PALMER-SMITH ET AL., *MURALS OF NEW YORK CITY* (2013).

2. *See* Order on Motion for a Preliminary Injunction at 2–3, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

controversy arose after some students complained to the school's administration that the figures of Black people in the murals, created by the artist to commemorate the work of abolitionists and those working in the Underground Railroad, demeaned the very people Kerson intended to praise.<sup>3</sup>

The story, described more fully in the next segment of this essay, raises a challenging series of issues, both for those involved in ongoing efforts to dismantle racist monuments and memorials and for those concerned about the scope of moral rights in American copyright law. The debate about the Vermont Law and Graduate School mural is somewhat different from those surrounding the multitude of extant monuments aggrandizing the Confederacy, its post-war supporters, and Southern culture, mostly erected across the South in the late 19th and early 20th centuries.<sup>4</sup> Proposals to remove monuments commemorating the Confederacy typically triggered debates about the propriety of preserving historical reminders of an overtly racist past, even if the history itself is unpleasant. Perhaps the most noteworthy of the public disputes was over the removal of the Robert E. Lee statue from Monument Avenue in Richmond, Virginia.<sup>5</sup> In contrast, the Kerson murals originally were intended as tributes to activist opponents of slavery but are now subject to criticism in some quarters as an inept and insulting effort to combat racism.

The moral rights issue is tangled up with the cultural conflicts engendered by Kerson's work. Do the moral rights provisions in the Visual

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3. Lorentz Hansen, *Chase Mural to Be Replaced, Subject to Board of Trustees' Decision*, THE FORUM (July 24, 2020), <http://vlsforum.com/2020/07/24/chase-mural-proposed-to-be-replaced/>.

4. See, e.g., Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1405–06 (2020). The monuments proliferated between 1889 and 1920, when the bulk of Jim Crow statutes were adopted across the South and other areas of the nation. *Id.* Recent disputes about Christopher Columbus statues also have arisen across the country. His arrival on these shores marked the beginning of a lengthy and ongoing history of dispossessing native peoples of their land and culture. See Ross Sandler, *Toppling Christopher Columbus: Public Statues and Monuments*, CITYLAND (Jan. 4, 2023), <https://www.citylandnyc.org/?s=columbus>.

5. See, e.g., Vimal Patel, *Virginia Supreme Court Clears Path for Removal of Robert E. Lee Statue*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/02/us/robert-e-lee-statue-removal-virginia.html>. CNN reported that 73 Confederate monuments were removed or renamed during 2021. Giselle Rhoden & Dalila Paul, *73 Confederate Monuments Were Removed or Renamed Last Year, Report Finds*, CNN, <https://www.cnn.com/2022/02/02/us/confederate-monuments-removed-2021-whose-heritage/index.html> (last updated Feb. 3, 2022). Also, the New York Times reported that over 160 Confederate symbols were removed in 2020. Neil Vigdor & Daniel Victor, *Over 160 Confederate Symbols Were Removed in 2020, Group Says*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/us/confederate-monuments-george-floyd-protests.html>. The controversy over removal of Confederate symbols has continued beyond the process of actually deciding to make the change. Very few contractors are willing to undertake the work and those that do have faced harassment and threats. See, e.g., Matt Stevens, *For a Black Man Hired to Undo a Confederate Legacy, It Has Not Been Easy*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/04/17/arts/confederate-statue-removal-contractor.html>.

Artists Rights Act (VARA) of copyright law, which protect works of visual art<sup>6</sup> from modification or destruction, suggest a need to evaluate either selection of artistic styles or the contours of their imagery some viewers may find demeaning? The words of the moral rights provisions, rife with ambiguity, say nothing directly about these questions. The statute<sup>7</sup> provides that artists have limited rights during their lives to prevent mutilation or modification of a work of visual art “which would be prejudicial to his or her honor or reputation” or to “prevent any destruction of a work of recognized stature.” The notions of prejudicing an artist’s honor or reputation or measuring the stature of artistic work certainly are open ended. Can a reputation, for example, be prejudiced by harsh criticism of the imagery, style, or political content of a work of fine art? Or may an artwork itself serve as its own reputational downfall? Similarly, is the stature of a work diminished by the harshness of its critics? Or may shifting cultural perceptions about the impact of a work of fine art’s style or content serve to diminish its stature over time? There is, of course, no end to the irony associated with the *Kerson* dispute arising in a law school.

Additional ambiguity arises because the law school, after originally stating it intended to paint over the murals, altered its plans to installing a barrier hiding the murals. In either case, its desire was to permanently restrict the ability of members of the law school community to view the images.<sup>8</sup> The school therefore claims that the work will neither be mutilated nor destroyed but simply placed in a form of permanent “storage.” It is true that a great deal of noteworthy art owned both by private parties and public institutions is now socked away in secure storage areas and vaults.<sup>9</sup> Much of it has not been seen

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6. A “work of visual art” as defined in 17 U.S.C. § 101 explicitly includes “paintings.” There is no requirement that the work surface be a canvas or other traditional material. It can be on any surface.

7. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(3) reads as follows:

(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—  
[ . . . ]

(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.

8. After *Kerson*’s preliminary injunction seeking to bar covering the mural during the litigation was denied, the school actually constructed the walls. Email from Emily Davis, Senior Articles Ed., Vt. L. Rev., to author (Nov. 2, 2022) (on file with author).

9. E.g., Graham Bowley & Doreen Carvajal, *One of the World’s Greatest Art Collections Hides Behind This Fence*, N.Y. TIMES (May 28, 2016), <https://www.nytimes.com/2016/05/29/arts/design/one->

by the public for a very long time. In some cases, the only aspect of the works presently available to the public are photographic or digital images. Is there a difference between long-term storage in a vault and the placement of a mural affixed to a building behind a barrier designed to permanently remove it from view? The school also claims that their proposed barrier will not cause deterioration of the work and that, even if it does, such an impact is not penalized by the Visual Artists Rights Act.<sup>10</sup>

Though the issues are potentially ineffable, the essay's structure is straightforward. I begin with a description of the history of the *Kerson* controversy and the contours of the judicial decisions in the case rendered to this point. The following section discusses two particularly relevant controversies that shed a great deal of light on the *Kerson* dispute. Both surfaced before the moral rights provisions of the copyright code were adopted in 1990.<sup>11</sup> Transplanting these controversies to the present allows for some interesting comparisons to the Vermont Law and Graduate School litigation. I will conclude with a few remarks on how I think *Kerson* should be resolved, using the work of the well-known artist William Christenberry, as well as that of other creative souls, as foils.

### I. THE *KERSON* STORY

Samuel Kerson completed painting a two-panel wall mural—“Vermont, The Underground Railroad” and “Vermont and the Fugitive Slave,” collectively “The Underground Railroad, Vermont and the Fugitive Slave”—in the Chase Community Center at Vermont Law and Graduate School in 1993.<sup>12</sup> Steve Nelson, the school's development director at the time, described the origins of the project:

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of-the-worlds-greatest-art-collections-hides-behind-this-fence.html; Robin Pogrebin, *Clean House to Survive? Museums Confront Their Crowded Basements*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/interactive/2019/03/10/arts/museum-art-quiz.html>; Christopher Groskopf, *Museums Are Keeping a Ton of the World's Most Famous Art Locked Away in Storage*, QUARTZ (Jan. 20, 2016), <https://qz.com/583354/why-is-so-much-of-the-worlds-great-art-in-storage/amp/#top>.

10. The claim is sharply contested by Kerson. See Brief for Plaintiff-Appellant at 31–34, *Kerson v. Vt. L. Sch., Inc.*, No. 21-2904 (2d Cir. Mar. 4, 2022).

11. See 17 U.S.C. § 106A.

12. Complaint ¶¶ 1, 23, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Mar. 10, 2021) states that completion was in 1994. But Kerson's sworn statement in support of his motion for a preliminary injunction states that completion occurred the year before. Appendix ¶ 15, at A22, *Kerson v. Vt. L. Sch., Inc.*, No. 21-2904 (2d Cir. Mar. 4, 2022). An earlier article in the law school's newspaper reported that the murals were installed in 1993. Hansen, *Mural to Be Replaced*, *supra* note 3. Reviews of the work in the *Christian Science Monitor* and the *Boston Globe* arose from visits by the critics in 1993. The timing is not important for purposes of this essay. Nothing of importance rides on the exact sequencing of the mural's creation.

Kerson and a colleague, Fredd Lee, visited me in 1993 to propose the murals. They believed that the law school's progressive mission made it a suitable site for a work celebrating Vermont's place in history as part of the Underground Railroad. We scouted the campus and settled on the blank expanse in the Chase Community Center. I discussed this with the then-dean, the late Max Kempner,<sup>13</sup> who provisionally supported the idea. After a review of Kerson's detailed sketches, the project got a green light and work began.<sup>14</sup>

The Puffin Foundation<sup>15</sup> underwrote the costs of the project and, with the participation of artist assistants working under his supervision, Kerson completed it in 1993. In the complaint he filed in 2020 seeking to bar Vermont Law and Graduate School from covering the mural, he asserted that the murals “depict the history of slavery including the capture and shipment of Africans to the Americas, the selling of captured humans in slave markets, the slave's work condition, the suppression of African culture, abolition, resistance to slavery, featuring important historical figures, and the Underground Railroad.”<sup>16</sup> Among those portrayed are Frederick Douglass, John Brown, Harriet Tubman, and Harriet Beecher Stowe.<sup>17</sup> There also are slave masters, slave auctioneers, and displays of brutality. After completion of the mural, the school, according to the artist, “publicly announced the display of the Murals and sponsored an opening ceremony celebrating the Murals.”<sup>18</sup> The project received positive reviews in the Boston Globe and the

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13. Beth McCormack, *Honoring Former Vermont Law School Dean Maximilian Kempner*, VT. L. & GRADUATE SCH. (Feb. 26, 2021), <https://www.vermontlaw.edu/blog/tribute/maximilian-kempner>.

14. Steve Nelson, *Column: Very Interested Bystander to VLS Murals Case*, VALLEY NEWS (Oct. 15, 2021), <https://www.vnews.com/Column-The-land-mines-of-Sam-Kerson-s-murals-at-VLS-43020585>. Kerson confirmed the gist of this account in his court-filed complaint. There he claimed that in 1993 he received a communication from the law school stating that it was “delighted that you have chosen VLS as the site for your mural.” Complaint, *supra* note 12, ¶ 19. Some further detail and confirmation appeared in Motion of Plaintiff Samuel Kerson for a Preliminary Injunction at 3–4, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

15. Complaint, *supra* note 12, ¶ 20. According to its website, “The Puffin Foundation, Ltd. has sought to open the doors of artistic expression by providing grants to artists and art organizations who are often excluded from mainstream opportunities due to their race, gender, or social philosophy.” *About Us*, THE PUFFIN FOUND., <https://www.puffinfoundation.org/> (last visited May 2, 2023).

16. Complaint, *supra* note 12, ¶ 22.

17. Three are in Panel 2 of the mural. Douglass is in the lower left corner at the left edge. Harriet Beecher Stowe is to his left (our right) across from a round object. Brown is centered above them. *See infra* Figure 2. Harriet Tubman is under what appears to be the circle of the sun on the first panel. *See infra* Figure 1.

18. Complaint, *supra* note 12, ¶ 23.

Christian Science Monitor.<sup>19</sup> The law school held a formal opening in 1994 on Dr. Martin Luther King, Jr.'s birthday.<sup>20</sup> The two panels of the mural, displayed in the Chase Community Center close to each other, are shown below. Since the murals are quite large, their full impact is felt only in person. Some sense of that is provided by the picture of part of the room where the murals are located, displayed below after the mural images.

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19. Keith Henderson, *The Painting of the Underground Railroad*, CHRISTIAN SCI. MONITOR (Sept. 27, 1993), <https://www.csmonitor.com/1993/0927/27161.html>; Yvonne Daley, *Painter's Mural Illuminates State's Contributions to Black History*, BOS. GLOBE, July 18, 1993, at 28, 30.

20. Appendix, *supra* note 12, ¶ 15, at A22.



Figure 1. Samuel Kerson, Vermont, *The Underground Railroad* (1993)



Figure 2. Samuel Kerson, *Vermont and the Fugitive Slave* (1993)





Figure 3. Photograph of Chase Community Center<sup>21</sup>

Some have noted that concerns about Kerson's work simmered for over 20 years before the present controversy emerged.<sup>22</sup> But the immediate catalyst for the present Vermont Law and Graduate School dispute was a thoughtful letter composed by two rising third-year students—Jameson C. Davis and April Urbanowski—and then distributed to the law school community by email. It was quickly signed by 73 students and 39 alumni and given to the president and dean of the law school, Thomas McHenry,<sup>23</sup> on June 30, 2020. At least 70 additional alumni expressed support for the

21. Marc James Léger, *Artist Sam Kerson Will Continue to Fight Vermont Law School Effort to Cover up Murals Commemorating Abolition of Slavery*, WSWS (Oct. 27, 2021), <https://www.wsws.org/en/articles/2021/10/28/mura-o28.html>.

22. Hansen, *Mural to Be Replaced*, *supra* note 3. In the papers filed by the school opposing Kerson's motion for a preliminary injunction, Shirley Jefferson, the associate dean for student affairs and diversity, stated that some students had expressed discomfort with the mural since she began working at Vermont Law and Graduate School in 1999. Lorentz Hansen, *Court Denies Mural Artist's Motion for Preliminary Relief, Artist Appears to Reference VLS Students in New Paintings*, THE FORUM (Mar. 26, 2021), <https://vlsforum.com/2021/03/26/court-denies-mural-artists-motion-for-preliminary-relief-artist-appears-to-reference-vls-students-in-new-paintings/>.

