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A Training Ground for Contemporary Art: Massachusetts Museum of Contemporary Art v. Biichel's Overly Broad Exclusion of Artistic Collaborations

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A *TRAINING GROUND* FOR CONTEMPORARY ART: *MASSACHUSETTS MUSEUM OF CONTEMPORARY ART V. BÜCHEL*'S OVERLY BROAD EXCLUSION OF ARTISTIC COLLABORATIONS

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In 2007, the Massachusetts Museum of Contemporary Art sought a declaratory judgment permitting it to display an unfinished installation artwork by artist Christoph Büchel without Büchel's permission. Büchel attempted to stop the display by arguing that it violated his moral rights under the Visual Artists Rights Act ("VARA"). The United States District Court for the District of Massachusetts ruled in favor of the museum, holding in part that the "collaborative" nature of the installation's construction precluded VARA protection.

The court analogized the artwork to a motion picture, which the Act's legislative history characterized as the type of collaborative effort VARA does not encompass. This Note argues that the court misconstrued this legislative history in two ways. First, Congress intended to exempt only those types of collaborative efforts where granting moral rights in each contributor would significantly impair the commercial viability of the work. By extending this exemption to any type of collaboration, regardless of the creative control of the participant parties, the Büchel *court effectively denied moral rights protection to all artists exhibiting large-scale works in American museums. Second, although Congress intended for VARA to be a narrow enactment, it anticipated that courts would use their common sense and evolving artistic standards to define the statute's scope. Yet, despite this congressional intent,* Büchel *is simply the latest in a line of cases that have denied VARA protection to new and nontraditional art forms.*

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Büchel *presents troubling implications for high-profile contemporary artists in the United States. Without moral rights protection, a museum can potentially modify an artwork without the artist's permission. If artists become aware of this possibility, they may choose not to exhibit in American museums. To ensure that the American public may continue to access high-quality contemporary art, courts should follow Congress's guidance and become more amenable to granting moral rights protection to contemporary art forms.*

INTRODUCTION

The Massachusetts Museum of Contemporary Art ("MASS MoCA") has gained a reputation as "one of the most fearless and adventurous cultural initiatives" in the United States in part due to its advancement of "installation art"[1]—large-scale artwork designed for specific museum spaces.[2] In 2006, MASS MoCA invited Swiss artist Christoph Büchel, a rising star of the installation art movement,[3] to create an exhibition piece.[4] Büchel constructs vivid, fictitious environments—crafting an "Alice in Wonderland feeling of entering a mysteriously eccen-

1. ROBERT SANFORD BRUSTEIN, MILLENNIAL STAGES 203–06 (2006).

2. Installation art has become increasingly popular in museums. *See, e.g.*, JULIE H. REISS, FROM MARGIN TO CENTER: THE SPACES OF INSTALLATION ART 136 (2001) ("Installation art 'is present in unprecedented quantities in museums, the very places it was supposed to render obsolete.' "); JULIAN STALLABRASS, ART INCORPORATED: THE STORY OF CONTEMPORARY ART 24–25, 136 (2004) (describing the rise of installation art—or "spatial art"—in the 1990s and positing that the practice of corporate sponsorship is one reason museums are now hosting more large-scale installations).

3. In 2008, Büchel reached the final round of nominations for the Hugo Boss Prize, a prestigious prize recognizing the most significant achievements in contemporary art. *See* Press Release, Guggenheim Museum, Guggenheim Museum Announces Shortlist for the Hugo Boss Prize 2008 (Jan. 4, 2008), http://www.guggenheim.org/new-york/press-room/press-releases/press-release-archive/2008/1802-guggenheim-museum-announces-shortlist-for-the-hugo-boss-prize-2008.

4. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 246 (D. Mass. 2008). Several news sources noted the beginning of the relationship and the development of *Training Ground*. *See, e.g.*, Cate McQuaid, *Impressions: Visual Arts*, BOSTON GLOBE, Sept. 10, 2006, *available at* http://www.boston.com/news/globe/living/articles/2006/09/10/10artsidart/ (briefly describing the anticipated exhibition piece); *MASS MoCA, Collecting Objects for Use in Next Big Installation, Asks for Community Donations*, iBerkshires.com, Oct. 1, 2006, http://www.iberkshires.com/story.php?story_id=21067 (describing MASS MoCA's attempts to collect items for use in Büchel's installation).

tric and possibly nonsensical parallel universe."[5] These conceptual works convey a sense of hyper-realism and seemingly mock Büchel's hosting institutions by transforming traditional exhibition spaces into cheap hotels[6] or discount malls.[7]

Büchel's next installation may be inspired by his lawsuit with MASS MoCA. The dispute concerns his installation, *Training Ground for Democracy* ("*Training Ground*"),[8] a large-scale work through which Büchel sought to evoke the experience of American military forces by mimicking the United States Army's virtual reality trainings.[9] MASS MoCA originally intended to open this large-scale exhibition piece to the public in 2007.[10] Amid escalating disputes between Büchel and the museum, however, MASS MoCA indefinitely delayed the exhibition.[11] After a nearly complete dissolution of communication between the two parties, MASS MoCA sought a declaratory judgment in federal district court granting it the right to display *Training Ground* in its then unfinished state.[12] Büchel counterclaimed that both the Copyright Act and the Visual Art-

5. Ken Johnson, *Art in Review: Christoph Büchel*, N.Y. TIMES, July 30, 2004, at E35, *available at* http://www.nytimes.com/2004/07/30/arts/art-in-review-christoph-buchel.html?fta=y.

6. Francesca Gavin, *Büchel Produces Gold at the Coppermill*, BBC, Jan. 11, 2007, http://www.bbc.co.uk/dna/collective/A18787846; *see also* REVIEW – Art Exhibitions in London, http://artreview.wordpress.com/ (May 19, 2007, 22:42 EST) ("[C]ertainly [the exhibition] is nothing like visiting a museum.").

7. Kunsthalle Fridericianum, Christoph Büchel, http://www.fridericianum-kassel.de/buechel.html?&L=1 (last visited May 19, 2009).

8. Büchel has admitted that the lawsuit may be fodder for his next art project: "This new series of works I have been doing is a kind of physical manifestation of the principle of freedom of speech and expression that the dispute is about . . . . It says to the museum: You cannot shut me up." Randy Kennedy, *Accusations, Depositions: Just More Fodder for Art*, N.Y. TIMES, Mar. 2, 2008, at AR.1, *available at* http://www.nytimes.com/2008/03/02/arts/design/02kenn.html. In fact, while the case was proceeding, Büchel used documents from the litigation in several small-scale, non-installation works. *See* Randy Kennedy, *An Artist's Legal Battle Becomes Art*, INT'L HERALD TRIB., Mar. 1, 2008, at 10 ("Even during the court battle Mass MoCA and its lawyers became concerned that Büchel might be conducting discovery actions simply to generate documents for a new artwork. That led to testy exchanges in which lawyers questioned him about why he was insisting on having depositions videotaped, including his own."); Karen Rosenberg, *At Fairs by the Beach, the Sands of Creativity*, N.Y. TIMES, Dec. 8, 2007, at B7, *available at* http://www.nytimes.com/2007/12/08/arts/design/08fair.html.

9. Answer and Counterclaims of Christoph Büchel at 2, Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245 (D. Mass 2008) (No. 3:07-30089-MP) [hereinafter Büchel Counterclaims].

10. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 254 (D. Mass. 2008).