23. See Biography of Thomas McHenry, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/directory/person/mchenry-thomas> (last visited May 2, 2023). The size of the present student body now is well over 600 including both J.D. and graduate students. See *JD Class Profile*, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/admissions/class-profile> (last visited May 2, 2023).

students' request to remove the mural after it was given to the dean.<sup>24</sup> The letter<sup>25</sup> presented several reasons for demanding termination of the Kerson mural's display. It also established baselines for some of the arguments made in the litigation that followed, as well as for some of the issues taken up in this essay.

Davis and Urbanowski began their plea with a recognition of the emotional, national distress that emerged after the police's murder of George Floyd on May 25, 2020 and named a number of other Black Americans who were victims of recent police or white vigilante violence—"Breonna Taylor, Ahmaud Arbery, Rayshard Brooks, Elijah McClain, and countless others."<sup>26</sup> It is clear that the string of highly public killings and the ongoing Black Lives Matter movement were major stimuli for heightened concerns about Kerson's work. "It has never been enough to not be racist; we must be anti-racist," the students wrote.<sup>27</sup> "Given the events across the world over the past few weeks, now is the time for us to hold our institution accountable."<sup>28</sup>

An intriguing part of the letter followed:

We, the community of Vermont Law School, demand and hold Vermont Law School accountable for making Vermont Law School an inclusive place for BIPOC [Black, Indigenous, people of color] students. With that being said, we demand that *Underground Railroad Vermont and the Fugitive Slave* mural be removed and replaced. The *Underground Railroad Vermont and the Fugitive Slave* mural is currently located in the Chase loft, on the second floor of the Chase Community Center. Vermont Law School students appreciate the time and money that the Puffin Foundation and artist Sam Kerson put into their efforts to illustrate a hypersensitive and nefarious time in American and Vermont history. We do not dispute that Sam Kerson sincerely attempted to create a piece of art that would "celebrate the efforts of Black and white Americans in Vermont and throughout the United States to achieve freedom and justice." Unfortunately, not all intentions

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24. Hansen, *Court Denies Motion*, *supra* note 22.

25. Appendix, *supra* note 12, at A72–78. A copy of the letter was provided to me by Jake Evans, a recent graduate of Vermont Law and Graduate School. He is now an associate at the Barr Legal Group in Stowe, Vermont. See Jake Evans, LINKEDIN, <https://www.linkedin.com/in/jake-evans-49223177> (last visited May 2, 2023); Barr Law Group, LINKEDIN, <https://www.linkedin.com/company/barrlaw> (last visited May 2, 2023).

26. Appendix, *supra* note 12, at A72.

27. *Id.* This comment surely refers to the widely read book IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019), published not long before the letter of Davis and Urbanowski was composed.

28. Appendix, *supra* note 12, at A72.

align with interpretation, with this mural serving as a current example.<sup>29</sup>

The letter's authors clearly recognized that Kerson's artistic goals were laudable but claimed that the best of intentions may lose luster over time as cultural attitudes and understandings change. That shift in perspective generated much of the tension surrounding the Kerson work.<sup>30</sup> It also exposed a few of the basic dilemmas confronted later in this essay—the tension between original artistic intention, the changing perspectives of contemporary culture, and the statutory language barring destruction or modification of some works of fine art.

A significant set of statements, along with a reference to the Jim Crow Museum of Racist Memorabilia housed at Ferris State University in Big Rapids, Michigan, concluded the letter. This final segment of the students' communication noted:

[C]urrent students have expressed supplementary concerns that include:

1. The depiction of white colonizers as green, which disassociates the white bodies from the actual atrocities that occurred.
2. The portrayal that “green colonizers” became white liberators, which perpetuates white supremacy, superiority, and the white savior complex.
3. The over exaggerated depiction of Africans, which is eerily similar to Sambos, and other anti-black coon caricatures.<sup>†31</sup>

After visiting the Jim Crow Museum of Racist Memorabilia website cited at the conclusion of statement 3, the student's statement is not

29. *Id.* (footnote omitted).

30. The Davis/Urbanowski letter did generate some opposition. One student responded to the request for supporters with a blistering refusal. Appendix, *supra* note 12, at A99–A100. A Change.org petition has drawn a large number of supporters, but there is no indication of how many were associated with Vermont Law and Graduate School. As of May 2, 2023, 1,210 had agreed to the petition. See *Stand Against the Destruction of the Underground Railroad Mural*, CHANGE.ORG, <https://www.change.org/p/vermont-law-school-stand-against-the-destruction-of-the-underground-railroad-mural> (last visited May 2, 2023).

† Ferris State University, *Jim Crow Museum of Racist Memorabilia*, <https://www.ferris.edu/jimcrow/coon/>, (last visited 6/30/2020).

31. Appendix, *supra* note 12, at A73.

unreasonable.<sup>32</sup> But it also is painfully true that the motivations for the images displayed at the Jim Crow Museum and those presented by Kerson’s mural were vastly different. And, as explained more fully below,<sup>33</sup> it also is clear that some of the human images in Kerson’s work came from folk art traditions, not racist ugliness.<sup>34</sup>

On July 6, just shy of one week after the student letter was widely circulated in the Vermont Law and Graduate School community and local news media, Dean Thomas McHenry notified the community that the mural would be painted over.<sup>35</sup> He wrote:

More than twenty-five years ago, the mural was offered to and accepted by the School with the intention of honoring African Americans and abolitionists involved in the Underground Railroad. . . . However, the depictions of the African-Americans on the mural are offensive to many in our community and, upon reflection and consultation, we have determined that the mural is not consistent with our School’s commitment to fairness, inclusion, diversity, and social justice. Accordingly, we have decided to paint over the mural.<sup>36</sup>

Jameson Davis, one of the student authors of the letter, tried to obtain consent from Kerson to remove the mural, but the artist firmly refused the offer. It was reported by John Gregg of *The Valley News* that Kerson likened Dean McHenry’s decision

to the “thuggery” of the destruction of a statue of Douglass last week in Rochester, N.Y.<sup>37</sup> “This is a monument to abolition in

32. Ferris State University, *supra* note 31. Be prepared to see extremely disturbing images if you visit the museum site. It was a difficult, but useful, visit.

33. *See infra* text accompanying notes 41–47.

34. The figures that are particularly relevant are the seated people at the left edge of Panel 1, the men wearing blue and white pants to their right, and the various masked figures to their right in the first Panel of the mural. *See supra* Figure 1. On the second panel, see the people sitting under the tree. *See supra* Figure 2.

35. Hansen, *Mural to Be Replaced*, *supra* note 3.

36. John P. Gregg, *Vermont Law School Mural Viewed as Racist Will Be Painted Over*, VALLEY NEWS (July 8, 2020), <https://www.vnews.com/Vermont-Law-School-to-paint-over-mural-about-Underground-Railroad-35136293>. Despite the article’s headline, Gregg noted that Davis and Urbanowski, the student authors of the letter to the law school administration, very carefully wrote their letter so it did not contend that either Kerson or the mural were racist.

37. Kerson was referring to an event that occurred on July 5, 2020. *See* Matthew S. Schwartz, *Frederick Douglass Statue Torn Down on Anniversary of Famous Speech*, NPR (July 6, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/06/887618102/frederick-douglass-statue-vandalized-on-anniversary-of-famous-speech>. The statue has since been replaced.

Vermont and a description of the people who struggled against slavery, and it is important to our culture,” he said of the mural. “To paint it over is outlandish—it’s like burning books,” he said. “It’s so inflammatory, I can’t believe it’s actually happening.”<sup>38</sup>

Others have expressed sympathy for Kerson. In the same *Valley News* article quoting Kerson, Gregg wrote:

Kerson said he based the characters in the mural on photographs from Cameroonian composer and author Francis Bebey’s book *African Music: A People’s Art*, and that they are meant to appear as heroic figures. His defenders said Kerson can be thought-provoking but well-intentioned.

David Ransom, a retired Congregational minister who created a Vermont chapter of Veterans for Peace, said Kerson’s work needs to be looked at in-depth.

“He does very challenging work, but people don’t always get it,” said Ransom, 87. “It’s like many artists—when you first look at them, they are not always understood.”<sup>39</sup>

Steve Nelson, the school’s development official at the time the mural was painted, wrote in a similar vein:

Unlike Confederate statues or other art that represents a noxious world view, Kerson’s work represents the courage and nobility of the pursuit of racial justice. I know that his work and images come from the tradition of folk art, not from racist caricature. I know Sam Kerson to be a man of integrity who is committed to social justice. In that respect, it seems reasonable that he would find hiding his murals “prejudicial to his . . . honor or reputation.”<sup>40</sup>

A look at images in the book on Francis Bebey referenced by Gregg confirms that Kerson’s work was in part a visual (though not political) descendant of African folk traditions that used images similar in some ways to those in the Kerson mural.<sup>41</sup>

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38. Gregg, *supra* note 36.

39. *Id.*

40. Nelson, *supra* note 14.

41. See FRANCIS BEBEY, *AFRICAN MUSIC: A PEOPLE’S ART* 70–90 (Josephine Bennett trans., 1999).

Folk portrayals of Black Americans vary widely across the artistic community—as widely as the differences between the racist images in the Jim Crow Museum of Racist Memorabilia and Kerson’s mural. It is therefore not surprising that Kerson’s images are different from those of other very prominent 20th-century Black artists tightly related to folk traditions—notably Romare Bearden and Jacob Lawrence. Prominent examples of their work present images, postures, facial features, and body characteristics unlike Kerson’s, though Lawrence’s clearly have some similar qualities. Both trace their work from a variety of Black cultural roots, including African and American naïve art images—a hallmark of folk styles, including Kerson’s—echoing work of early Americans untrained in the fine arts.<sup>42</sup> Examples in the Museum of Modern Art and National Gallery of Art collection by Bearden and Lawrence respectively are pictured below.



Figure 4. Romare Bearden, *Jazz II Deluxe* (1980)<sup>43</sup>

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42. An interesting review of their work may be found in an essay by a member of the education staff of the Metropolitan Museum of Art that is posted on their web site. See Stella Paul, *Modern Storytellers: Romare Bearden, Jacob Lawrence, Faith Ringgold*, THE MET (Oct. 2004), [https://www.metmuseum.org/toah/hd/most/hd\\_most.htm](https://www.metmuseum.org/toah/hd/most/hd_most.htm).

43. Romare Bearden, *Jazz II Deluxe*, MUSEUM OF MOD. ART, <https://www.moma.org/collection/works/95190> (last visited May 1, 2023).



Figure 5. Jacob Lawrence, *Street to Mbari* (1964)<sup>44</sup>

But the fact that highly respected artists in the folk tradition portray visions of Black communities differently from Kerson is not necessarily an appropriate reason to suppress visibility of the Vermont Law and Graduate School murals even if they might be seen as less complimentary to Black traditions. As noted by Amna Khalid, one of Kerson's supporters:

By insisting on an offensive interpretation of the murals, by refusing to see both the context in which the artwork was made and for what purpose, the students are dictating that a creative work can and must be read only in one way. And by effectively effacing the murals, the students are denying to others the opportunity to engage with the art and thereby to respond to it themselves.<sup>45</sup>

44. *Street to Mbari, 1964*, NAT'L GALLERY OF ART, <https://www.nga.gov/collection/art-object-page.79459.html> (last visited May 1, 2023).

45. Amna Khalid, *Art Crushed by Political Orthodoxy . . . Again*, FREE VOICE (Apr. 22, 2022), <https://www.usfsu.org/p/art-crushed-by-political-orthodoxyagain?s=r>. Khalid is an associate professor of history at Carleton College and affiliated with the Free Speech Union of the United States. See also Amna Khalid, *Amna Khalid: It's Ironic That Art That Attests to the Inequities of the Past is Under Attack*, VTDIGGER (May 5, 2022), <https://vtdigger.org/2022/05/05/amna-khalid-its-ironic-that-art-that-attests-to-the-inequities-of-the-past-is-under-attack/>.

Furthermore, and most importantly for purposes of this essay, it is not at all clear that images deemed distasteful in a new social context are excluded from coverage by the VARA. As noted earlier, widely disliked or challenging images by well-known and even highly respected artists may be protected from destruction or mutilation. It is worth recalling that the disassembly and removal of Richard Serra's *Tilted Arc* from Foley Square in downtown New York City by the General Services Administration has been recognized as a catalyst for adoption of the VARA two years later.<sup>46</sup> Though highly praised by the artistic community, Serra's work was castigated by some working in and around Foley Square who disliked its monumental disruption of sight lines and easy passage across the square to the street and nearby subway station.<sup>47</sup> Though obviously not related to concerns over racial issues, the likelihood that it would be protected if covered by present law emphasizes that public angst about art is not necessarily decisive in VARA cases.



Figure 6 Richard Serra, *Tilted Arc* (1981)

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46. A summary of the story may be found in Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 615–21 (2018).

47. An image of the work in the rather sterile square in front of the Javits Federal Courts Building is at *A Kind Giant with Expressiveness*, ART @ SITE, [https://www.artsite.com/NewYork/details/Serra\\_Richard\\_Tilted\\_Arc\\_Federal\\_Plaza\\_modern\\_statue\\_Art\\_at\\_Site\\_New\\_York.html](https://www.artsite.com/NewYork/details/Serra_Richard_Tilted_Arc_Federal_Plaza_modern_statue_Art_at_Site_New_York.html) (last visited May 1, 2023).



II. THE *KERSON* LITIGATION*A. Pleadings and Initial Proceedings*

On August 5, 2020, about a month after Dean McHenry distributed his letter announcing plans to paint over the Kerson mural, the school wrote a second letter to Kerson. For the first time, the school's communications with the artist clearly reflected familiarity with the terms of the Visual Artists Rights Act that limited the ability of the law school to simply paint over an artwork originally installed with the full support of the institution. Among other things, the statute provides that if "a work of visual art has been incorporated in or made part of a building" with the consent of the owner and "the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work," the artist must be given 90 days to remove it before the owner of the building may consider taking any action.<sup>48</sup> These provisions impose two important requirements on the building owner before consideration of removing or modifying a work may be allowed—that notice giving the artist a chance to

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48. The important parts of 17 U.S.C. § 113(d) for purposes of this essay read more fully as follows:

(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

remove is provided and that the work is removable in a way that does not of necessity destroy or mutilate it.<sup>49</sup> The letter from Dean McHenry notified Kerson that the school intended “to effectuate . . . removal or covering” of the mural and offered him “the opportunity to remove it yourself or pay for its removal.”<sup>50</sup> The reference to “covering” was the first time a formal statement appeared suggesting that physical destruction of the mural was not necessarily in the offering.

The statutory provisions, however, leave open an enormous gap in coverage. Bizarrely, the statute is silent about what the building owner may do if a work that is incorporated in a building with consent may only be removed by destroying or mutilating it. Does the building owner then have an automatic right to remove it or to destroy either the artwork or the building in which the artwork is incorporated after giving the appropriate notice? Or does the inability to remove the work without damage imply that it must be left intact, at least in cases where clearly legitimate and important reasons to demolish or significantly remodel the structure do not exist?<sup>51</sup>

After receiving the letter, Kerson had the murals inspected by Daniel Hecht and Ross Calabrese, experts in the hanging and display of art. They confirmed that the mural was painted directly on the surface of the sheet rock making up the wall of the second-floor room at the Chase Community Center and concluded that removing the mural would require it to be cut up into 20 sections, effectively destroying it.<sup>52</sup> Kerson therefore declined to arrange for its removal. The school’s intention to paint over or cover the work in the absence of its removal led Kerson to file suit under the Visual Artists Rights Act of 1990.

The complaint in *Samuel Kerson v. Vermont Law School, Inc.* briefly describing the story and claiming a violation of the Visual Artists Rights Act, was filed in the United States District Court for the District of Vermont on December 2, 2020.<sup>53</sup> From that point, the litigation progressed through its initial stages fairly quickly. Kerson filed a motion for a preliminary injunction in mid-January 2021. Vermont Law and Graduate School

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49. Note also that 17 U.S.C. § 113(d)(1)(B) also provides that when the work is installed the artist may agree that the work may be destroyed by the building owner if it is removed. Such an agreement was never signed in this case.

50. Letter from Thomas McHenry to Samuel F. Kerson; Appendix, *supra* note 12, at A42.

51. This issue came close to judicial consideration in the major dispute over the destruction of 5Pointz in Queens, one of the most important graffiti sites in the world. *See Castillo v. G&M Realty L.P.*, 950 F.3d 155, 165–66 (2d Cir. 2020); Chused, *supra* note 46, at 624. However, the issue was mooted when the owners of the site white-washed all the art prior to demolition, thereby allowing the artists to sue on destruction grounds. They collected \$6.75 million in their successful litigation.

52. Motion of Plaintiff Samuel Kerson for a Preliminary Injunction, *supra* note 14, at 5–6.

53. *See Complaint*, *supra* note 12.

responded with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) a bit over a week later.

While both of these motions were pending, the court requested additional information<sup>54</sup> of the law school about its intentions. The request was made the day after the institution filed its opposition to Kerson's preliminary injunction motion.<sup>55</sup> The school argued that the plan to construct a barrier in front of the mural would not harm it in any way and, therefore, that the plaintiff could not meet the standard requirements for a preliminary injunction—the presence of irreparable harm and the likelihood of success on the merits. In addition to the lack of harm from construction of the covering barrier itself, the school argued that such a step was neither a destruction nor a modification of the underlying work in violation of the Visual Artists Rights Act. But given the lack of specificity about the school's plans as described in their brief, it was not surprising that Judge Crawford sought “additional information about its plan to install acoustic panels in front of the mural so as to conceal it from view,” including “construction drawings showing the design and construction method of the proposed acoustic tile addition . . . sufficient to permit plaintiff's expert to determine whether the mural will be concealed unharmed behind the addition.”<sup>56</sup> The school's response revealed for the first time some of the details about what was planned:

After researching panels or materials that could be used to remove the Mural from view without harming it in the process, VLS has elected to proceed with acoustical panels constructed of a light-weight frame housing sound-dampening material, covered in a cushioning fabric. A separate wooden frame will be constructed which will be affixed to the wall surrounding the Mural, not to the Mural itself.<sup>57</sup>

In addition, the school's buildings and grounds director, Jeffrey Knudsen, filed somewhat primitive drawings created by

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54. Request for Additional Information, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

55. Vermont Law School, Inc.'s Opposition to Plaintiff's Motion for a Preliminary Injunction, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

56. Request for Additional Information, *supra* note 54. The court also wanted “an explanation of its [the school's] intended course of action if a student, visitor, or any other person asks to see the mural.” The answer to this question was that access would always be denied. Vermont Law School, Inc.'s Response to Court's Request for Additional Information at 1, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

57. Vermont Law School, Inc.'s Opposition to Plaintiff's Motion for a Preliminary Injunction, *supra* note 55, at 4 (citation omitted).

Will Hasting,<sup>58</sup> showing a plan to build a wood frame with the four outer pieces attached to the wall outside the boundaries of the mural and  $\frac{5}{4}$ " by 6" vertical framing attached to the frame and placed away from the mural, all covered by sound panels attached to the outer edges of the wood framing.<sup>59</sup> From the appearance of the drawings, it is apparent that they were crafted by the buildings and grounds department without the assistance of an architect. In addition to the crude nature of the drafting, the diagram uses the nominal dimensions (1" by 4"), which are technically inaccurate. The actual dimensions of such standard material are approximately  $\frac{3}{4}$ " by  $3\frac{1}{2}$ ".<sup>60</sup> The sound panel plans placed them closer to the murals than the drawings suggested. It also is clear that an expert capable of evaluating the potential long-term impact of the wall was not involved in the development of the plans. Nor were any statements made about the potential impact of the barrier on the mural.<sup>61</sup> The last page of the drawings is shown here to demonstrate the informality of the planning.

Mural Cover @ Vermont Law School Chase Center Feb 10, 21

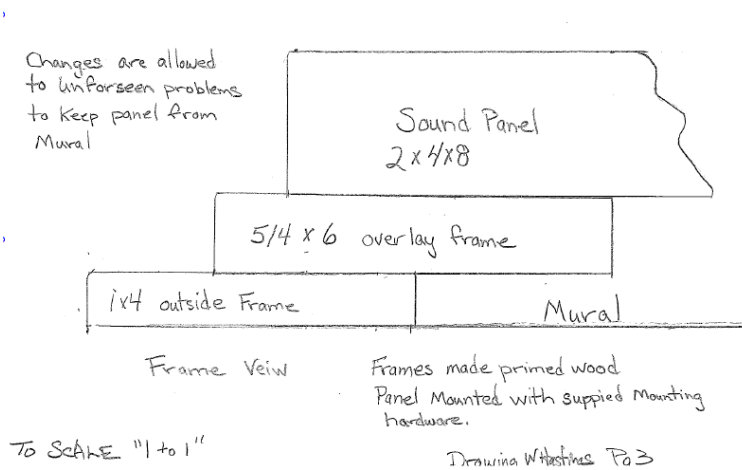


Figure 7

58. Hasting was an employee on Knudsen's staff. Deposition of Jeffrey Knudsen at 30, Kerson v. Vt. L. Sch., Inc., No. 5:20-CV-202 (D. Vt. Nov. 8, 2021).

59. Declaration of Jeffrey Knudsen, Kerson v. Vt. L. Sch., Inc., No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

60. The actual size of the nominally  $\frac{5}{4}$ " x 6" framing is 1.1" x  $5\frac{1}{2}$ ".

61. Deposition of Jeffrey Knudsen, *supra* note 58, at 48. Attached was the Declaration of Knudsen with the drawings.

*B. Decisions on Preliminary Injunction and Dismissal Motions*

On March 10, 2021, while briefing and other preparations for hearing Vermont Law and Graduate School's motion to dismiss proceeded, the court denied Kerson's motion for a preliminary injunction. The primary conclusion of the court was that it was unlikely Kerson would prevail in the litigation. In order to obtain preliminary relief, Kerson was obligated to demonstrate that he was likely to prevail in his contention that construction of a barrier in front of the mural was either a modification of the work of visual art that was prejudicial to his honor or reputation, or that it was equivalent to the destruction of a work of recognized stature within the meaning of § 106A(a)(3) of the VARA.<sup>62</sup> Though Judge Crawford agreed that the mural likely was a work of recognized stature and that its modification might well damage Kerson's honor or reputation, the decision by the law school to conceal the mural behind acoustic panels rather than cover it with paint was deemed to be neither a modification nor a destruction of the mural. The planned barrier would neither touch the mural nor "alter or change" the work, the court wrote, but merely conceal it from view. Similarly, the barrier would not "damage [the work] in an irreparable fashion," but merely remove it from display as if it was placed in storage.<sup>63</sup> No factual presentations on the possibility of the barrier damaging the mural in the future, however, were part of the preliminary injunction process. The time period between the presentation of the barrier plans and the hearing was very short, making it virtually impossible for Kerson to find and prepare witnesses with enough conservation expertise and investigation time to raise concerns about the physical impact of the barrier on the work of art in either the short or long term.<sup>64</sup>

By the time the motion to dismiss was fully briefed, it had morphed into a motion for summary judgment. Federal Rule of Civil Procedure 12(d) requires that shift when "matters outside the pleadings" become part of the

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62. Order on Motion for a Preliminary Injunction, *supra* note 2, at 5, 11; 17 U.S.C. § 106A(a)(3).

63. Order on Motion for a Preliminary Injunction, *supra* note 2, at 9, 10. While the various motions were pending, the school hung a tarpaulin in front of the mural to conceal it from view. When Kerson's motion for a preliminary injunction was denied, the school constructed barriers in front of the mural panels. Email from Emily Davis to author, *supra* note 8.

64. Seeking an extension of time was certainly an option but doing so would have reduced the force of any argument that preliminary relief was needed. The actual hearing on the preliminary injunction motion was held on February 24, 2021. The opinion was released the following month. Plaintiff Samuel Kerson's Supplemental Memorandum in Opposition to Vermont Law School, Inc.'s Motion for Summary Judgment at 4–5, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021); Order on Motion for a Preliminary Injunction, *supra* note 2.

record.<sup>65</sup> When the hearing was held on October 8, 2021, various matters outside the pleadings had been submitted by both sides. In addition to the responses to the court's request for information on the structure of the proposed barrier, Kerson took a deposition of Jeffrey Knudsen, the school's supervisor of building and grounds,<sup>66</sup> and the law school took a deposition of Emily Phillips, an art conservation expert hired on Kerson's behalf.<sup>67</sup> Crucially, Knudsen had no prior experience with constructing barriers in buildings to hide artistic works, with the acoustic panels chosen for use in the barrier, with the possible off-gassing from the panels that might endanger Kerson's mural, or with the possible use of air circulation systems to mitigate any possible damage.<sup>68</sup> Phillips claimed it was more likely than not that construction of the barrier in close proximity to an exterior wall of a frame building that was likely subject to temperature and humidity variations, together with chemical emanations from the acoustic panels, would cause damage to the mural over time.<sup>69</sup>

When the briefing and discovery was complete, at least three issues remained open. First, may covering a work of art painted on the interior wall of a building in a manner that will never physically damage the work ever be deemed a destruction or modification barred by the Visual Artists Rights Act? Second, assuming such a barrier may be allowed under some circumstances, will it be barred if it is likely to cause damage over time to the work it covers? Third, given the factual predicate presented up to this point in the litigation, was it appropriate to resolve the case on summary judgment?<sup>70</sup>

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65. This procedural shift is called for by FED. R. CIV. P. 12(d), which provides that if a motion to dismiss for failure to state a claim for relief is made under Rule 12(b)(6), when "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." FED. R. CIV. P. 12(d). In this case, of course, matters outside the pleadings were actually requested by the court.

66. Deposition of Jeffrey Knudsen, *supra* note 58, at 3.

67. Deposition of Emily Phillips at 3–4, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

68. A summary of his testimony is in Plaintiff Samuel Kerson's Supplemental Memorandum in Opposition to Vermont Law School, Inc.'s Motion for Summary Judgment, *supra* note 64, at 4–5.

69. A summary of Phillips' deposition testimony is in Plaintiff Samuel Kerson's Supplemental Memorandum in Opposition to Vermont Law School, Inc.'s Motion for Summary Judgment, *supra* note 64, at 2–3.

70. The school also claimed that barring it from hiding the mural infringed on the institution's First Amendment rights. This contention is outside the scope of this essay but seems highly unlikely to bear fruit. To agree with the argument would gut the VARA. In resolving the motion, the court did not speak to the First Amendment claim. Given its resolution of the other issues by granting summary judgment, that was deemed unnecessary. *See* Order on Motion for a Preliminary Injunction, *supra* note 2, at 9.

On October 20, 2021, summary judgment against Kerson’s case was granted by Judge Crawford.<sup>71</sup> In an opinion that is strikingly easy to challenge, the court reaffirmed the conclusions reached in its preliminary injunction opinion—that concealment is neither a destruction nor a modification of the mural, and that damage from “environmental conditions” caused by a work’s concealment behind a barrier is not a modification of the work. Sometime after the preliminary skirmishing in the case concluded, the law school actually constructed the planned wall in front of the mural panels.<sup>72</sup>



Figure 8

*C. Is Concealment Either Destruction or Modification Under the VARA?*

The court’s conclusion that construction of a barrier would be neither a destruction nor a modification was stated boldly. As Judge Crawford wrote:

After the construction of the acoustic panel wall, the murals will not “look different” . . . . Indeed, they will not be seen at all. The murals will have the same status as a portrait or bust that is

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71. Order on Defendant’s Motion for Summary Judgment, *Kerson v. Vt. L. Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. Nov. 8, 2021).