11. *See generally id.*

12. *Id.* at 254–55.

ists Rights Act ("VARA"),[13] a relatively recent and controversial addendum to the Copyright Act, prohibited the museum's intended actions.[14] VARA protects artists' so-called "moral rights"—their rights to claim and maintain the integrity of their works.[15] Büchel asserted that displaying his unfinished work would impermissibly distort his work and thereby harm his reputation.[16]

The United States District Court for the District of Massachusetts upheld the museum's request for declaratory relief.[17] Although the court declined to generate any bright-line rules, it laid out four principles for courts to use when applying the Act: (1) where it is unclear if VARA encompasses a particular work, courts should be wary to extend VARA's protection;[18] (2) the Act generally should not apply to unfinished works;[19] (3) even if a work falls within the statute's scope, courts should also consider whether there are any conflicting legal principles;[20] and finally, (4) as works become more "collaborative," VARA's protections should diminish.[21] This last holding undermines artists' rights by eliminating VARA protection for so-called "collaborative efforts,"[22] a problem made more acute by the court's failure to define collaborative in any meaningful sense.[23] The court's reluctance to interpret VARA as encompassing "collaborative" works stemmed from two sources. First, the court claimed that VARA's legislative history indicates that Congress did not intend to confer protection on artworks to which numerous people contributed.[24] Second, the court concluded that Congress's intentionally limited drafting

13. Büchel Counterclaims, *supra* note 9, at 17.
14. *See infra* Part I.C.
15. *See* 17 U.S.C. § 106A (2006).
16. Büchel Counterclaims, *supra* note 9, at 17–19.
17. *Büchel*, 565 F. Supp. 2d at 259.
18. *Id.* at 258.
19. *Id.* at 257–58.
20. *Id.* at 258.
21. *Id.*
22. *See id.* at 256, 258 (suggesting but not clearly stating that the possibility an artwork will evolve in multiple formats and the fluidity of the work make it collaborative).
23. *See id.* at 251 n.4 ("Büchel admits that the museum agreed to provide 'funding, logistical and technical support and to provide the necessary components and objects for the Work of Art.' As this admission and the undisputed facts regarding the actual fabrication of 'Training Ground for Democracy' confirm, the creation of the art installation was, in fact, 'collaborative,' as that term is understood in ordinary usage." (citation omitted)).
24. *Id.* at 256.

of the Act and courts' subsequent narrow interpretation of it further constrict the statute's scope.[25]

Although each of the court's four interpretive principles is significant, the court's stance on collaborative works poses the greatest threat to contemporary art. This Note will therefore address only this final holding, arguing that the court wrongly construed VARA's legislative history. Congress limited the Act's scope to prevent injury to the film industry and other industries that developed around "collaborative" mediums.[26] The problems inherent in these media neither apply to *Training Ground* specifically nor to installation art in general. By restricting VARA's scope further than Congress intended, the court essentially denied VARA protection to installation art and other large-scale artworks and endangered the United States' position as a leader in the contemporary art world.

To advocate for a narrower interpretation of VARA's exclusion of collaborative works, this Note begins in Part I by detailing the history of moral rights, how the rationale underlying these rights differs from the United States' traditional rationale regarding intellectual property, and how Congress's reluctance to grant rights based on an alternative rationale affected the drafting and enactment of VARA. Part II describes the circumstances that led to the *Büchel* lawsuit and argues that the court both interpreted "collaborative effort" too broadly and mischaracterized the legislative history regarding such works. Finally, Part III elucidates the potential harm that could result if other courts begin to exclude "collaborative" works from VARA protection—most significantly, that well-known contemporary artists would choose not to exhibit in American museums.

I. THE DEVELOPMENT OF MORAL RIGHTS

Moral rights seek to protect artists' essences—their creative souls—as embodied in their works.[27] Derived from the French *droit moral*, the world's broadest and most sophisticated moral rights system, moral rights embody a personality-

25. *See id.*

26. H.R. REP. NO. 101-514, at 6 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6918–19 [hereinafter VARA HOUSE REPORT].

27. *See, e.g.*, Jill R. Applebaum, Comment, *The Visual Artists Rights Act of 1990: An Analysis Based on the French* Droit Moral, 8 AM. U. J. INT'L L. & POL'Y 183, 183 (1992).

based theory of rights that is inconsistent with the United States' economic-based rights system.[28] During the nineteenth century, European countries increasingly accepted this non-economic rationale, eventually resulting in the codification of moral rights in the Berne Convention for the Protection of Literary and Artistic Works, the world's first international copyright treaty.[29] Although the United States remained opposed to the non-economic basis of moral rights, it eventually became a signatory to the Berne Convention.[30] After a year of contentious debate concerning whether the United States could comply with the Convention's moral rights provision without implementing domestic legislation, Congress enacted VARA, which grants narrow moral rights protection to a restricted class of artwork.[31] Although the Act is very limited, Congress did not intend for courts to interpret it as narrowly as they have. Rather, Congress anticipated that courts would look to the evolving standards of the artistic community to determine VARA's scope.[32] By ignoring or misconstruing Congress's intent, courts have refused to extend the Act's protections to many contemporary art forms and have thereby overly limited the statute's effect.

A. The Theoretical Underpinnings of Moral Rights

The United States' system of intellectual property rights derives primarily from a utilitarian rationale.[33] This rationale focuses on incentivizing new creation rather than simply rewarding ownership of the right.[34] The rights holder is "re-

28. *See infra* Part I.A. *See generally* Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. REV. 1 (1997) (focusing on the disconnect between economic-based rights theories and the concept of *droit moral*).

29. *See infra* Part I.B; *see also* Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886 (last revised July 24, 1971), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726 [hereinafter Berne Convention].

30. *See infra* Part I.B. *See generally* The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (effective March 1, 1989) [hereinafter Berne Implementation Act].

31. *See infra* Part I.C; *see also* 17 U.S.C. § 101 (2006) (defining a "work of visual art"); *id* § 106A (granting protection only to works of visual art).

32. *See infra* Part I.D; *see, e.g.*, Phillips v. Pembroke Real Estate, 459 F.3d 128, 142–43 (1st Cir. 2006) (holding that VARA does not protect site-specific art).

33. Cotter, *supra* note 28, at 7.

34. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); United States v.

warded" by receiving an economic interest in the work, not because of his or her natural rights in the work, but because Congress reasoned these economic incentives would benefit society by encouraging future creation.[35] Thus, intellectual property rights in America ideally only afford the amount of protection that is necessary to encourage creation without unduly impeding future invention.[36]

The idea of moral rights is not an organic outgrowth of American law; it neither seeks to incentivize future creation nor to promote economic interests. Rather, the theory of moral rights is based on a philosophy of individualism[37] that evolved in continental jurisprudence in the eighteenth and nineteenth centuries.[38] Immanuel Kant and George Wilhelm Friedrich Hegel created the foundation for moral rights by developing a "personhood theory" about property.[39] This theory posits that an object's value is based on the importance of that object to a person's sense of self.[40] A wedding ring, for example, is hypothetically more valuable than a television set because it reflects a greater tie to the owner's environment. Without establishing a connection to external objects, a person's self-development is limited.[41]

Although ownership interests are important in personhood theory, the rationale is especially important for works that a person creates. In the process of creation, artists imbue their work with their "will"—the fundamental essence of a person that seeks self-actualization.[42] The creation thus becomes a

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Paramount Pictures, 334 U.S. 131, 158 (1948) ("[C]opyright law . . . makes reward to the owner a secondary consideration.").

35. *See* Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments*, 26 HAMLINE L. REV. 601, 606–07, 612 (2003).

36. *See* Alina Ng, *The Social Contract and Authorship, Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 422 (2009) ("Authors may seek as much financial remuneration for their works through the market for as long as is necessary to provide an economic incentive for authors to create and produce works.").

37. Laura Lee Van Velzen, Note, *Injecting a Dose of Duty into the Doctrine of* Droit Moral, 74 IOWA L. REV. 629, 632 (1989).

38. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 555 (1940).

39. *See* Cotter, *supra* note 28, at 7.

40. *See* Margaret G. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

41. *See id.*

42. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 35 (1996); *see also* GEORG WILHELM HEGEL, PHILOSOPHY OF RIGHT 66 (T.M. Knox trans., Oxford Univ. Press 1952) (1821) (describing what comprises a person's will).

manifestation of "the universal essence of [the creator's] self-consciousness."[43] Under personhood theory, artistic creations become unique embodiments of the artist's personality.[44] The work effectively becomes an extension of the artist so that any denigration of the creation is a denigration of the artist.[45] Moral rights recognize the closely intertwined relationship of creator to created work by granting artists heightened protection for their works.[46]

Personhood theory evolved into the French *droit moral*,[47] a sophisticated moral rights doctrine that numerous countries have adopted.[48] French legal theory divides an artist's rights in a given work into economic and personal aspects,[49] with the latter (embodied in the *droit moral*) predominating over the former.[50] For proponents of moral rights, this subdivision is necessary: although copyright law prevents economic exploitation, it does not prevent non-economic injury to the creator.[51] To prevent these non-economic injuries, *droit moral* encompasses three basic non-economic rights:[52] the right of integrity,

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43. HEGEL, *supra* note 42, at 66.