72. The image was contained in an email from Emily Davis to author, *supra* note 8.

removed from public exhibition and placed in storage. Their concealment [does not violate] . . . the right of integrity, as they will not be seen in a manner different from that created by the artist.<sup>73</sup>

The court result, in essence, required that some physical change in the actual artwork itself must be undertaken by the defendant in order for there to be any VARA violation. The court claimed that the mural after it is hidden “will not be seen” in a way different from Kerson’s presentation. That is misleading at best. The murals were made when all involved in its creation intended that those using the Chase Community Center lounge would be able to see the work. The school’s actions have made that impossible. While it is a nice question as to whether long-term storage of a work of easily movable fine art is a modification, that was not actually the issue before the court. It is simply not the same as dealing with the hiding of a work painted in a building and intended to be stable and permanent. In essence, Judge Crawford failed to understand the full import of his opinion.<sup>74</sup>

In reaching the conclusion that covering the mural did not violate the VARA, the court relied heavily on *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*.<sup>75</sup> Judge Crawford claimed that the *Büchel* court’s approval of the museum’s covering of an incomplete installation of a non-permanent work left Vermont Law and Graduate School free to cover Kerson’s mural. But *Büchel* is inapposite to *Kerson*. It arose out of a bitter dispute between the Massachusetts Museum of Contemporary Art (MASS MoCA) and Swiss artist Christoph Büchel. In 2006, the artist and the museum reached a largely oral, vaguely structured understanding about the use of an enormous space in Building 5 of the sprawling, multi-building art campus<sup>76</sup> for the creation of the largest work ever considered for public

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73. Order on Defendant’s Motion for Summary Judgment, *supra* note 71, at 13.

74. Art, for good or ill perhaps, is made to be seen and discussed. Destruction’s primary effect is to deprive the world of the opportunity to do both. As a practical matter, disappearance behind a permanent barrier has the same cultural consequences as its demolition or mutilation.

75. Order on Defendant’s Motion for Summary Judgment, *supra* note 71, at 13 (citing Mass. Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38 (1st Cir. 2010)). The Massachusetts Museum of Contemporary Art, located in North Adams, Massachusetts, is an enormous 19th-century industrial complex of old buildings that has been imaginatively turned into one of the most important institutions presenting short- and long-term exhibits of two- and three-dimensional art installations and other contemporary works, many crafted onsite by artists in residence. The museum’s fascinating history is available at *History*, MASS. MUSEUM OF CONTEMP. ART, <https://massmoca.org/about/history/> (last visited Apr. 26, 2023).

76. The large display space in Building 5 is almost as large as a football field. Karen Bjornland, *MASS MoCA Doubles in Size*, DAILY GAZETTE (July 23, 2017), <https://dailygazette.com/2017/07/23/with-building-6-mass-moca-doubles-in-size/>.



display at the institution.<sup>77</sup> Called *Training Ground*, it was to be assembled in a fashion allowing visitors to experience ways Americans are culturally trained to cope with standard features of American “democracy”—

training to be an immigrant, training to vote, protest, and revolt, training to loot, training iconoclasm, training to join a political rally, training to be the objects of propaganda, training to be interrogated and detained and to be tried or to judge, training to reconstruct a disaster, training to be in conditions of suspended law, and training various other social and political behavior.<sup>78</sup>

Assembly of the installation began in the fall of 2006 and ended in bitterness and anger during the spring of the following year. Büchel complained that the museum failed to follow his directions on the construction of the installation and made decisions about its elements without consultation. He therefore claimed that publicly displaying the work or showing it covered without his permission violated the VARA. The museum claimed it was frustrated by the frequent changes in the artist’s preferences, growing cost overruns in putting the installation together, and Büchel’s absence for long periods of time. The lack of a formal contractual understanding between the parties about finances, control, and resolution of disputes made it much more difficult to find solutions to the ongoing conflicts. In May 2007, the museum cancelled the show and immediately scheduled a new exhibit entitled *Made at MASS MoCA*. It was to be a “documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions.”<sup>79</sup>

The litigation began the day before MASS MoCA announced the cancellation of Büchel’s installation when the museum sought a judicial declaration that it was entitled to show the partially completed work. Büchel responded with a claim that the museum would violate his rights of integrity under the VARA by allowing the public to view the incomplete work—in his

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77. The best retelling of the story is K. E. Gover, *Christoph Büchel v. Mass MoCA: A Tilted Arc for the Twenty-First Century*, 46 J. AESTHETIC EDUC. 46 (2012). It was to include, among other things, an oil tanker that had to be cut open and decontaminated; a smashed police car; a truck; a used mobile home; deactivated bomb shells; nine shipping containers; a shuttered local movie theater; and a 1,400-square foot, two-story Cape Cod-style house that was lifted out of the ground, sliced into four pieces, and reassembled.

*Id.* at 50.

78. *Mass. Museum Contemp. Art Found., Inc. v. Büchel*, 593 F.3d 38, 43 (1st Cir. 2010).

79. *Id.* at 45 (quoting Massachusetts Museum of Contemporary Art, Press Release, *Presentation of Training Ground for Democracy Cancelled; New Exhibition, Made at MASS MoCA, to Open on Saturday, May 26*).

mind, a state displaying mutilation or modification of his artistic intentions.<sup>80</sup> The issues were complicated by the facts that the museum's new exhibit *Made at MASS MoCA* was set up in a space adjacent to Büchel's work, that Büchel's incomplete work was covered with tarps that revealed the shapes of the items placed in the gallery prior to the museum's request for relief, and that, if the tarps were removed, museum visitors would have to walk past the incomplete installation on the way to the new show. In addition, there was some evidence that a few people had been shown parts of the installation before it was hidden under tarps.<sup>81</sup>

The *Büchel* story raises quite different questions from *Kerson*. Arrangements for the installation of the work were vague and open-ended. Issues of ownership, cost, decisional control, and resolution of disputes were all indefinite. Given the scale, size, expense, and breadth of the intended work, it would have been remarkable if the creation of *Training Ground* went forward without a hitch. Even if all the parties had acted with the best of intentions, it was ready-made for failure—a textbook example of how not to arrange for the installation of a very large, complex, highly integrated major work with an array of parts in a museum.<sup>82</sup> When the dispute reached an impasse, a decision had to be made about what to do with the quite substantial amount of material—a large array of the parts and pieces of an incomplete work—sitting in Building 5 at MASS MoCA. The museum was caught between a rock and a hard place. If they left the incomplete and disputed installation intact and showed it, they risked the moral right lawsuit that was actually forthcoming. If they removed the residue, they risked a different VARA claim—destruction of a work of recognized stature. Even with these potential problems, the trial court granted the museum the right to show the incomplete work.<sup>83</sup> Electing to avoid the possibility of a long, drawn-out judicial squabble leaving Building 5 unusable, the museum “decided instead to cut its losses. It deinstalled the work at its own expense and dumped

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80. He also claimed under more traditional copyright law that he had control over decisions to publicly display his work as the owner of its intellectual property. 17 U.S.C. § 106(5) provides:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

[. . .]

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly . . . .

81. *Büchel*, 593 F.3d at 42–46.

82. This same point is made quite strongly in the *Büchel* opinion. *Id.* at 41.

83. *Mass. Museum of Contemp. Art Found., Inc. v. Büchel*, 565 F. Supp. 2d 245, 257–60 (D. Mass. 2008). Why destruction of the incomplete work by MASS MoCA was not treated as a moral rights violation is a mystery to me. It seems that the issue was not raised by Büchel.

everything in a landfill.”<sup>84</sup> The First Circuit Court of Appeals later decided that incomplete works were covered by the VARA moral rights provisions, that the demolition of the work mooted any copyright or VARA issues about display of the incomplete work, but that a jury could find a moral rights violation arising out of the changes made during the installation process as a result of the disagreements that arose between Büchel and MASS MoCA.<sup>85</sup> Surprisingly, a claim for destruction of a work of recognized stature was never actually made by Büchel.

The court also decided that covering Büchel’s incomplete work was not a violation of the VARA’s modification provisions. That holding by the court of appeals, the main result relied upon by Judge Crawford in the district court, was taken out of context in his *Kerson* opinion. He quoted the appellate opinion this way:

[A]though the installation unquestionably looked different with the tarpaulins partially covering it, we agree with the district court that the mere covering of the artwork by the Museum, its host, cannot reasonably be deemed an intentional act of distortion or modification of Büchel’s creation.<sup>86</sup>

But the *Kerson* court ignored the intriguing paragraph of the *Büchel* opinion that followed that brief declaration:

This is not to say that MASS MoCA was necessarily acting with pure intentions when it created “Made at MASS MoCA” in close proximity to the tarped “Training Ground.” It might be a fair inference that the Museum was deliberately communicating its anger with Büchel by juxtaposing his unfinished work with the successful artistic collaborations depicted in its new exhibition. The partial covering of “Training Ground” may have been intended to highlight, rather than hide, the failed collaboration. The right of integrity under VARA, however, protects the artist from distortions of his work, not from disparaging commentary about his behavior. In our view, a finding that the Museum’s covering of the installation constituted an intentional act of

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84. Gover, *supra* note 77, at 52.

85. *Büchel*, 593 F.3d at 57. The case was later settled before it went to trial. *Training Ground for Democracy*, MASS. MUSEUM OF CONTEMP. ART, <https://massmoca.org/event/training-ground-democracy/> (last visited May 5, 2023).

86. Order on Defendant’s Motion for Summary Judgment, *supra* note 71, at 13 (quoting *Büchel*, 593 F.3d at 61).

distortion or modification of Büchel's artistic creation would stretch VARA beyond sensible boundaries.<sup>87</sup>

The omission of this segment of the opinion was a serious and crucial oversight. It omitted two critical aspects of the *Büchel* result. First, the *Büchel* court read the tarp covering as a derogatory commentary about the artist, *not* about the artwork. The court opined that some level of intention to destroy or modify the creative endeavor itself rather than to make a derogatory statement about the artist must be present to find a VARA violation. That holding, while certainly subject to argument on the facts, does not apply in the *Kerson* case. Quite the contrary. A segment of the law school community did not like the two-panel mural, but they never made critical comments about the artist. In fact, the students who initiated the decision to cover the mural praised Kerson's original intentions. They just did not like the art. Second, the ongoing disagreements over the installation of Büchel's project that led to MASS MoCA's desire to vent its spleen were completely absent in the *Kerson* setting. The mural was installed seamlessly with the full cooperation of the school administration and was well-reviewed at the time. Finally, covering Büchel's work was never intended to be permanent. It was an interim solution to what had become an intractable dispute.

As a result, the *Kerson* court never really grappled with the question of whether permanently covering an extant, completed mural may ever be a destruction or mutilation under the VARA. As noted at the outset of this section,<sup>88</sup> simply stating that covering a work is equivalent to long-term storage of a painting or other movable work does not do the trick, especially when the work is permanently affixed to a building. When the intention of those constructing a covering of art attached to a building is to permanently hide the work, the impact is akin to destruction, distortion, or mutilation of the work. That is because murals installed on the wall of a building with the consent of the owner are inherently created with the intention of all involved that they be seen for the foreseeable future in the area where they are located. But a movable work, like a painting hung on a hook, is virtually always subject to relocation in ways wholly different from a mural. The nature of the

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87. *Id.* at 61–62. A footnote within the brief provides:

Indeed, the Boston Globe's art critic, Ken Johnson, described the exhibit as a "self-serving photo and text display" that implicitly conveys criticism of Büchel for the failure of "Training Ground for Democracy." The juxtaposition left Johnson with the impression that MASS MoCA was "exacting revenge" against the artist "by turning his project into a show that misrepresents, dishonors, vilifies, and even ridicules him."

*Id.* at 62 n.22.

88. See Order on the Motion for Summary Judgment, *supra* note 71 and accompanying text.

artistic intent is therefore dramatically different in the two settings. As a result, hiding a mural is mutilating a work, while hiding a painting may not be.<sup>89</sup> Furthermore, a mutilation that is not permanent is still subject to VARA constraints in both mural and movable art settings. If a vandal slashes or paints over some or all of any type of artwork, that surely would be deemed a destruction, distortion, or mutilation of the art. Even if the vandalism can be repaired, it is hard to believe that the miscreant would escape the imposition of damages for the cost of making that repair, as well as any loss in value if the repair failed to render the damage undetectable. In short, distortion or mutilation of any type of work need not be permanent to raise a problem under the VARA. That means that reducing the ability of those wishing to view a work of fine art like a mural affixed to a building—a work installed with the clear intention that it be permanently visible—is a mutilation whether long-lasting or not.<sup>90</sup> The barrier in front of Kerson’s mural, therefore, is also a mutilation even if it causes no harm during its existence or can be taken down without its demolition causing any harm to the art.

*D. “Environmental Conditions” as Not Destructive for Modification Purposes*

The weak analysis of the issue of hiding the Kerson work is minor compared to the court’s treatment of “environmental conditions” as nonmodifications in all circumstances. The court stated that the covering to be constructed in front of Kerson’s mural would not make it “look different” and that any damage occurring over time caused by the barrier itself cannot be a VARA violation because of 17 U.S.C. § 106A(c)(1). That section provides:

The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a

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89. Note well that treating the hiding of a mural as a destruction or mutilation does not mean it can never be destroyed. For example, in the most extreme cases, such as a building that must be torn down because of severe and irremediable safety issues, a mural will surely be lost unless there is a way to move it without damage.

90. Similar issues are raised by the long-term storage of art in freeports and museum vaults. But in most of these situations, the works are easily movable to a public place, unattached to a building, and therefore lacking an agreed upon intention to be permanently viewable by the public, and not typically subject to physical harm. Whether long-term storage of movable fine art should always be treated as outside the sanctions of the VARA is an interesting question that need not be answered here.

distortion, mutilation, or other modification described in subsection (a)(3)(A).<sup>91</sup>

On the face of the statutory language, however, the court's conclusion was profoundly erroneous. The section clearly refers to the work of art itself—its decay over time due to natural forces or the particular materials used by the artist in crafting the work. The well-known fading of the fugitive red pigments used in an array of Van Gogh paintings,<sup>92</sup> for example, clearly is not a modification or mutilation of his work under any moral rights provision. But if someone creates a physical environment surrounding a work of art knowing that it is likely to damage the work in ways that go beyond natural forces or material decomposition, a serious VARA question arises. By construing the statutory language so broadly, the court eliminated all issues surrounding the impact of the barrier covering Kerson's work, even if those building it were aware of the potential for serious damage.

Consider the placement of a work made of wax<sup>93</sup> in a museum space that was routinely and knowingly maintained by the museum staff at a temperature likely to damage the sort of wax used in the work over time. If the art then gradually deteriorated, that cannot possibly be measured by the passage of time alone or by deterioration of the materials making up the work. It would be the result of knowing misbehavior by the museum staff in failing to operate the HVAC system correctly. Section 106A(a)(3)(A)'s proscription of intentional mutilation or modification of a work of fine art provides the artist a remedy in this hypothetical. Intentional misbehavior includes not only a specific intent to overtly mar or destroy a work, but also the results of actions that the responsible parties perform despite knowing their behavior is likely to have a deleterious impact on a work. The contention that placing a work in a situation likely to damage it while knowing of the risk is merely damage caused naturally by the passage of time is incongruous.

For this segment of the *Kerson* opinion, Judge Crawford relied upon *Flack v. Friends of Queen Catherine, Inc.*,<sup>94</sup> a case which itself is based on similarly flawed reasoning.<sup>95</sup> In *Flack*, a work made of clay was placed

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91. 17 U.S.C. § 106A(c)(1).

92. See, e.g., Sarah Everts, *Van Gogh's Fading Colors Inspire Scientific Inquiry: Lessons Learned from the Chemical Breakdown of Pigments in the Post-Impressionist's Masterpieces*, CHEM. & ENG'G NEWS (Feb. 1, 2016), <https://cen.acs.org/articles/94/i5/Van-Goghs-Fading-Colors-Inspire.html>.

93. Such works of wax do exist. See Wolfgang Waib's *Wax Room* at the Phillips Collection gallery. *Wax Room: Wohin Bist Du Gegangen – Wohin Gehst Du? (Where Have You Gone – Where Are You Going?)*, PHILLIPS COLLECTION, <https://www.phillipscollection.org/collection/laib-wax-room> (last visited May 5, 2023).

94. *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526, 535 (S.D.N.Y. 2001).

95. *Id.* at 534.

outdoors. Not surprisingly, that resulted in its deterioration. Any museum worthy of the name knows that clay and the outdoors do not mix well. Such knowing misbehavior must be treated as an unlawful modification or mutilation. In short, *Flack*, like *Kerson*, was based on faulty logic.

Judge Crawford stated in his summary judgment opinion that Kerson's experts described "changes that they fear may occur over time as a result of exposure to gases or humidity. These," the judge continued, "are potential harms that take time to develop. They may fairly be considered sources of damage that are 'the result of the passage of time' and are excluded from the VARA."<sup>96</sup> This conclusion is certainly in error. If the law school is aware of the likelihood that the mural will be damaged by the construction of the barrier and builds it anyway, any resulting damage is not due merely to the passage of time. Rather, it is the result of knowing, and therefore intentional, creation of an environment likely to cause modification or mutilation of the work.

#### *E. Propriety of Granting Summary Judgment*

In light of the court's erroneous conclusions that covering a work with a permanent barrier was neither a modification nor a destruction of Kerson's mural and that knowing mistreatment of a work is irrelevant to determining whether harm occurs naturally over a period of time, the grant of summary judgment is reversible as a matter of law. In addition, the factual contentions about the likelihood of the barrier planned by the law school causing damage to the mural were in dispute between the two parties. Since the court's interpretation of the meaning of the statutory section dealing with change occurring over time was wrong, factual resolution of that issue actually goes to the heart of the litigation. In such a circumstance, granting summary judgment was not only erroneous as a matter of law, but also seriously out of kilter with the common understanding that material disputes of fact may not be resolved on motion.

### III. ANALOGIES: TWO OTHER IMPORTANT MURAL DISPUTES

*Kerson* certainly is not the first major quarrel about a mural's longevity. Among the array of disputes, two provide a rich background for thinking about the Vermont Law and Graduate School tussle—the destruction of Diego Rivera's partially completed fresco *Man at the Crossroads* at the Rockefeller Center in 1933, and the 2017 dispute at Indiana University over

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96. Order on Defendant's Motion for Summary Judgment, *supra* note 71, at 14.

murals by Thomas Hart Benton. Both involved contentious dialogues about the artistic presentation of controversial subjects in wall art.<sup>97</sup> The Rivera saga, while infamous, would probably not have violated the VARA had the statute existed that early in our copyright history. Its contractual underpinnings provided strong grounds for the Rockefeller family to destroy and remove the work. The other story discussed here involves a mural by Thomas Hart Benton with images of Ku Klux Klan activities displayed on a wall of a large lecture hall at Indiana University. Removing the mural, painted by a vociferous opponent of the Klan, most likely would have involved violations of the VARA if Benton were still alive. But it was resolved after a mature and intelligent discussion about ways to open controversial creativity issues to the public for ongoing discourse—a resolution that now seems unlikely in *Kerson* given the contours of the present debate and the construction of the barrier in front of the mural while

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97. Another candidate among a large number of possibilities includes the decision, later rescinded, to remove an old set of murals at the George Washington High School with unpleasant images of Native Americans and slaves. Kristin Lam, *A California School Board Has Voted to Paint Over a Mural of George Washington. Educators Want to Save It*, USA TODAY (July 11, 2019), <https://www.usatoday.com/story/news/nation/2019/07/11/san-francisco-mural-academics-george-washington-history/1689543001/>; Zachary Small, *San Francisco School Board Reverses Vote on Mural Removal*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/arts/design/san-francisco-george-washington-mural.html>. See also, e.g., Heidi Kulicke, *Nine Years After Being Destroyed, Twitchell's 'Ed Ruscha Monument' Mural to Return*, L.A. DOWNTOWN NEWS (June 11, 2015), [http://www.ladowntownnews.com/news/nine-years-after-being-destroyed-twitchell-s-ed-ruscha-monument-mural-to-return/article\\_c1e69a5c-0fd3-11e5-ae8f-0b8fed567176.html](http://www.ladowntownnews.com/news/nine-years-after-being-destroyed-twitchell-s-ed-ruscha-monument-mural-to-return/article_c1e69a5c-0fd3-11e5-ae8f-0b8fed567176.html) (describing the destruction of Kent Twitchell's 70-foot-tall mural of the artist Ed Ruscha in Los Angeles); Maleeha Syed, *Downtown Burlington Mural to Be Covered or Removed by August After Years of Public Backlash*, BURLINGTON FREE PRESS (May 19, 2020), <https://www.burlingtonfreepress.com/story/news/2020/05/19/burlingtons-city-council-voted-cover-remove-downtown-mural-mural-august/5219041002/> (describing the removal of a mural thought to be racist in downtown Burlington, Vermont); Svetlana Mintcheva, *Nude Sculpture Removed from Public View in Michigan*, NAT'L COAL. AGAINST CENSORSHIP (June 25, 2009), <https://ncac.org/news/blog/nude-sculpture-removed-from-public-view-in-michigan> (describing the removal of a nude male sculpture from the public space in front of the Anton Art Center in Mount Clemens, Michigan). For an overview of the painting over of prized murals at a San Francisco gay bar, see Brian Boucher, *Six Artists Are Suing a Property Owner for Painting Over Beloved Murals at a Famed San Francisco Gay Bar During Pride Month*, ARTNET (Nov. 18, 2020), <https://news.artnet.com/art-world/the-stud-artworks-destroyed-1924660>; *Canilao v. City Com. Invs., LLC*, No. 20-cv-08030-EMC, 2022 WL 2668550, at \*2 (N.D. Cal. July 11, 2022). For an overview of students calling for removal of a mural with images of slaves at the University of Kentucky, see Julia Jacobs, *Students' Calls to Remove a Mural Were Answered. Now Comes a Lawsuit*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/arts/design/university-of-kentucky-slavery-mural-lawsuit.html>; Haley Simpkins, *Mural Still Standing Months After Promise to Remove*, KY. KERNEL (Feb. 8, 2021), [www.kykernel.com/news/mural-still-standing-months-after-promise-to-remove/article\\_64412d68-6a18-11eb-a19d-c31380e17445.html](http://www.kykernel.com/news/mural-still-standing-months-after-promise-to-remove/article_64412d68-6a18-11eb-a19d-c31380e17445.html); Alexis Baker, *UK Under Legal Pressure for Planned Removal of Memorial Hall Mural*, KY. KERNEL (Dec. 1, 2022), <https://kykernel.com/89949/news/uk-under-legal-pressure-for-planned-removal-of-memorial-hall-mural/>.



the litigation was pending, despite the arguably wise course of action it suggests.

*A. Rivera and the Rockefeller Center Mural*

The story about the removal of the incomplete Diego Rivera mural from the lobby of 30 Rockefeller Plaza in midtown Manhattan is well known.<sup>98</sup> It was told in fulsome detail in two major tomes by Susana Pliego Quijano, Javier Aranda Luna, and Pablo Ortiz Monasterio published in 2013 and by Catha Paquette in 2017.<sup>99</sup> The Rockefeller family, one of the wealthiest in the Nation, owned virtually all of Standard Oil Company. In the midst of the Great Depression, the family decided to use its wealth to construct Rockefeller Center in midtown Manhattan. The enormous project became a major provider of paid employment, generating tens of thousands of jobs.<sup>100</sup> Their plan was in part designed to demonstrate the family's commitment to the nation's well-being during a time of widespread poverty and deprivation. In developing plans for the enormous project, they created an Art Committee to review installation of a variety of works in the 14-building complex. Generally, Abby Aldrich Rockefeller, the wife of John D. Rockefeller, the family patriarch, was deeply involved in making the artistic decisions. But the final decision-making authority was exercised by her husband.<sup>101</sup>

Abby Rockefeller, among other roles, was one of the founders of the Museum of Modern Art.<sup>102</sup> She greatly admired the work of Diego Rivera, the famous Mexican muralist. With her encouragement, he was selected to

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98. Among the many publications covering the dispute are SUSANA PLIEGO QUIJANO ET AL., *MAN AT THE CROSSROADS: DIEGO RIVERA'S MURAL AT ROCKEFELLER CENTER* 60–63 (2013); CATHA PAQUETTE, *AT THE CROSSROADS: DIEGO RIVERA AND HIS PATRONS AT MOMA, ROCKEFELLER CENTER, AND THE PALACE OF FINE ARTS* 6–7 (2017); Anne Quito, *Diego Rivera Returns: America's Most Controversial Office-Lobby Mural Has Been Resurrected*, QUARTZ (Feb. 14, 2020), <https://qz.com/work/1801747/the-whitney-reproduced-diego-riveras-controversial-office-mural/>; Ruxi Rusu, *Diego Rivera: The Controversial Story of Man at the Crossroads*, DAILY ART MAG. (Apr. 13, 2022), <https://www.dailyartmagazine.com/diego-rivera-man-at-crossroads/>; *Mexican Muralists and the Whitney Rewrite Art History*, ITSNEWSTOYOU (Jan. 22, 2021), <https://itsnewstoyou.me/2021/01/22/mexican-muralists/>; Allison Keyes, *Destroyed by Rockefellers, Mural Trespassed on Political Vision*, NPR (Mar. 9, 2014), <https://www.npr.org/2014/03/09/287745199/destroyed-by-rockefellers-mural-trespassed-on-political-vision>.

99. See QUIJANO ET AL., *supra* note 98, at 55–136; see also PAQUETTE, *supra* note 98, at 93–216.

100. QUIJANO ET AL., *supra* note 98, at 55; PAQUETTE, *supra* note 98, at 97–98.

101. PAQUETTE, *supra* note 98, at 99, 139.

102. QUIJANO ET AL., *supra* note 98, at 55. The museum's description of its history is at *The Museum of Modern Art History*, MOMA, <https://www.moma.org/about/who-we-are/moma-history> (last visited Mar. 26, 2023).

craft a mural for the lobby of 30 Rockefeller Plaza, the largest and most central building in the Rockefeller Center complex.<sup>103</sup> Rivera, knowing of her admiration, actually sought out a major commission for installation in the Center.<sup>104</sup> His selection, however, still remains somewhat puzzling. As a well-known member of the Communist Party, it is ironic that an enormously wealthy family like the Rockefellers would select him to craft the most important interior artwork of the entire complex. It is also somewhat mystifying why Rivera thought he might be offered the job and still be able to keep it while exercising complete freedom to decide on its message.<sup>105</sup> But his sketches and narratives were thought by the Rockefellers and others associated with the project to mesh closely enough with the themes the family was interested in portraying that they were willing to take a risk to work with an artist they recognized as one of the most important muralists in the world.<sup>106</sup>

Rivera composed and submitted preliminary drawings when he sought the commission, though the work he later began to create was quite different from the original versions.<sup>107</sup> The changes arose despite the fairly stringent terms of the contract he signed before undertaking the project. The terms of that deal required that the mural be painted on canvas, that it be crafted in a grey, white, and black palette, and that it faithfully follow the preliminary drawings submitted to the architects and Art Committee. The agreement also provided:

If our architects shall not approve of the sketches in their original form, or as the same may be changed by you pursuant to the suggestions, if any, of said architects, we shall have the right to cancel this agreement at once by giving you written notice by registered mail of our desire so to do. In such event, we shall return said sketches to you, and neither you nor we shall be under any further liability one to the other, and you shall have the right to retain the payment made by us to you upon the delivery of this agreement. . . . In doing the final paintings, the sketches . . . shall be faithfully and closely followed.<sup>108</sup>

Despite the seemingly ironclad terms of the contract, Rivera sought changes almost immediately after his selection to do the project. He

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103. QUIJANO ET AL., *supra* note 98, at 60.