44. *See* RADIN *supra* note 42, at 34.

45. *See* Adolph Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 213 (1995).

46. RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 943 (1998).

47. One scholar has suggested that personhood theory may be more similar to the "right of personality theory," which is distinct from the French monist approach and instead focuses on the "intimate bond" between the artist and his or her work rather than on the artist's right to his "personality" (as reflected in his work). Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 73–75 (2007). In this Note, this distinction will not be explored.

48. Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S. 1, 2 (1980).

49. Edward J. Damich, *The Visual Artists Rights Act of 1990: Towards a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 949 (1990); *see also* Rigamonti, *supra* note 47, at 73–74 (elaborating on the idea that artists have both economic and moral rights).

50. *See* Dietz, *supra* note 45, at 204.

51. Roeder, *supra* note 38, at 557; *see also supra* text accompanying notes 33–35.

52. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (1985). Although scholars typically divide moral rights into three categories, some subdivide them further. *See, e.g.*, Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 45–46 (1998) (finding that there are five moral rights: attribution, integrity, disclosure, withdrawal, and resale royalties); Jeffrey M. Dine, Note, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics,* Mannu Bhandari, *and the Dead Sea Scrolls*, 16 MICH. J. INT'L L. 545, 550 (1995)

the right of attribution, and the right of disclosure.[53] The right of integrity deals with the artist's creative personality; it allows artists to prevent modifications to their works that alter the work's character or spirit.[54] Legal scholars generally recognize integrity as the most important of the three rights.[55] The right of attribution is comprised of two rights, one allowing the author to prevent others from misattributing his work, and another allowing the author to compel others to attribute him as the author.[56] Finally, the right of disclosure allows the author to determine when a work is ready for public consumption.[57]

Because of their non-economic focus, the basis of moral rights is diametrically opposed to the traditional rationale for copyright protection in the United States. Whereas American copyright theory is based on a utilitarian theory,[58] under which the state grants intellectual property owners a limited monopoly in their works to induce authors to produce more works,[59] moral rights focus on the natural rights instilled in the author through the process of creation. The author receives moral rights based on the fact of authorship, whether or not this protection incentivizes new works.[60] Consequently, in addition to any purely economic rights, moral rights protect artists' personal, more intimate interests in their works.[61] Because moral rights do not seek to incentivize production, they do not fit com-

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(categorizing moral rights as four basic rights: the rights of publication, paternity (essentially the right of attribution), integrity, and withdrawal).

53. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152 (2001).

54. *See* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 15 (1988).

55. LERNER & BRESLER, *supra* note 46, at 947.

56. Kwall, *supra* note 53, at 152–53.

57. Some scholars further subdivide this right into two rights: the right to divulge a work and the right to withdraw. *See* DaSilva, *supra* note 48, at 3–4.

58. Cotter, *supra* note 28, at 7.

59. *See id.*; *see also* U.S. CONST. art. I, § 8, cl. 8 (stating that Congress may enact legislation "[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"); Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 781–82 (2009).

60. Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) (stating "the economic incentive for . . . creation . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent").

61. Rigamonti, *supra* note 47, at 73.

fortably within the American intellectual property regime. As such, Congress debated whether to ratify the Berne Convention in part because of concerns over its moral rights provision.

B. The Berne Convention

The Berne Convention is the most important international treaty establishing moral rights protection, albeit in a limited form.[62] Ten countries gathered to draft the Berne Convention on September 9, 1886,[63] and thereby establish a unified international intellectual property rights regime providing a minimum level of intellectual property protection to authors of literary and artistic works.[64] Initially, the Convention did not include a moral rights provision, but a revision in 1928 added Article 6*bis*, the first provision addressing artists' moral rights.[65] This Article grants artists more limited rights of attribution and integrity than under the French *droit moral* system.[66] For example, it does not directly confer a right of disclosure, although the right of an author to "claim authorship" in his work may imply a right of disclosure.[67] Furthermore, the author's right of attribution only extends to the right to claim

62. *See* Berne Convention, *supra* note 29, art. 6*bis*. The Berne Convention was not the first international treaty to include moral rights protection, however. That honor goes to the Convention between the United States and Other Powers on Literary and Artistic Copyright, Aug. 11, 1910, 38 Stat. 1785, 155 L.N.T.S. 179, which the signatories amended in 1928 to include a moral rights provision, Article 13*bis*. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 357 & n.20 (2006).

63. Susan Stanton, *Development of the Berne International Copyright Convention and Implications of United States Adherence*, 13 HOUS. J. INT'L L. 149, 156 & n.44 (1990) (listing the 10 countries—Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia—and noting that the United States was present but merely as an observer).

64. Berne Convention, *supra* note 29, art. 1; *see also* SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 84–133 (2d ed. 2006) (describing the initial adoption of the Berne Convention and subsequent revisions, including the adoption of a moral rights provision). The Convention guarantees its signatories that works of their artists in other member nations will have the basic minimum protections the Convention provides. Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 386 (1995).

65. RICKETSON & GINSBURG, *supra* note 64, at 108.

66. *Id.*

67. *See* Berne Convention, *supra* note 29, art. 6*bis*(1); *see also infra* text accompanying notes 100–01 (discussing the Convention's implied right of disclosure).

authorship of the work,[68] not to the right to disclaim works the author did not create.[69] Additionally, a person only violates an author's right of integrity by distorting, mutilating, or modifying the work in a way that harms the artist's reputation[70]—suggesting a person may alter an artist's work in a way that reflects positively or neutrally on the artist regardless of whether the artist opposes the change.[71]

Although the Berne Convention codified a more limited form of moral rights than the traditional *droit moral*, the United States' hostility towards Article 6*bis* made it reluctant to adopt the Convention.[72] The entertainment and publishing industries, the largest producers of works involving multiple participants (i.e. collaborative works), were the most adamant opponents of moral rights,[73] resisting any draft of the Berne Convention Implementation Act that integrated Article 6*bis*.[74]

These lobbies feared that under Article 6*bis* many participants in entertainment and publishing efforts who were not eligible to receive traditional copyright protection would now receive moral rights protection. If moral rights vested in more trivial participants, it would be virtually impossible to alter works—for example, to publish another edition of a work or reformat a film on DVD—because such a change could potentially constitute the type of harmful modification Article 6*bis* prohi-

68. *Id.* ("[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

69. *See id.*

70. *See id.*

71. *See id.*; *see also* Rigamonti, *supra* note 47, at 118–19 (suggesting the Berne Convention only prevents harm to an artist's reputation in part because the initial common law signatories refused to sign a broad provision protecting artists' general moral rights interests).

72. Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 174–76 (1989).

73. *See* Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 830 (1992). This opposition continued after the United States became a signatory to the Berne Convention as part of the debate on whether further legislation was needed to satisfy American obligations under Article 6*bis*. *See, e.g., Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 585 (1990) [hereinafter *Moral Rights Hearings*] (statement of Michael R. Klipper, Counsel, Committee for America's Copyright Community, an organization representing the publishing, music, and film industries).

74. *See* VerSteeg, *supra* note 73, at 830.

bits.[75] The lobbies' supposition that moral rights could vest in even the most trivial of participants[76] was predicated on their understanding that it would be easier for participants to obtain rights under a personhood rationale than a utilitarian rationale.[77] To illustrate, the publishing industry suggested that under a personhood approach, an editor who did even so simple a task as revising a novel's sentence structure would, at least in theory, gain a moral right in the resulting novel.[78] Conversely, under American copyright law's utilitarian approach, only authors can receive copyright protection—a requirement that entails some significant level of creative contribution.[79] This approach minimizes the problem of multiple rights holders: because the editor's minimal creative input would do little to engender the further production of works (and in fact would likely decrease production if authors were unwilling to share the rights in their works), the editor would likely not be eligible for copyright protection.[80]

Although the publishing and entertainment industries correctly differentiated between the rationales underlying copyright and moral rights, their argument appears to overstate

75. *Moral Rights Hearings*, *supra* note 73, at 668–69, 682–83 (statements of Nicholas A. Veliotes, President, Association of American Publishers, and R. Jack Fishman, Chairman, National Newspaper Association) (arguing that moral rights would make publishing virtually impossible because editors would be required to continually request the author's permission for editing changes).

76. *See id.* at 585 (statement of Michael R. Klipper, Counsel, Committee for America's Copyright Community) (suggesting that multiple moral rights holders would impede the marketing of films because film producers would not have the "unencumbered freedom" to adapt their products as they wished for different markets without having to get the permission of the various moral rights holders); VerSteeg, *supra* note 73, at 830.

77. *See* VerSteeg, *supra* note 73, at 830.

78. *See id.* at 830 & n.12; *see also Moral Rights Hearings*, *supra* note 73, at 682–83, 668–69 (statements of Nicholas A. Veliotes, President, Association of American Publishers, and R. Jack Fishman, Chairman, National Newspaper Association).

79. *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000) (refusing to grant author status to a person whose creative contributions did not reflect some significant level of creative control); *see also* Liemer, *supra* note 52, at 50 (describing moral rights as resulting from the artistic control an artist has over his or her work).

80. *See Aalmuhammed*, 202 F.3d at 1233; *see also* Silverstein v. Penguin Putnam, Inc., 368 F.3d 77, 80, 85 (2d Cir. 2004) (refusing to grant an injunction where the plaintiff simply selected which poems should be published in a collective work because it was unlikely this contribution was enough to establish copyright protection and, even if it was enough, "enforcement of [the plaintiff's] rights by a preliminary or permanent injunction that stops publication of [the work] is an abuse of discretion").

moral rights' scope. Under the Berne Convention, only "authors" receive Article 6*bis* protection.[81] The Convention does not define who qualifies as an author, allowing the signatory state to create the scope for the term.[82] The United States was therefore free to align authorship in moral rights with authorship in copyright—which it eventually did.[83]

In 1988, the United States became a signatory to the Berne Convention.[84] Its ratification of the Convention did not reflect a changed attitude towards moral rights, but rather was the United States' attempt to use the Convention's international protections to halt increased piracy of American copyright-based products in foreign markets.[85] The United States sought to utilize the economic benefits of the Convention while avoiding the problem of moral rights.[86] Thus, Congress sidestepped Article 6*bis* by specifying in the Berne Convention Implementation Act of 1988 that the Convention could not be enforced in the United States absent specific implementation legislation.[87] The United States justified its subsequent failure to enact any domestic moral rights legislation on a 1988 congressional report that concluded that existing common law and legislation satisfied the American obligation to protect moral rights under the Convention.[88] Only after a year of debate did Congress

81. *See* Berne Convention, *supra* note 29, art. 6*bis*.

82. *See id.* (failing to define authorship, although Article 15 establishes some presumptions as to who is the author); *see also infra* Part II.C.

83. *See* 17 U.S.C. § 106A (2006) (granting rights to the author of a work of visual art); *see also id.* § 101 (failing to distinguish authorship of a work of visual art from authorship in the remainder of the Copyright Act).

84. *See generally* Berne Implementation Act, *supra* note 30.

85. The United States hoped that in becoming a signatory not only would American works receive protection in other signatory countries but also that the American example would encourage other countries to join the Berne Convention. David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, LAW & CONTEMP. PROBS., Spring 1992, at 211, 215; Sherman, *supra* note 64, at 400.

86. *See* Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 249, 251 (2006).

87. Berne Implementation Act, *supra* note 30, § 2(1) ("[The Berne Convention is] not self-executing under the Constitution and laws of the United States.").

88. H.R. REP. NO. 100-609, at 32–34, 38 (1988). The Report adhered to this view even though the common law protections were scattered and varied from jurisdiction to jurisdiction. *See id.* at 34 ("[Laws providing] [t]he kind of protection envisioned by Article 6*bis* . . . [include] 17 U.S.C. § 106, relating to derivative works, 17 U.S.C. § 115(a)(2), relating to distortions of musical works used under the compulsory license respecting sound recordings, 17 U.S.C. § 203, relating to termination of transfers and licenses, and section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions. State and local laws in-

alter its stance and enact VARA to comply with the Berne Convention's moral rights provision.

C. *The Visual Artists Rights Act*

For a year following the Berne Implementation Act, Congress continued to discuss whether to implement moral rights legislation. Because Congress initially took the stance that American common and statutory law sufficiently protected moral rights, the Act expressly stated that it did not affect the scope of American moral rights.[89] Some members of Congress criticized the existing system, however, and argued for a more uniform system of moral rights.[90] Eventually—and perhaps for unrelated political reasons[91]—Congress enacted VARA in 1990. Although it was the first federal act specifically designed to implement moral rights in the United States,[92] Congress significantly limited the statute's potential effect by circumscribing

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clude those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy. In addition, eight states have recently enacted specific statutes protecting the rights of integrity and paternity in certain works of art. Finally, some courts have recognized the equivalent of such rights."). Congress supported its argument by noting that many Berne signatories also did not strictly comply with the treaty's moral rights provision. *Id.* at 37 & n.87; *see also* FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION, *reprinted in* 10 COLUM.-VLA J.L. & ARTS 513, 548 (1986).

89. *See* Berne Implementation Act, *supra* note 30, § 3(b) ("The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law to claim authorship of the work; or to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation."); *see also id.* § 2(3) ("The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.").

90. *See, e.g.*, *The Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 104 (1989) (statement of John B. Koegel, Esq.) (suggesting that the current system was a " 'patchwork' of rules which by itself vitiates somewhat the single, unified system of copyright").

91. Several scholars have argued that Congress only passed VARA because it was attached to a federal judgeship bill that Republican Senators (who had previously blocked the Act) wanted to pass. *See* Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997); Geri J. Yonover, *The "Dissing" of Da Vinci: The Imaginary Case of* Leonardo v. DuChamp*: Moral Rights, Parody, and Fair Use*, 29 VAL. U. L. REV. 935, 965 (1995).

92. *See* Damich, *supra* note 49, at 946.

the types of work the Act protects and the scope of that protection.

Congress constructed VARA to protect visual artists' "honor and reputations" and to safeguard artworks that are considered integral parts of American artistic heritage.[93] The moral rights the Act confers exist independently of ownership or possession of the work and traditional copyright protection in the work.[94] Despite Congress's broad goal, moral rights under the Act are narrower in scope than those afforded by Article 6*bis* of the Berne Convention, which was itself a limited provision.[95] For example, VARA, like the Berne Convention, protects both the rights of attribution and integrity.[96] Under the Convention, however, the right of integrity includes the author's right "to object to any distortion, mutilation or other modification of . . . the said work, which would be prejudicial to his honor or reputation,"[97] whereas under VARA an author may only "prevent any *intentional* distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[98] Seemingly, the requirement of intent means that authors have no recourse to protest unintentional modifications.[99] Additionally, the Convention offers a broader right of attribution. The Convention's right of attribution simply states an author may "claim authorship" of a visual artwork, thereby conferring an implied right of disclosure—the right of the artist to determine when the work shall be made public.[100] Article 10 supports this interpretation by permitting fair use of a work that "has already been lawfully made available to the public," suggesting the author had to endorse the public disclosure.[101] Conversely, VARA also allows an author

93. 136 CONG. REC. 12,608 (1990) (statement of Rep. Kastenmeier); *see also* Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 391 (1998).

94. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

95. *See supra* notes 66–71 and accompanying text.

96. VARA HOUSE REPORT, *supra* note 26, at 6924.

97. Berne Convention, *supra* note 29, art. 6*bis*(1).

98. 17 U.S.C. § 106A(a)(3)(A) (2006) (emphasis added). The right of integrity also encompasses the right "to prevent any destruction of a work of recognized stature." *Id.* § 106A(a)(3)(B).

99. *See id.* § 106A(a)(3)(A).

100. Berne Convention, *supra* note 29, art. 6*bis*(1).

101. *Id.* art. 10(1); *see also* 3 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.01 n.24 (2009) (noting that "a divulgation right may exist in Berne by implication") (citing SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 276 (1987)); Jane C.