104. *Id.* at 62–63; *see also* PAQUETTE, *supra* note 98, at 124–25.

105. *See* QUIJANO ET AL., *supra* note 98, at 60.

106. PAQUETTE, *supra* note 98, at 142–43.

107. QUIJANO ET AL., *supra* note 98, at 73–74; *see also id.* at 126–38.

108. QUIJANO ET AL., *supra* note 98, at 87, 90 (alteration in original).

succeeded in getting permission to make some changes, but his refusal to follow the imagery in the preliminary drawings eventually led to his dismissal. The first change he sought was to create a fresco rather than a painted canvas. Rivera maintained that “[n]othing can take the place of fresco in mural painting because fresco is not a painted wall, but rather a painting that is a wall.”<sup>109</sup> Quijano suggested Rivera held such a view because

[t]he painting would take on greater meaning since, as it became a part of the building dollars could not pull it off the wall that held it, so its permanence was guaranteed. Although there are techniques for removing a mural, practically the only way to destroy [a fresco is] with a chisel and hammer, leaving what we might call a “scar” in the building. Rivera wrote to Abby Aldrich Rockefeller begging her to allow him to paint in fresco, not just because it was his preferred medium and a familiar language, but because “the architectural beauty of the building will be thousand times better: beautiful fresco, not the hateful, lined canvas.”<sup>110</sup>

Rivera’s preferred media was approved. Rivera’s second concern was the contractual limitation to a bland palette of grey, white, and black, a constraint he found to be funereal and inappropriate for a work so central to the importance of the space. This request also was granted.<sup>111</sup>

In early 1933, Rivera began making preparatory arrangements for installation of the fresco and moved to New York with his well-known artist wife Frida Kahlo. As the project developed it became more and more clear that its thematic content portrayed a struggle between forward-thinking socialism and dangerous, backward-looking capitalism. The political content of the fresco underwent a critical change in April.<sup>112</sup> An article in the *World Telegram* by Joseph Lilly was headlined “Rivera paints scenes of communist activity for RCA walls and John D. Jr. foots bill.”<sup>113</sup> Quijano wrote: “This blunt affirmation scandalized American society and provoked a reaction in the artist: If people really believed the mural was communist, it would be openly and explicitly communist.”<sup>114</sup> Rivera then elected to insert an image of Vladimir Lenin to the right of the central features of the fresco.<sup>115</sup> He

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109. *Id.* at 90.

110. *Id.* at 90–91.

111. *Id.* at 91.

112. A summary of the controversy caused by the changes is told in PAQUETTE, *supra* note 98, at 149–82.

113. QUIJANO ET AL., *supra* note 98, at 99.

114. *Id.*

115. *Id.*

retained other imagery he had previously installed in the fresco, including Depression-era scenes of breadlines and worker demonstrations, as well as an image of John D. Rockefeller among symbols of sexually transmitted disease, consumption of alcohol (Rockefeller supported Prohibition but later agreed with its repeal<sup>116</sup>), and courtesans. A reconstruction of the work, shown just below, was made by Rivera in 1934 for the Palace of Fine Arts in Mexico City<sup>117</sup> and reconstructed for the Whitney Museum in New York in 2020.<sup>118</sup> Below that is a blown-up image of the central part of the painting containing the images of Rockefeller and Lenin.<sup>119</sup>



Figure 9



Figure 10

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116. PAQUETTE, *supra* note 98, at 161.

117. *See generally id.* at 217–48.

118. *Vida Americana: Mexican Muralists Remake American Art, 1925–1945*, WHITNEY MUSEUM OF AM. ART, <https://whitney.org/exhibitions/vida-americana> (last visited Mar. 26, 2023).

119. Diego Rivera, *Man, Controller of the Universe* (1934), in PAQUETTE, *supra* note 98, following p. 91.

On May 4, 1933, Nelson Rockefeller wrote Rivera a quite polite letter asking for the image of Lenin to be removed and replaced by an “everyman” figure.<sup>120</sup> Rivera declined by letter two days later, after which he was paid for his work and escorted from the building under orders never to return. His violation of the terms of the original contract had eventually ended his career as a Rockefeller family artist.<sup>121</sup> The denouement quickly led to protests and demonstrations, all for naught. In February 1934, the incomplete fresco was chiseled off the wall.<sup>122</sup>

While the controversy over the Rivera mural provoked substantially greater controversy than that at Vermont Law and Graduate School, it would have had no major copyright law significance were the events contemporary. The existence of a tightly worded agreement between Rockefeller and Rivera limiting the artist’s artistic freedom would prevent any recourse to the VARA. While it is possible that Rivera’s gaining permission to make some changes in his agreement with Rockefeller effectively waived the right to enforce the contract, it is more likely that § 106A(e)(1) would have been decisive. It provides:

The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.<sup>123</sup>

This provision is of no assistance to Vermont Law and Graduate School, since it failed to seek any contractual agreement other than a promise of payment in return for installation of the murals. It is, however, a warning to any organization desiring to install artwork in or on their building to carefully craft the written terms under which such work may proceed. While there certainly is a great deal of irony in the failure of a law school to take the terms of the VARA seriously, Kerson is clearly benefitted by their oversight.

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120. QUIJANO ET AL., *supra* note 98, at 99–100; *id.* at 170.

121. QUIJANO ET AL., *supra* note 98, at 115.

122. *Id.* at 122. It was replaced with a mural by José Maria Sert. For a version of that story and an image of Sert’s mural, see Jane Lerner, *Art History: The Story Behind the “American Progress” Mural at Rockefeller Center*, *CTR. MAG.* (May 5, 2015), <https://www.rockefellercenter.com/magazine/arts-culture/jose-maria-sert-muralist-rockefeller-center-art/>. Efforts to have the Rivera fresco moved to MoMA failed. See PAQUETTE, *supra* note 98, at 191–96.

123. 17 U.S.C. § 106A(e)(1). It is theoretically possible that the changes sought and obtained by Rivera would have been deemed a waiver by Rockefeller, but that seems an unlikely outcome. See generally PAQUETTE, *supra* note 98, at 145–82.

*B. Benton Murals at Indiana University*

In 1932, Indiana Governor Harry G. Leslie asked Colonel Richard Lieber, director of the Department of Conservation, to oversee the state's entry for the Century of Progress Exposition in Chicago, opening the following year. His proposal to create a large, 250-foot mural with a number of distinct panels memorializing the state's history was adopted. He selected Thomas Hart Benton, a then relatively unknown Indiana regional artist, to make the works. Benton asked for and received complete artistic freedom for the project depicting Indiana history, with half portraying industry and the other culture. He also wished to present a broad picture of the state's past—events evoking praise, condemnation, and controversy.<sup>124</sup> After the Chicago Exposition, the murals were stored at the Indiana Fairgrounds. In 1939, arrangements were made to install the panels in various locations at Indiana University.

Two of the 16 panels created controversy from the outset. As the university website notes:

Cultural Panel 10 (“Parks, the Circus, the Klan, the Press”) depicts a vivid, startling image of a Ku Klux Klan rally and a burning cross. The Klan had ruled Indiana politics during the 1920s—much to the embarrassment of progressives like Col. Lieber who preferred to bury the state's sins of the past.

Industrial Panel 9, titled “Coal, Gas, Oil, Brick,” was also controversial. It pictured Socialist union leader Eugene V. Debs (from Terre Haute) rallying Indiana workers with a placard stating, “Workers, Why Vote the Rich Man's Ticket? You've Got a Choice.” The panel also features hints at the physical violence that took place during union strikes and rallies. In the midground to the right, Benton painted a crouched figure poised to throw a rock at a hired guard.<sup>125</sup>

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124. A brief history of the creation of the Thomas Hart Benton murals now located at the University of Indiana is available at *The Indiana Murals: History*, IND. UNIV. BLOOMINGTON, <https://murals.sitehost.iu.edu/history/index.html> (last visited May 5, 2023).

125. *Id.*

Here is Panel 10:



Figure 11<sup>126</sup>

In 2017, a petition was circulated seeking removal of Cultural Panel 10.<sup>127</sup> Triggered by the Nazi demonstration in Charlottesville that year, the petitioners argued that the mural's presence in a classroom violated the university's diversity statement mandating that diverse communities be "respected and valued," as well as the student Right to Freedom from Discrimination statement noting that "[s]tudents have the right to study, work, and interact in an environment that is free from discrimination in

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126. Detail of Thomas Hart Benton, *A Social History of Indiana: Parks, the Circus, the Klan, the Press* (1933), in Sarah Cascone, *Students Rally to Remove a Thomas Hart Benton Mural Depicting the KKK at Indiana University*, ARTNET NEWS (Oct. 31, 2017), <https://news.artnet.com/art-world/thomas-hart-benton-mural-indiana-1133765>.

127. It is available on Change.org. Jacqueline Barrie, *Remove KKK Mural in Woodburn Hall at Indiana University*, CHANGE.ORG, <https://www.change.org/p/michael-mcrobbe-remove-kkk-mural-in-woodbury-hall-at-indiana-university> (last visited Apr. 25, 2023).

violation of law or university policy.”<sup>128</sup> This removal effort followed a series of prior objections to the continued presence of the mural in Woodburn Hall, the largest lecture hall on the campus.<sup>129</sup> These sorts of claims obviously echo the ongoing dispute at Vermont Law and Graduate School.<sup>130</sup> Despite the long-extant controversy over the Benton mural, it remained in place when the 2017 petition was circulated and still does.

After circulation of the petition seeking removal of the Benton work, the university elected to leave it in place while ending use of Woodburn Hall as a classroom. The decision was explained in a lengthy statement issued September 29, 2017, by Lauren Robel, the university’s executive vice-president and provost.<sup>131</sup> She agreed that the presence of the Benton mural in Woodburn Hall before the “captive audience of classes” was a problem and concluded that the facility would no longer be used for that purpose:

[E]ven with the proper information and education, many students still feel strongly that a Klan rally and burning cross looming over their classes seriously impedes their learning. For some of our students, the burning cross is a symbol of terror that has haunted their families for generations. For others, the robed Klansman has figured in personal family or community tragedies and anguish. These reactions are absolutely reasonable on their face, and as Charlottesville shows, they are not ancient history. They have to be reckoned with, but it is far from clear that the reckoning should be an inevitable part of a class in finite mathematics, macroeconomics, organic chemistry, or gross anatomy and physiology—all classes taught regularly in this space—particularly since the burden of that reckoning inevitably falls more heavily on students whose race or religion have made their families the historical targets of the Klan.<sup>132</sup>

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128. *Id.*; INDIANA UNIVERSITY, CODE OF STUDENT RIGHTS, RESPONSIBILITIES, & CONDUCT 2 (2023).

129. See Ab Tonsing, *IU’s Benton Mural with KKK Image Being Challenged Again*, HERALD TIMES (Aug. 31, 2017), <https://www.heraldtimesonline.com/story/news/local/2017/08/31/iu-benton-mural-with-kkk-image-being-challenged-agai/46715635/>. Tonsing notes that prior disputes about the mural arose in 1989, 2002, 2005, and 2008. The university’s chancellor released a lengthy statement on the issue in 2002. *Statement from Chancellor Brehm on Benton Mural*, IND. UNIV., <https://newsinfo.iu.edu/news/page/normal/296.html> (last modified Mar. 25, 2002).

130. They also echo remarkably similar claims about a mural at the University of Kentucky over a fresco picturing enslaved people. See Jacobs, *supra* note 97; Simpkins, *supra* note 97. This work also still remains in place.

131. Lauren Robel, *On the Benton Murals*, IND. UNIV. (Sept. 29, 2017), <https://provost.indiana.edu/statements/archive/robel/benton-murals.html>.

132. *Id.*



But she defended the continued presence of Cultural Panel 10 on campus.

The classroom contains a panel . . . that has repeatedly sparked controversy, as it includes a depiction of a Ku Klux Klan rally and a burning cross. The imagery in that panel, entitled “Parks, the Circus, the Klan, the Press,” has been controversial since its creation. Benton’s intent was to show the role that the press had played in battling the Klan through exposing the Klan’s corruption of and infiltration into all levels of Indiana government in the 1920s. At the time of the mural’s creation, many opposed Benton’s decision to include the Klan, because they did not want to portray Indiana in a negative light, and the memories of the Klan’s political influence were still raw. Benton, however, overcame this opposition, and maintained artistic control. He believed that his murals needed to show all aspects of the state’s history, even the ugly and discomfiting parts, so we could confront the mistakes of the past.

Understood in the light of all its imagery and its intent, Benton’s mural is unquestionably an anti-Klan work. Unlike statues at the heart of current controversies, Benton’s depiction was intended to expose the Klan’s history in Indiana as hateful and corrupt; it does not honor or even memorialize individuals or the organization as a whole. Everything about its imagery—the depiction of the Klan between firefighters and a circus; the racially integrated hospital ward depicted in the foreground suggesting a different future ahead—speaks to Benton’s views. Every society that has gone through divisive trauma of any kind has learned the bitter lesson of suppressing memories and discussion of its past; Benton’s murals are intended to provoke thought.<sup>133</sup>

Thomas Hart Benton was a well-known painter. A number of his works are owned by the National Gallery of Art in Washington, D.C., among other important museums.<sup>134</sup> The VARA does not protect any of his work. He died in 1975, 15 years before the statute went into effect. Were he still with us and the murals of more recent vintage, however, there is no question that the exact same moral rights provisions at issue in the *Kerson* dispute would govern the

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133. *Id.*

134. A biography and images of his work are available at *Thomas Hart Benton*, NAT’L GALLERY OF ART, <https://www.nga.gov/collection/artist-info.953.html> (last visited Apr. 25, 2023). A list of other museums holding his works may be found at *Museums*, THOMAS HART BENTON, <https://thomashartbenton.org/museums> (last visited Apr. 25, 2023).