"to claim authorship" of a visual artwork, but it subsequently clarifies that an author may also "prevent the use of his or her name as the author of any work of visual art which he or she did not create."[102] This clarification indicates that the right to claim authorship only encompasses the right to have one's name associated with the work, not the right to decide when to release the work to the public.[103]

Furthermore, not only are the rights VARA affords narrower in scope than rights under the Berne Convention, VARA applies these rights to a more limited class of works.[104] VARA's definition of a "work of visual art" encompasses only traditional art forms, such as painting, sculpture, and certain types of photographs.[105] The Berne Convention, on the other hand, protects all literary and artistic works, regardless of media of expression, and thus extends protection to film, music, and other types of works that VARA explicitly excludes.[106] In addition, VARA exempts authors of "work[s] made for hire" from coverage,[107] whereas no such exemption exists under the Convention.[108] Because of these and numerous other differences,[109] some scholars doubt whether the United States is tru-

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Ginsburg, *Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPs?* 15 & n.56 (Columbia Law Sch. Pub. Law & Legal Theory Working Papers, Paper No. 09162), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1054&context=columbia_pllt (forthcoming 2009 *in* WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY (Rochelle Cooper Dreyfuss et al. eds.)).

102. 17 U.S.C. § 106A(a)(1).

103. *See id.*

104. *See* Damich, *supra* note 49, at 946–47.

105. 17 U.S.C. § 101 (defining a work of visual art as: "(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author").

106. *Compare* Berne Convention, *supra* note 29, art. 2(1) ("The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression . . . ."), *with* 17 U.S.C. § 101 (limiting what constitutes a work of visual art to certain categories).

107. *See* 17 U.S.C. § 101 (stating that works of visual art do not include "work[s] made for hire"); Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 88 (2d Cir. 1995) (stating that VARA does not extend to works made for hire).

108. *See generally* Berne Convention, *supra* note 29, art. 6*bis*.

109. For example, moral rights under VARA are limited to the author's lifetime whereas the default rule under the Convention is that moral rights must last at

ly in compliance with Article 6*bis* of the Berne Convention.[110] Before enacting VARA, a congressional subcommittee prepared a preliminary report that partially addressed what was required to comply with Article 6*bis*, and the subsequent enactment ostensibly complied with these recommendations.[111] Nevertheless, the issue of American compliance has never been litigated or otherwise definitively resolved. Further complicating the issue is the trend in American jurisprudence to take an extremely restrictive view of VARA, especially concerning contemporary art forms.

D. The Narrow Application of VARA to Contemporary Art

VARA was a limited enactment to begin with, and judicial interpretation has served only to constrict its protections.[112]

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least fifty years past the author's death. *Compare* Berne Convention, *supra* note 29, art. 6*bis*(2) ("The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights . . . ."), *and id.* art. 7(1) ("The term of protection granted by this Convention shall be the life of the author and fifty years after his death."), *with* 17 U.S.C. § 106A(d) (stating that the rights "shall endure for a term consisting of the life of the author"). The Convention does recognize an exception to its suggested length, however, allowing rights to last only the lifetime of the author in "countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of [moral rights]." Berne Convention, *supra* note 29, art. 6*bis*(2). Additionally, VARA, unlike the Convention, allows an author to waive any or all of his or her moral rights. *Compare* Berne Convention, *supra* note 29, *with* 17 U.S.C. § 106A(e)(1) (stating the rights "may be waived if the author expressly agrees to such waiver in a written instrument signed by the author").

110. *See, e.g.*, Damich, *supra* note 49, at 996; Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 131–33 (2006) (arguing the U.S. is not in compliance because common law protections for moral rights "do not provide clear and express protection for the rights of integrity and attribution [and] are limited in nature and scope of protection" and "[w]hile VARA clearly comports with Article 6bis, it only applies to works of fine art"); Dana L. Burton, Comment, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 639–40 (1995). Further evidence of non-compliance may be inferred from the United States' insistence in 1994 that Article 6*bis* not be included in the Agreement on Trade Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"). Tyler T. Ochoa, *Introduction: Rights of Attribution, Section 43(A) of the Lanham Act, and the Copyright Public Domain*, 24 WHITTIER L. REV. 911, 926–27 (2003).

111. *See generally* Paul Geller, *Comments on Possible U.S. Compliance with Article 6*bis *of the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 665 (1986).

112. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 142–43 (1st Cir. 2006) (denying VARA protection to site-specific art); Lilley v. Stout, 384 F. Supp. 2d 83, 88 (D.D.C. 2005) (holding that photographic prints created to assist an artist were not created only for exhibition purposes and thus did not have VARA pro-

This trend has been especially noticeable in the field of contemporary art, where courts have denied VARA protection to a number of new and non-traditional art forms. Although Congress intended for VARA to be limited, the congressional report regarding the drafting of the statute (the "House Report") indicates that Congress did not intend for courts to so significantly narrow the Act's protections. Rather, Congress recognized that the statute must be flexible as the notion of what constitutes art changes. Therefore, it instructed courts to consider common sense and the opinion of the arts community when determining if a work falls under the Act's purview.[113]

Courts' reluctance to apply the Act to contemporary art is exemplified by *Phillips v. Pembroke Real Estate*, in which the First Circuit denied VARA protection to site-specific art—art designed as part of environmental context.[114] In *Phillips*, a sculptor sought to enjoin a park manager from moving any of a set of interrelated sculptures the sculptor had created specifically for the park.[115] The sculptor argued that a work's location is an essential element of site-specific art; thus, the removal of his site-specific piece constituted the type of modification or destruction that the Act prohibits.[116]

The court disagreed. It noted that extending VARA protection to site-specific art would require the Act's "public presentation" exception to be read differently for site-specific versus non-site-specific works.[117] The public presentation exception allows persons other than the artist (such as the owner of the work or the owner of the site where the work is situated) to make certain changes to the work without violating the artist's right of integrity.[118] For traditional works, or "plop-art" as the court termed it, moving the work would not constitute a violation of the right of integrity.[119] The artist proposed that the court construe the exception differently for site-specific works

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tection); Nat'l Ass'n for Stock Car Auto Racing v. Scharle, 356 F. Supp. 2d 515, 528–29 (E.D. Pa. 2005) (holding that design drawings for a trophy were not works of visual art under VARA because there were multiple drafts and copies).

113. VARA HOUSE REPORT, *supra* note 26, at 6921.

114. *Phillips*, 459 F.3d at 143.

115. *Id.* at 130–31.

116. *Id.* at 141–42.

117. *Id.*

118. 17 U.S.C. § 106A(c)(2) (2006) (stating that VARA does not prohibit modifications that are the result of "public presentation, including lighting and placement").

119. *Phillips*, 459 F.3d at 141.

because environment is integral to these works.[120] The court rejected this argument, finding no congressional intent to treat site-specific art differently from plop-art.[121] Thus, it held that the Act's right of integrity does not encompass protection against the removal of site-specific works.[122]

The *Phillips* court misinterpreted congressional intent, highlighting courts' unwillingness to apply VARA with the flexibility it requires to deal with contemporary, non-traditional art forms. The court recognized that "the notion of sculpture has undergone a radical redefinition"[123] but nonetheless refused to include the new genre of site-specific art under the statute. Instead, it stated that if the Act is silent, the court must presume the omission was intentional.[124] Although a common canon of statutory interpretation,[125] legislative history suggests the rule should not be applied strictly in construing VARA. The House Report charges courts to "use common sense and generally accepted standards of the artistic community" to determine whether the statute protects a particular work.[126] This instruction is similar to the United States Supreme Court's admonition, in a copyright-related case, that courts should not "constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most ob-

120. *See id.* at 141–42.

121. *See id.* at 143 (relying on VARA's "plain language").

122. *See id.* at 142–43 (buttressing its argument with the rule that courts should interpret statutes altering the common law—like VARA—to align as closely as possible with previously established law). A number of notes have criticized the *Phillips* decision for construing VARA too narrowly. *See, e.g.*, Rachel E. Nordby, Note, *Off of the Pedestal and into the Fire: How* Phillips *Chips Away at the Rights of Site-Specific Artists*, 35 FLA. ST. U. L. REV. 167, 168 (2007); Kristin Robbins, Note, *Artists Beware: The Effect of the First Circuit's Refusal to Apply VARA to Site-Specific Art*, 9 TUL. J. TECH. & INTELL. PROP. 395, 395 (2007). *But see* Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 761 (acknowledging that it is difficult to apply VARA to site-specific art but praising the court's decision as "display[ing] sensitivity to the norms of realty, particularly the real property policy disfavoring restrictions on land").