Benton work had Indiana University elected to destroy or cover it. In her statement, Robel made it quite clear that it could not be removed from view without destroying it. She also opined that hiding it behind a curtain would risk turning every decision to open it for viewing when classes were not in session into an endorsement of the very views Benton abhorred.<sup>135</sup>

The similarities between the *Benton* and *Kerson* controversies are stunning. Both involve closely related, controversial subject matter about race found offensive by some members of their educational communities. Both were painted in versions of folk-art style with some measure of caricaturizing. Both were created by artists with anti-racist intentions. Both were crafted in ways that make it impossible to remove them without their destruction. Both presented the same legal issues if made invisible by creating covers of some sort. Both were located in areas available to large segments of the student body. Though disliked by some, both works probably were and are of recognized stature. And both works were installed in or on their present locations with the permission, approval, and encouragement of institutional leadership.

Were Benton's Depression-era work at Indiana University covered by the VARA, the institution almost surely would have been barred from removing or covering it. The message of Indiana University's refusal to remove Benton's work is consistent with much of copyright law history. Long before the moral rights provisions were adopted, courts resisted efforts to intensely review the aesthetic nature, quality, or message of artistic works as a measure of copyrightability. The roots for that sentiment go back over a century to Justice Oliver Wendell Holmes' famous opinion in *Bleistein v. Donaldson Lithographing Company*.<sup>136</sup> George Bleistein, an employee of Courier Lithographing Company, was hired by Benjamin Wallace, owner of the Great Wallace Show, to make posters for use in advertising the circus. When Wallace ran out of posters, he hired Donaldson Lithographing

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135. Robel, *supra* note 131, stated:

The murals cannot be moved. Benton painted them using egg tempera paint, which has become extremely fragile over time. Moreover, the space in Woodburn 100 was designed specifically to house the two panels that now hang there, and they were installed in such a way that moving them would almost certainly cause irreparable damage. Nor does the notion of covering them with a curtain accord with our responsibility as stewards of this precious art. Covering the murals feels like censorship and runs counter to the expressed intent of the artist to make visible moments in history that some would rather forget. Furthermore, covering the murals during class periods would leave them hidden for the vast majority of time and create a situation in which the decision to uncover them could be used by some as a symbolic act in support of the very ideology the murals are intended to criticize.

136. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903). It is widely recognized as an intellectual property classic that is read in virtually every copyright course in the nation.

Company to make more. Donaldson did so by reproducing the Bleistein versions in a somewhat smaller size. When sued, he claimed that commercial advertisements, like the Bleistein poster displayed below,<sup>137</sup> were aimed at the masses and therefore did not promote the “useful Arts” within the meaning of the intellectual property clause of the Constitution.<sup>138</sup>



Figure 12

But the claim made by the attorneys for Donaldson moved well beyond the surface meanings of commercial advertising and public relations functions by also asserting that the scantily clad circus performers pictured in a number of the posters incited lustful behavior among the masses and therefore should be unavailable for protection.<sup>139</sup> In their brief, they claimed that:

137. *The Stirk Family, Performing on Bicycles*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Bleistein\\_v.\\_Donaldson\\_Lithographing\\_Co.#/media/File:The\\_Great\\_Wallace\\_Shows\\_circus\\_poster.jpg](https://en.wikipedia.org/wiki/Bleistein_v._Donaldson_Lithographing_Co.#/media/File:The_Great_Wallace_Shows_circus_poster.jpg) (last visited Apr. 25, 2022).

138. Article I, Section 8, Clause 8 of the Constitution grants Congress 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.” U.S. CONST. art. I, § 8, cl. 8. The useful arts language was not directed to patents, but to other forms of intellectual endeavor.

139. Even defamatory, pornographic, and offensive works have long been subject to protection, despite periodic objections to this practice. For a recent essay suggesting the need for change in this understanding, see Michal Shur-Ofry & Noy Lion, *Copyright Neutrality? Lessons From Mein Kampf*, 40 CARDOZO ARTS & ENT. L. J. (forthcoming 2023).

[T]he copyright law does not protect what is immoral in its tendency . . . . A print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences, and to attract them to witness the performance of such scenes, is manifestly of that character. It is the young and immature and those who are sensually inclined who are liable to be influenced by such scenes and representations, and it is their influence upon such persons that should be considered in determining their character.<sup>140</sup>

This was certainly not an unusual argument over a century ago. Supposed sexual impropriety and allegedly immoral behavior were a major concern of the era.<sup>141</sup>

In a holding that still resonates when claims are made that controversial or unpopular subjects should not be eligible for copyright protection, Justice Holmes strongly rejected Donaldson's claim. Though he did not speak directly to the overt call for using copyright law to control morality and improper behavior, he indirectly did so by writing:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the

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140. Brief for Defendant in Error at 23, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (No. 117). The brief contends that the trial judge reached the correct result when it stated that the picture which represents a dozen or more figures of women in tights, with bare arms, and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art, or fine art, it is something to be regarded as merely frivolous, to some extent immoral in tendency.

*Id.* at 22–23.

141. The prohibition movement was largely built on such concerns. *See, e.g.*, JAMES H. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900–1920*, at 4–67 (1963); JED DANNENBUM, *DRINK AND DISORDER: TEMPERANCE REFORM IN CINCINNATI FROM THE WASHINGTONIAN REVIVAL TO THE WCTU* (1984); SCOTT C. MARTIN, *DEVIL OF THE DOMESTIC SPHERE: TEMPERANCE, GENDER, AND MIDDLE-CLASS IDEOLOGY, 1800–1860* (2008) (discussing women's involvement in the temperance movement); IAN TYRRELL, *REFORMING THE WORLD: THE CREATION OF AMERICA'S MORAL EMPIRE* 74–97 (2010); Richard H. Chused, *The Temperance Movement's Impact on Adoption of Women's Suffrage*, 53 AKRON L. REV. 359, 363–64 (2019).

etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.<sup>142</sup>

Similarly, the “recognized stature” standard in the VARA, though at first glance seeming to require courts to make a species of judgment about the cultural worth of pictorial illustrations, is not based on the nature or contours of aesthetic, moral, or political styles of the messaging in works of art. Rather, the stature notion is based on the general recognition of the work by both the public and those with artistic knowledge.<sup>143</sup> A work may be intensely disliked by some while still fulfilling the recognized stature requirement. The most frequently cited precedent is *Carter v. Helmsley-Spear, Inc.*,<sup>144</sup> though courts have not been totally consistent in their consideration of either the case or the stature issue.

Discussing this problem in an earlier article about aerosol art, another form of mural creativity, I previously noted that the *Carter* court was required to deal with a potentially contradictory and difficult standard by treading a fine line between cultural messaging and artistic creativity. The *Carter* court opined, I wrote, that

the recognized stature requirement served a “gate-keeping” function, preserving “only those works of art that art experts, the art community, or society in general views as possessing stature.” The showing required was not that the art met the standard of widely recognized artistic stars. Nor must the work be widely admired. Rather, the goal of the recognized stature requirement was to avoid nuisance lawsuits and squabbles over minor artistic endeavors. To fulfill the standard, the court concluded, “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

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142. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. at 251–52.

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

144. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–26 (S.D.N.Y. 1994) (outlining the requirements for a showing of “recognized stature”); *see also* *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994) (granting preliminary injunction); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995) (holding the artwork was made for hire and thus not protected by the VARA, vacating the injunction).

is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” And in fulfilling these obligations, the artist typically must make use of expert testimony.

It might be argued that the rule as stated by the court went well beyond the notion of gate-keeping, that it allowed too much art to be destroyed. Indeed, it has been argued that the recognized stature condition for VARA protection is unnecessary and counterproductive. By imposing a requirement that the value of artistic endeavors be subject to judicial scrutiny, VARA violates a basic norm of copyright jurisprudence dating back to Justice Holmes’ famous warning well over a century ago in *Bleistein v. Donaldson Lithographing Company*, that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” Imposing a stature requirement risked allowing the destruction of works that might later be deemed highly important exemplars of major artistic trends.<sup>145</sup>

At times courts have eased the burden of fulfilling the *Carter* standard even while claiming to apply it. In *Martin v. City of Indianapolis*,<sup>146</sup> for example, the court affirmed a grant of summary judgment under the VARA for destruction of the sculptural work pictured below based largely on newspaper and other public commentary but without affidavits or deposition testimony from any experts. The general tenor of the public commentary was favorable, though hardly in superlative terms.<sup>147</sup> And the artist, like Benton, was a regional figure. Even now his work is displayed almost entirely in Indiana.<sup>148</sup> Nonetheless, the extant caselaw leaves us with a somewhat ambiguous “stature” standard. The extent to which the door is open for courts to inquire into the aesthetic or cultural contours or motivations of artistic work may be left a bit ajar.

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145. Chused, *supra* note 46, at 624–25. The best analysis of the stature standard critiquing its contours is Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1937 (2000).

146. *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

147. The commentary is summarized in *Martin v. City of Indianapolis*, 982 F. Supp. 625, 631 (S.D. Ind. 1997).

148. His resume makes that quite clear. Jan Martin, *Resume*, JAN MARTIN ART, <https://janmartinartist.com/resume> (last visited Apr. 25, 2023).

Figure 13<sup>149</sup>

That, of course, does not lead to a straightforward answer about whether the Kerson murals are works of recognized stature. The initial reception of the works was praiseworthy.<sup>150</sup> And if the sometimes-negative reception to the Vermont Law and Graduate School work is put aside for a moment, there can be little doubt that his general reputation as an artist of note is well-deserved. Over the years his artwork has appeared in a variety of venues all over the world.<sup>151</sup> He also has been the artistic director of the Dragon Dance Theater, which has orchestrated workshops and fellowships in Argentina, Cuba, Nicaragua, Guatemala, Mexico, the United States, Canada, Belgium, Germany, Finland, and France.<sup>152</sup> At the time the Vermont Law and Graduate School work was completed, it was therefore difficult to claim that it was not of recognized stature. The most important issue, therefore, is whether that conclusion can be challenged by reactions to the work over time.

Consider again the work of Thomas Hart Benton. During the 1920s—the decade before Thomas Hart Benton painted his murals for the Century of Progress Exposition in Chicago, the Ku Klux Klan was a major cultural and

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149. Jan Martin, *Symphony #1*, in *Martin vs Indianapolis (VARA Law)*, JAN MARTIN ART, <https://janmartinartist.com/martin-vs-indianapolis> (last visited Apr. 25, 2023).

150. See *supra* note 18 and accompanying text.

151. The best biography I have found is *Sam Kerson*, EVERYBODYWIKI, [https://en.everybodywiki.com/Sam\\_Kerson](https://en.everybodywiki.com/Sam_Kerson) (last visited Apr. 25, 2023).

152. See *Home, DRAGON DANCE THEATRE*, <https://dragondancetheatre.wixsite.com/dragondancetheatre> (last visited Apr. 25, 2023).

institutional force in Indiana. Its members sat in the governor's mansion and both houses of the state legislature in large numbers during the 20s. Though its widespread acceptance was reduced in later years, its influence continued.<sup>153</sup> Suppose an important member of the Klan then (or now for that matter) became a very well-known racist painter whose work sold for large amounts of money. Given the tenor of the times, it probably would have been deemed to have "recognized stature." Assume that the popularity and the price of the artist's works declined precipitously in value during the Great Depression and in later years. Would they still have been of recognized stature if the VARA applied? The answer might be no. But that sort of conclusion simply cannot apply to the work of Kerson or Benton. Controversy is not the same as a decline into moral and monetary bankruptcy. Kerson's work may not be liked by all comers, but it is not so far out of the mainstream that it loses its recognized stature. As the case law in this area suggests, the standard does not demand that a work be "high art" but only that some established circles of art-minded people find it worthy.<sup>154</sup>

#### IV. A TELLING COMPARISON: WILLIAM CHRISTENBERRY'S KLAN ART

It is worth comparing both the Kerson and Benton controversies to those generated by the work of William Christenberry, a much better-known artist than either Benton or Kerson whose work has been widely shown in Europe and America<sup>155</sup> and displayed and owned by a number of important museums.<sup>156</sup> Christenberry was a native of Alabama. Though he spent most

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153. Jordan Fischer, *The History of Hate in Indiana: How the Ku Klux Klan Took Over Indiana's Halls of Power*, WRTV (Oct. 19, 2021), <https://www.wrtv.com/longform/the-ku-klux-klan-ran-indiana-once-could-it-happen-again>. For a more general history of the Klan in that period, see FELIX HARCOURT, *KU KLUX KULTURE: AMERICA AND THE KLAN IN THE 1920S* (2017).

154. It also is worth noting that the United States Supreme Court has held that the First Amendment bars routine refusal to recognize the legality of derogatory trademarks. See *Matal v. Tam*, 137 S. Ct. 1744, 1756–57 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301–02 (2019).

155. See an abbreviated list of his exhibits at *Estate of William Christenberry*, HEMPHILL <http://www.hemphillfinearts.com/artists/estate-of-william-christenberry/exhibitions> (last visited Mar. 23, 2023).

156. These include the Museum of Modern Art in New York, the Smithsonian Institution, and the Kemper Museum of Art in Kansas City. *William Christenberry*, ARTNET, <http://www.artnet.com/artists/william-christenberry/> (last visited Mar. 23, 2023). Today, Christenberry's work is also in the public collections of the Hirshhorn Museum and Sculpture Garden in Washington, D.C., the Whitney Museum of American Art in New York, and the J. Paul Getty Museum in Los Angeles, among many others. Neely Tucker, *After a Lifetime of Capturing What Was, Christenberry Faces What Is*, WASH. POST (June 11, 2015), [https://www.washingtonpost.com/lifestyle/magazine/after-a-lifetime-of-capturing-what-was-christenberry-faces-what-is/2015/06/05/66d755e8-0092-11e5-833c-a2de05b6b2a4\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/after-a-lifetime-of-capturing-what-was-christenberry-faces-what-is/2015/06/05/66d755e8-0092-11e5-833c-a2de05b6b2a4_story.html). His estate is represented by Hemphill Fine Arts, an important gallery in Washington, D.C. *Representing*, HEMPHILL, <http://www.hemphillfinearts.com/artists/c/representing> (last



of his adult life in Washington, D.C., he frequently traveled to his native region. He was fascinated with the decay of rural buildings and was well-known for taking series of pictures of the same deteriorating structures year after year and showing the pictorial record of deterioration over time in exhibitions. He was also well-known for his *Klan Room*—a display of Ku Klux Klan images and sculptures in a room next to his studio—and for various exhibits of both artifacts from that room and other Klan related works at museums all over the country.<sup>157</sup> These objects are not pleasant viewing. Many who see them, or other Christenberry Klan-related works, react with anger, if not revulsion. Below are two examples.



Figure 14. William Christenberry, *Dream Building Ensemble* (2001)<sup>158</sup>

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visited Mar. 23, 2023). Christenberry was a long-time member of the faculty at the Corcoran School of Art in D.C., where he spent much of his life until his death in 2016. Tim Smith, *Homage and Warning in William Christenberry's Look at the Deep South*, *BALT. SUN* (Dec. 29, 2016), <https://www.baltimoresun.com/entertainment/arts/bs-ae-christenberry-20161229-story.html>.

157. The list is too long to show, but searching online for “Christenberry Klan Room Exhibits” will lead you to many of them. A good article about his life and the Klan imagery is Jo Ann Lewis, *Southern Exposures*, *WASH. POST* (Mar. 23, 1997), <https://www.washingtonpost.com/archive/lifestyle/style/1997/03/23/southern-exposures/77bca2e4-aebb-4f81-84e6-42bb805fd797/>.

158. *ENCYCLOPEDIA OF ALA.*, <http://encyclopediaofalabama.org/article/m-5442> (last visited May 5, 2023).



Figure 15. Detail of William Christenberry, *Klan Room* (2016)<sup>159</sup>

Christenberry himself was horrified by the Klan. But he insisted that its history must not be hidden from view.

I hold the position that there are times when an artist must examine and reveal secret brutality,” Christenberry says. To those who find the work inappropriate or offensive, he also offers a quote from Picasso: “Painting is not made to decorate houses. It is a weapon of offensive and defensive war against the enemy.”<sup>160</sup>

Surely these works by one of the best-known, and most highly respected, artists from America’s South were not exempt from the VARA during Christenberry’s life because of their controversial nature any more than Picasso’s *Guernica* would have lacked protection.

Care in displaying such work obviously is important. And doing so has prevented some, but not all, controversies from emerging over Christenberry’s work.<sup>161</sup> That possibility was raised in quite palpable ways

159. Smith, *supra* note 156.

160. See Lewis, *supra* note 157.

161. Students were asked to participate in preparing Christenberry’s *Klan Room* for display at the Maryland Institute College of Art. The show provoked no major controversy. Scott Jaschik, *Students and Art on the Klan*, INSIDE HIGHER ED. (Dec. 1, 2016), [https://www.insidehighered.com/news/2016/12/01/salem-state-reopens-exhibit-closed-due-criticism-art-](https://www.insidehighered.com/news/2016/12/01/salem-state-reopens-exhibit-closed-due-criticism-art)

while he was alive. Many of his Klan works, as noted, were at one point kept in his home in Washington, D.C. in a space carefully “curated” by Christenberry. In 1979, the room where they were located was mysteriously burglarized and 64 components of the work disappeared.<sup>162</sup> The culprit has never been found. But marks of displeasure that deeply frightened Christenberry were left behind by the perpetrators—“a blood-red window, drawings and a neon cross.”<sup>163</sup> Had this event occurred after the VARA went into effect and had the burglars been found, courts would have been hard-pressed to avoid imposing moral rights remedies. Would not Christenberry have had a viable claim of destruction or mutilation in such a setting? Just the removal of work from his well-organized display would be a modification or a mutilation. And if the crooks were found but the works were not, how different would this have been from hiding the work of Kerson behind an impervious, permanent barrier?

#### CONCLUSION

The breadth and scope of recent disputes about public art with obvious racist overtones or with imagery that may be seen as insulting or demeaning by Black Americans or other cultural groups has fractured our social fabric. In the minds of some, such controversies place a strain on my preference to leave Benton’s art in place at Indiana University and Kerson’s work in place at Vermont Law and Graduate School. Traditional notions that the best way to counter the social harm caused by the visibility of such highly charged work is with education, public discussions, and open debates certainly have been put under serious stress by a deluge of irresponsible, untruthful, and hateful material on social networks and the media. In a related vein, much of the opposition to removing works commemorating racist historical figures from view has been based not on the propriety of dialogue about controversial public works, but on a historic preservation notion that it is better to leave objects displaying unpleasant parts of our history in open view than it is to make them invisible by covering, removing, or destroying them.

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about-kkk-drapes-around-piece. *But see* Mark Muro, *Christenberry’s Southern Discomfort*, APERTURE, Fall 1996, at 76, 77–78; Anna Y. Germano, *Bunched Panties & the Naked Truth About Censorship in University Art Museums*, UNIV. ART MUSEUMS & GALLERIES IN VA., <https://sites.google.com/site/universityartmuseumsinvirginia/paper-topics/germano-anna-y> (last visited Mar. 23, 2023).

162. Paul Richard, *The Missing Klan Room*, WASH. POST (Mar. 17, 1979), <https://www.washingtonpost.com/archive/lifestyle/1979/03/17/the-missing-klan-room/10fccc7-27b4-4284-977a-07bd6cc6bb60/>.

163. *Id.*

The potential conflict between dialogue and preservation was quite visible in recent controversies over the removal of dozens of monuments celebrating the Confederacy<sup>164</sup> while simultaneously building monuments and museums generating discussions of those who died or suffered under racist regimes.<sup>165</sup> Placing images of two of the most important sites next to each other, as is done below with the Robert E. Lee statue recently removed from the center of Richmond, Virginia, and the National Memorial for Peace and Justice in Montgomery, Alabama, overtly reveals the issues.<sup>166</sup> Both memorialize the past—one commemorating racism, the other marking the cruelty, death, and potential for renewal from reminders of that past.<sup>167</sup>

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164. See sources cited *supra* note 5.

165. Among the bevy of such places are the National Civil Rights Museum at the Lorraine Motel in Memphis, where Dr. Martin Luther King, Jr. was assassinated (1991); the Legacy Museum at the National Memorial for Peace and Justice in Montgomery (2018); the Smithsonian National Museum of African American History and Culture (2016); the National Museum for Civil and Human Rights in Atlanta (2014); and the Birmingham Civil Rights Institute (1992). *About the Museum*, NAT'L CIV. RTS. MUSEUM AT THE LORRAINE MOTEL, <https://www.civilrightsmuseum.org/about> (last visited Mar. 23, 2023); *The National Memorial for Peace and Justice*, EQUAL JUST. INITIATIVE, <https://museumandmemorial.eji.org/memorial> (last visited Mar. 23, 2023); *About the Museum*, NAT'L MUSEUM OF AFRICAN AMERICAN HIST. & CULTURE, <https://nmaahc.si.edu/about/about-museum> (last visited Mar. 23, 2023); *About the Center for Civil and Human Rights*, NAT'L CTR. FOR CIV. & HUM. RTS., <https://www.civilandhumanrights.org/about-the-center/> (last visited Mar. 23, 2023); *About the Institute*, BIRMINGHAM CIV. RTS. INST., <https://www.bcri.org/about/> (last visited Mar. 23, 2023).

166. On the left is a picture of the statute of Robert E. Lee recently removed from Richmond Virginia's Monument Square and placed in storage. Henry Graff, *Final Remnants of Confederate Monuments in Richmond Could Be Gone This Summer*, WHSV3, <https://www.wHSV.com/2021/05/21/final-remnants-of-confederate-monuments-in-richmond-could-be-gone-this-summer/> (last updated May 21, 2021). An image of a segment of the National Memorial for Peace and Justice in Montgomery, Alabama is on the right. *The National Memorial for Peace and Justice*, MASS DESIGN GRP., <https://massdesigngroup.org/work/design/national-memorial-peace-and-justice> (last visited Mar. 23, 2023).

167. The foreboding of hanging tomb-like memorials and the renewing force of water create a powerful mood.



Figure 16. Robert E. Lee Statue, Monument Avenue, Richmond, Virginia. Removed in 2021.



Figure 17. National Memorial for Peace and Justice.

There is no obvious and clear resolution to this cultural dilemma. Pain and anger may surface from viewing either site, especially from those whose personal lives and family histories are embedded in racism and the history of slavery.<sup>168</sup> Similar reactions certainly may arise when viewing the Kerson murals at Vermont Law and Graduate School. There is, therefore, some irony in the fact that the VARA is in significant part a historic preservation statute requiring minimal legal intrusion into the social contours of works of art. Its terms make weak, if any, social or cultural judgments about the works of art it protects from destruction or mutilation. The VARA's limitation of protection to works of visual art and to prints, sculptures, and photographs made with the permission of the author in 200 or fewer copies<sup>169</sup> certainly confirms that preservation partly motivated the legislation. Mass-produced items, as the House Report on the VARA indicates, are unlikely to raise preservation issues; the destruction or modification of one copy of a work

168. I get similar reactions at Holocaust memorials. My father's ancestors lived in a town whose Jewish population was wiped out during the Holocaust. Walking through the Holocaust Museum in Washington, D.C. or Yad Vashem (a memorial and a name) in Jerusalem leaves me in tears.

169. See the definition of "visual art" in 17 U.S.C. § 101.

with many other extant copies available leaves access intact.<sup>170</sup> In addition, the recognized stature requirement is similar to that used in historical preservation statutes governing buildings and neighborhoods. Here too buildings may be preserved in recognition of their historical or creative importance, even if the history supporting historic designation has ugly overtones.<sup>171</sup>

The recognized stature standard for protecting works from destruction and the harm to reputation standard for preventing modification or mutilation of works do not necessarily require evaluation of whether any particular work of art is good or bad, or socially acceptable or unacceptable in the minds of most viewers. There must at a minimum, therefore, be a strong reason to allow destruction or modification of works of art with stature or reputational import. But it certainly is not untenable to construe the wording of either standard to mean that a work that has become intensely undesirable and historically unacceptable to a very large number of people might lose whatever stature or reputation it once had and thereby forfeit moral rights protection.

The situations at Indiana University and Vermont Law and Graduate School, however, do not meet such a rigorous standard. Indeed, in most cases, Indiana University's resolution—reducing the settings in which the work may create anger and creating an education program to encourage understanding of the artwork itself—crafts the most creative and intelligent way of handling controversial historical artworks under the moral rights provisions. As an educational institution, Indiana University, as well as Vermont Law and Graduate School, should be sensitive to and knowledgeable about ways of dealing with controversial subject matter. That is one of their institutional missions. While a huge statue of a racist like Robert E. Lee on a horse lordling it over the most central location of a city like Richmond, largely populated by African Americans, is a constant and unavoidably visible reminder to an entire city of an intolerable and unacceptable past, the murals at Indiana University and Vermont Law and Graduate School are laden with different and potentially conflictual cultural meanings and located in single places in the midst of campuses with a great deal of room to mount displays, brief essays, audio visual works, and places for open commentary. In addition, at both Indiana University and Vermont

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170. H.R. REP. No. 101-514, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6922.

171. See, for example, John Freeman Gill, *The Push to Landmark the Last-Known 'Colored' School in Manhattan*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/07/realestate/segregated-school-landmark-manhattan.html>, for a story about a movement to preserve one of the last remaining school buildings in New York City from the city's segregated past.

Law and Graduate School, the works were created by artists intending to counter the demoralizing impact of works like the Robert E. Lee monument. In each case, what appears ugly and unsettling to some may be turned into learning opportunities for others. And if Vermont Law and Graduate School, like Indiana University,<sup>172</sup> was concerned about the presence of the Kerson murals before a somewhat captive audience using the largest lounge on campus, it could have easily constructed a wall some distance from the murals with educational materials affixed that allowed those wishing to see the murals to easily walk behind the wall to view them.<sup>173</sup> While the VARA's present failure to protect the works of deceased artists allows us to culturally erase the past after one generation, even if that is unwise, that does not relieve us of the responsibility to protect most art engendering cultural angst from protection for artistic lifetimes. It must not be forgotten that the ability to trigger controversy is the whole point—not a mere byproduct—of much art. Therefore, Vermont Law and Graduate School must wait at least until Kerson dies before it removes or permanently hides the Chase Community Center murals from view.<sup>174</sup> We must not forget William Christenberry's reference to the words of Pablo Picasso: "Painting is not made to decorate houses. It is a weapon of offensive and defensive war against the enemy."<sup>175</sup>

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172. See Cascone, *supra* note 126.

173. Alternatively, the school could have hung a curtain in front of the panels that could be opened by those wishing to see the panels. An offer to settle the case in that way proposed by Kerson was rejected by the school. Statement of Steve Hyman at a presentation by the author of this writing project to members of the faculty and staff at New York Law School on November 8, 2022.

174. Given the present status of the case, a reversal by the United States Court of Appeals for the Second Circuit would require Vermont Law and Graduate School to remove the barriers now blocking the view of Kerson's work and pay for any repairs that are required to return the work to its original condition. Brief for Plaintiff-Appellant, *supra* note 10, at 14–18.

175. Lewis, *supra* note 156.