123. *Phillips*, 459 F.3d at 134 (emphasis omitted).

124. *See id.* at 141–42; *see also* Gegenhuber v. Hystopolis Prods., Inc., No. 92 C 1055, 1992 WL 168836, at *4 (N.D. Ill. July 13, 1992) ("We will not read into VARA that which Congress has evidently chosen to leave out, for, having included extensive categories of works that do or do not constitute 'visual art,' Congress could have included works such as puppets, costumes and sets if it desired to afford them the protections of section 106A.").

125. *See, e.g.*, Russello v. United States, 464 U.S. 16, 23 (1983).

126. VARA HOUSE REPORT, *supra* note 26, at 6921.

vious limits."[127] Such judgments risk excluding artworks whose "novelty would make them repulsive until the public had learned the new language in which their author spoke."[128] Thus, both the House Report and Supreme Court jurisprudence emphasize the danger to contemporary art forms when courts unilaterally determine what constitutes art.[129] Because the form of art may change with time, Congress clarified that "whether a particular work falls within the definition [of a work of visual art] should not depend on the medium or materials used."[130] Rather, courts should interpret VARA in light of evolving artistic theory and practice.[131]

Today, the standards of contemporary art are different than when the Act was drafted and enacted in 1989–90. Installation art became prominent in the 1990s, resulting in larger-scale museum exhibitions.[132] According to the House Report, courts should account for this evolution.[133] The size of an artwork may require the artist to rely on outside logistical sup-

127. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (determining whether a set of circus posters was copyrightable).

128. *Id.* at 251–52; *see also* Laura Flahive Wu, Note, Mass. Museum of Contemporary Art v. Büchel: *Construing Artists' Rights in the Context of Institutional Commissions*, 32 COLUM. J.L. & ARTS 151, 169 (2009) (reasoning that because the *Bleistein* statement has been broadly applied to prevent aesthetic discrimination, it is equally applicable to the interpretation of VARA).

129. *See Bleistein*, 188 U.S. at 251–52; VARA HOUSE REPORT, *supra* note 26, at 6921.

130. VARA HOUSE REPORT, *supra* note 26, at 6921.

131. *See* Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 261, 276 (1997) (lamenting that in drafting VARA Congress sought only to protect " 'art' in the sense of 'fine art' " and arguing "[i]n light of the rather dismal history of failure by critics and other experts to anticipate history's judgments, the arbiters of copyright (for example, federal judges) are unlikely to be a reliable barometer of quality in art").

132. *See* STALLABRASS, *supra* note 2, at 24, 26.

133. *See* Richard J. Hawkins, Comment, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause*, 55 UCLA L. REV. 1437, 1468 (2008) (arguing for broader VARA protection because "[a]t the time of [VARA's] drafting, Congress could not possibly have anticipated each situation in which the Act might be applied"). It is not unusual for courts to recognize the need to look to artistic standards in interpreting VARA. For example, to determine whether a work is a "work of recognized stature" under section 106A(a)(3)(B), courts must consider the testimony of "art experts, other members of the artistic community, or by some cross-section of society." Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *rev'd on other grounds*, 71 F.3d 77 (2d Cir. 1995); *see also* 17 U.S.C. § 106A(a)(3)(B) (2006) (failing to clarify what constitutes a "work of recognized stature"); Pollara v. Seymour, 206 F. Supp. 2d 333, 336 (N.D.N.Y. 2002) (utilizing the *Carter* test).

port, but the artist's acceptance of this support should not preclude VARA protection.

Therefore, when the court in *Büchel* declined VARA protection to *Training Ground*, it made the sort of unilateral determination against which the Supreme Court and the House Report cautioned.[134] Instead of recognizing that Congress intended the Act—although narrow—to be flexible enough to deal with art forms the statute did not explicitly address, the court loosely extracted a principle from the legislative history that courts should uniformly exclude "collaborative" works from VARA protection.

II. *MASSACHUSETTS MUSEUM OF CONTEMPORARY ART FOUNDATION, INC. V. BÜCHEL*

In *Büchel*, the District Court of Massachusetts narrowly interpreted VARA's legislative history to suggest that as an artwork becomes increasingly "collaborative," VARA's protections should correspondingly diminish, regardless of the artwork's medium.[135] *Training Ground* was a large-scale piece envisioned entirely by Büchel but which required museum employees' aid to construct.[136] The court looked to VARA's legislative history to determine that Büchel's work was the type of collaborative effort Congress intended to exclude from protection.[137] This interpretation relies too heavily on antiquated notions of authorship, which romanticize the idea of a solitary author and are unable to effectively deal with "polyvocal" works—works with multiple "voices."[138] A closer analysis of the VARA House Report indicates that when Congress excluded "collaborative efforts," it wished to exclude films and other audiovisual works, not the type of installation art at issue in *Büchel*.[139]

134. *See infra* Part II.

135. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 256 (D. Mass 2008).

136. *Id.* at 250.

137. *Id.* at 256.

138. *See infra* Part II.C.

139. *See* VARA HOUSE REPORT, *supra* note 26, at 6921; *see also infra* Part II.D.

A. Factual Background

In 2006, MASS MoCA invited Büchel to create an artwork for its largest exhibition space.[140] Büchel proposed *Training Ground*, a large-scale installation that would mimic the U.S. Army's virtual reality trainings to evoke the experience of American military forces.[141] Büchel envisaged the work and determined the experiential areas to be incorporated, including depictions of protests, political rallies, looting, and interrogation trainings.[142] Büchel and the museum neglected to formalize the schedule, the projected costs, or other pertinent details of their agreement.[143] MASS MoCA submitted a potential contract to Büchel's American representative, but—ostensibly due to an administrative mix-up—Büchel never signed or even saw the contract. The museum did not follow up on the issue.[144] Thus, while the museum contended the parties had agreed to spend only $160,000, Büchel countered they had never agreed on an amount.[145]

Büchel selected the necessary components for *Training Ground* and used both his own artistic assistant and MASS MoCA's staff[146] to help with basic tasks such as collecting, transporting, and configuring a number of massive components for the exhibit, including a movie theater, a mobile home, a police car, and a two-story house.[147] This acquisition and instal-

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140. *Büchel*, 565 F. Supp. 2d at 246.

141. Büchel Counterclaims, *supra* note 9, at 2.

142. *Büchel*, 565 F. Supp. 2d at 249.

143. *Id.* at 250.

144. *Id.* Nonetheless, the museum has since implied there was some sort of "agreement" in place. The MASS MoCA Blog, FAQ re: Training Ground, http://blog.massmoca.org/2007/09/18/faq-re-training-ground/ (Sept. 18, 2007) ("We had an agreement with Mr. Büchel regarding the budget, the time, and material resources available for fabrication and installation, the opening and closing dates of the show, and the general scope and scale of the joint effort.").

145. Roberta Smith, *Is It Art Yet? And Who Decides?*, N.Y. TIMES, Sept. 16, 2007, http://www.nytimes.com/2007/09/16/arts/design/16robe.html.

146. Anastasia Telesetsky, *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Christoph Büchel*, 15 INT'L J. OF CULTURAL PROP. 87, 87 (2008); Exhibitionist, http://www.boston.com/ae/theater_arts/exhibitionist/2007/05/exclusive_buech_1.html (May 25, 2007, 10:56 EST).

147. *Büchel*, 565 F. Supp. 2d at 250; *see also* Randy Kennedy, *The Show Will Go On, but the Art Will Be Shielded*, N.Y. TIMES, May 22, 2007, http://www.nytimes.com/2007/05/22/arts/design/22muse.html (describing the exhibition as consisting of "a tiny mud-brick house . . . a wrecked police car, a carnival ride rigged with bomb casings, a dilapidated two-story house, a rusted oil tanker, [and] an interrogation chamber").

lation was done at MASS MoCA's expense,[148] while Büchel provided the creative direction.[149] The artist spent some time at MASS MoCA creating the exhibit, but he eventually returned to his native Switzerland.[150] While abroad, he maintained creative control over the developing exhibition via e-mail and phone.[151] Despite his continued communication with museum staff, Büchel's absence was one factor that led the court to later characterize *Training Ground* as "the product of a highly collaborative process with a good deal of back-and-forth and shared decision-making."[152]

As the exhibition preparation continued, disagreements arose over timing, funding,[153] and Büchel's participation.[154] Most significantly, the museum felt it was not receiving enough direction as to how to construct the exhibit, while Büchel thought the museum was attempting to seize artistic control.[155] *Training Ground* was not complete by the proposed opening date of mid-December 2006, and Büchel walked off the project in January.[156] Initially, MASS MoCA attempted to negotiate Büchel's return to the project.[157] Büchel agreed to begin work again if the museum met a list of requirements,[158] one of which

148. *Büchel*, 565 F. Supp. 2d at 246.

149. *Id.* at 251.

150. *Id.*

151. *Id.*

152. *See id.* (noting that Büchel denied any collaboration, but suggesting that there was collaboration because Büchel admitted he understood MASS MoCA would provide the funding and logistical and technical support).

153. By the time the museum stopped working on *Training Ground*, it had spent $300,000 on materials and labor. *Id.* at 255. *But see* Kennedy, *supra* note 8 (revealing that there were significant discrepancies between what Büchel argued and what MASS MoCA contended was spent).

154. *Büchel*, 565 F. Supp. 2d at 251–52.

155. *Id.* at 247.

156. Smith, *supra* note 145.

157. *Büchel*, 565 F. Supp. 2d at 253–54.

158. *Id.* at 252–53. The court enumerated several of these demands:

> [Büchel] stated that he would not return to finish "Training Ground for Democracy" unless certain conditions were met, including the raising of sufficient funds to complete the project (excluding any contributions from Büchel's galleries, as Büchel would have to repay a portion of that money personally), the hiring of an independent crew to assist him, and no further negotiation regarding the scope of the installation. Büchel refused to accept "any more pressure or compromises [on] how things have to be done," accusing MASS MoCA of "sabotage acts" and lack of respect and enumerating its alleged failures in procuring materials efficiently and economically.

Id. (citation omitted). *See also* Exhibitionist, http://www.boston.com/ae/theater_arts/exhibitionist/2007/03/buechel_list_of.html (Mar. 28, 2007, 10:36 EST), (reproducing a list of requirements Büchel sent to MASS MoCA in January 2007

was that he would not allow the museum to display *Training Ground* in an unfinished state.[159] Concerned about the time, money, and effort it had already expended on *Training Ground*,[160] the museum refused to acquiesce to Büchel's "unreasonable" requests.[161] Büchel reacted by completely severing himself from the project.[162] Faced with Büchel's final refusal to return to the project, the museum decided to display the exhibition in its unfinished state—roughly eighty percent complete—regardless of Büchel's permission.[163] Throughout the dispute, the museum continued to plan the exhibit without Büchel's involvement or permission.[164] Nevertheless, the museum recognized the work remained Büchel's artistic creation and questioned how far museum employees could deviate from his instructions before compromising his artistic integrity.[165]

The museum sought a declaratory judgment entitling it to display the unfinished work.[166] Büchel responded by seeking a permanent injunction to prevent the display under VARA.[167] The court orally ruled that MASS MoCA could display the exhibit if the museum posted a disclaimer stating that *Training Ground* was unfinished and did not conform to the artist's original intent.[168] Additionally, Büchel's name could not be referenced in association with the exhibit.[169] Despite its victory, within days of the decision, MASS MoCA decided that it would not display *Training Ground*.[170] Nevertheless, the court issued

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that included a statement that he would "not accept any orders and any more pressure or compromises as to how things have to be done from the museum director or museum's technicians"). Büchel emphasized that he "demand[ed] full autonomy with regard to his artwork." *Id.*

159. Exhibitionist, *supra* note 158.

160. *Büchel*, 565 F. Supp. 2d at 253. The museum alleged that it had spent roughly $300,000 on materials and labor. *Id.* at 254–55.

161. *Id.* at 254.

162. *Id.* at 247.

163. *Id.*

164. *Id.* at 254 (stating the exhibition construction "was based on a 'best reasonable guess' of what Büchel would have wanted"); *see also* Exhibitionist, *supra* note 158 ("The artist will not give permission to show an unfinished project nor will the artist allow the museum to show any work in progress, as the museum had suggested in previous discussion related to the postponed opening date.").

165. *Büchel*, 565 F. Supp. 2d at 254.

166. *Id.*

167. *Id.*

168. *Id.* at 248.

169. *Id.* Because the dispute was so public and Büchel's name was so widely associated with the work, it is doubtful the disclaimer would have been effective. *See* Kennedy, *supra* note 8.

170. *Büchel*, 565 F. Supp. 2d at 248.

a memorandum to clarify the reasoning underlying its ruling.[171]

B. The Court's Decision

The court's ruling provided no definitive statements about what types of art would be excluded from VARA protection in the future.[172] Instead, it fashioned four principles to be used in interpreting VARA: the Act generally should not apply to unfinished works;[173] courts should construe the Act narrowly for works that are not expressly included;[174] even if a court determines that a work falls within the statute's scope, it should consider any conflicting principles that weigh against inclusion;[175] and, most importantly for the purposes of this analysis, VARA's "exclusion of coverage for film suggests that as a work becomes more collaborative and fluid the protections offered by VARA will perhaps diminish."[176]

The court's discussion of collaboration under VARA was brief. In reaching its conclusion, the court initially looked to the text of the Act. The definition of "a work of visual art" does not directly address the issue of installation art.[177] The statute does, however, list what does not constitute a work of visual art.[178] The court analogized *Training Ground* to one of these exemptions: motion pictures.[179] The court felt that this exemption had "some significance" for the case, as the legislative history indicated *Training Ground*, like a motion picture, was the type of collaborative effort Congress did not intend to afford protection.[180] The court next pointed to the decision in *Phillips* as exemplifying how courts can and should create further exceptions to VARA protection where the legal interests so re-

171. *Id.*
172. *See generally Büchel*, 565 F. Supp. 2d 245.
173. *Id.* at 257–58.
174. *Id.*
175. *Id.* at 258.
176. *Id.*
177. *Id.* at 256; *see also* 17 U.S.C. § 101 (2006) (failing to address large-scale artistic works in the definition of a work of visual art).
178. 17 U.S.C. § 101.
179. *Büchel*, 565 F. Supp. 2d at 256 (acknowledging that although the motion picture exemption did not directly apply to *Training Ground*, "the implication of [this] exception[ ] has some significance for this case").
180. *Id.*; *see also* 17 U.S.C. § 101 (listing mediums that do not constitute a work of visual art).

quire.[181] Thus, the court construed VARA's legislative history as instructing courts to restrictively interpret VARA for any type of collaborative work.[182] Although the court noted that Congress instructed courts to use common sense and artistic standards to guide determinations about VARA's scope, it only applied this principle in reaching its holding about *Training Ground*'s *unfinished* nature.[183] Thus, the court's holding regarding collaborative efforts relied only on statutory exemptions and past case law, rather than on an application of the common sense principle to collaborative efforts.[184] By neglecting to apply this principle and only briefly discussing its reasoning, the court failed to truly explain why collaborative works like *Training Ground* could not be works of visual art.

Furthermore, it is unclear from the court's analysis what exactly constitutes a collaborative effort. The court suggested that works that are the product of "highly collaborative efforts," are not entitled to VARA protection.[185] The court did not define what constitutes a highly collaborative effort, simply indicating that it arises where "a good deal of back-and-forth and shared decision-making" takes place.[186] For example, the record was unclear on the extent to which Büchel dictated certain aspects of the installation, such as the appearance of the slogan "Pride, Professionalism and Partnership" on a police car.[187] The court thought many such details were "the product of happenstance, or even the fruit of a lucky impulse by the staff member."[188] Thus, although the court acknowledged that Büchel provided the inspiration for the artwork, because "so many of the details of fabrication and execution relied on chance or the discretion of the workers on the scene, an ocean away from the artist, the final product had a blended flavor."[189] This emphasis on the museum employees' discretion and *Training Ground*'s consequent "blended" nature is at odds with

181. *Büchel*, 565 F. Supp. 2d at 256.
182. *Id.*
183. The court only briefly mentioned this principle in the analysis of VARA's application to unfinished works. *Id.* at 257. The court never referred to the common sense standard in relation to its discussion of collaborative efforts. *See generally id.*; *see also* VARA HOUSE REPORT, *supra* note 26, at 6921 (discussing the common sense standard).
184. *See Büchel*, 565 F. Supp. 2d at 256.
185. *See id.*
186. *See id.* at 251.
187. *Id.* at 255.
188. *Id.*
189. *Id.* at 256.

the museum's admission that it either followed Büchel's specific instructions or, if these instructions were unclear, attempted to follow his general outline subject to Büchel's later approval or disapproval.[190] The idea that MASS MoCA and Büchel were engaged in shared decision-making was illusory because MASS MoCA never contended that Büchel did not have ultimate artistic control.[191]

It is possible that the court's characterization of *Training Ground*'s construction and its ultimate ruling were simply a reaction to the peculiar circumstances of the case. The court recognized that *Training Ground* presented "a particularly awkward fit with the squared corners of the law."[192] The museum was seemingly the more sympathetic party, seeking only to produce an exhibition for the public within a reasonable time and for a reasonable amount.[193] The court's description of Büchel's behavior suggests that it sympathized with MASS MoCA:

> When an artist makes a decision to begin work on a piece of art and handles the process of creation long-distance via e-mail, using someone else's property, someone else's materials, someone else's money, someone else's staff, and, to a significant extent, someone else's suggestions regarding the details of fabrication—with no enforceable written or oral contract defining the parties' relationship—and that artist becomes unhappy part-way through the project and abandons it, then nothing in the Visual Artists Rights Act or elsewhere in the Copyright Act gives that artist the right to dictate what that "someone else" does with what he has left behind, so long as the remnant is not explicitly labeled as the artist's work.[194]

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190. *See id.* at 250–51, 254.

191. *See id.*

192. *Id.* at 256.

193. Smith, *supra* note 145.

194. *Büchel*, 565 F. Supp. 2d at 248. One article characterized the court's decision as recognizing that an artist should not be able to "agree to collaborate on a piece, overspend on the budget, abandon the project, and then cry foul" when the institution wants to display the work in its unfinished state. *See* Telesetsky, *supra* note 146, at 91–92. However, the museum's behavior after winning the case indicates the behavioral problems were not one-sided: during the brief period it displayed the artwork, it "mount[ed] a slick, disingenuous, egregiously self-serving photo and text display" and a bulletin board "adorned with newspaper articles describing the controversy, mainly in terms unfavorable to Büchel." Ken Johnson, *Is MASS MoCA Trampling Artists' Rights?*, TIMES UNION, July 8, 2007, at H.1.

However, if *Büchel* does espouse a broader interpretive principle, the implications are troubling. The court misinterpreted the legislative history regarding collaborative efforts. As the following analyses of moral rights authorship and the history of film and moral rights in the United States demonstrate, Büchel's artwork was not the type of collaborative work Congress sought to exclude from VARA's scope.

C. *The Relationship of Collaboration and Authorship in Copyright Law*

Neither the Copyright Act, in general, nor VARA, in particular, provides adequate guidelines for dealing with collaborative works. Instead, they overemphasize the idea of a solitary author who bears the sole responsibility for a work and—as the only author—is entitled to the exclusive protection of the rights in the work.[195] This overemphasis on authorship is known as the "author effect."[196] Congress's reliance on this theory of authorship meant it did not expressly address the issue of art forms with multiple contributors in VARA. This led the *Büchel* court to misguidedly exclude Büchel's "collaborative" piece from protection. Even though Congress never expressly addressed polyvocal works under the Copyright Act or VARA, its instruction to consider the standards of the artistic community in determining VARA's scope requires courts to think about authorship in a new way when addressing collaborative artworks.

1. The Author Effect and the Romantic Vision of the Solitary Artist

The so-called "author effect" has been the subject of contentious debate over the last several decades. Numerous scholars have pointed out the fallacy inherent in the notion of the solitary author.[197] Although society tends to think of one

195. *See* Elton Fukumoto, Comment, *The Author Effect After the "Death of the Author": Copyright in a Postmodern Age*, 72 WASH. L. REV. 903, 906 (1997).

196. *See, e.g.*, Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 279 (1992) (suggesting that the notion of authorship reflected in copyright law, while influential, may change); Fukumoto, Comment, *supra* note 195, at 906–08 (describing the rise of the author effect in the Romantic conception of the author and how the Copyright Act embodies the author effect).

197. *See, e.g.*, Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 141 (Josué V. Harari ed.,

person as the sole creative force in a work, in reality there are multiple contributors, be they actual physical "collaborators"—as in *Büchel*—or sources of inspiration and influence.[198] Arguably, the notion of the solitary author derives from the nineteenth-century Romantic Movement's emphasis on artwork as a unique expression of the author's personality.[199] As noted scholar Michel Foucault has argued, this perception of art and the artist is simply the current paradigm in an ever-evolving history of ideas.[200] Yet copyright doctrine continues to overemphasize the idea of the solitary author: copyright initially vests in an author,[201] and a person must exercise some level of creative control to qualify as an author.[202] As such, copyright law protects ideas about inspiration and originality that are becoming antiquated as new forms of art emerge.[203] Contemporary art is polyvocal in a way that art forms a hundred years ago were not—its polyvocalness arises more from physical contributions whereas authorship scholars think more theoretically about general societal and intellectual contributions. Congress has failed to address either type of polyvocality. Instead, due to its overemphasis on the lone author, copyright law fails to expressly deal with the polyvocal works occupying an increasingly large area of copyright.[204] Where Congress has only offered broad and potentially vague legislative guidance—such as to consider common sense and the standards of the artistic community—courts like the district court in *Büchel* have simply excluded polyvocal works from protection.[205]

1979); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 295 (1992); Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 741 (2007); Woodmansee, *supra* note 196, at 280 ("The notion that the writer is a special participant in the production process—the only one worthy of attention—is of recent provenience.").

198. *See generally* Foucault, *supra* note 197.

199. Jaszi, *supra* note 197, at 295.

200. Foucault, *supra* note 197, at 141.

201. 17 U.S.C. § 201 (2006).

202. *See* Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000); *see also* Liemer, *supra* note 52, at 50 (describing moral rights as arising from the artistic control an artist has over his or her work).

203. *See* Jaszi, *supra* note 197, at 302 (suggesting that "the extension of copyright protection to new categories of works may entail reimagining them so as to suppress complicating details about their modes of production").

204. *Id.*

205. *See supra* notes 124–25 and accompanying text (explaining that courts commonly construe statutory omissions as intentional).

This stagnant approach to contemporary art forms is especially evident in the field of the visual arts. Over the last several decades, the physical scale of contemporary artworks has grown,[206] and the ability of one artist to be responsible for the whole has correspondingly diminished.[207] VARA and *Büchel* demonstrate how courts have had more difficulty attempting to conceptualize the role of the author in these large-scale contemporary art forms.

2. VARA's Overemphasis on Authorship

Because VARA is an extreme result of the author effect, its provisions do not provide effective guidance to courts seeking to apply the Act to polyvocal works. VARA places even greater importance on authorship than the Copyright Act. Although copyright law is primarily concerned with balancing the interests of the creative author with the recipient public,[208] the ability of a copyright holder to transfer his or her copyright[209] reflects a strong emphasis on ownership.[210] In collaborative works where authorship is unclear, copyright protection may exclusively vest in the overall owning institution or indi-

206. MASS MoCA is an example of the growing importance of large-scale works in contemporary art. The museum was established in 1999 to be a leader in the art world for these types of installation pieces and is comprised of over twenty buildings with vast sizes allowing the museum to accommodate large pieces. *See* EDWARD PORTER ALEXANDER & MARY ALEXANDER, MUSEUMS IN MOTION: AN INTRODUCTION TO THE HISTORY AND FUNCTIONS OF MUSEUMS 40 (2007).

207. Büchel, for example, could not be expected to procure and move the movie theater and two-story house that he used in *Training Ground* by himself. *See* Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 250 (D. Mass 2008). This contemporary trend is not wholly at odds with historical practice. Prior to the Renaissance, artworks were created in a largely collective process. Although the Renaissance gave rise to the first solitary artistic geniuses, it was still dominated by a collaborative process. *See* 2 ARNOLD HAUSER, THE SOCIAL HISTORY OF ART: RENAISSANCE, MANNERISM, BAROQUE 48–49 (3d ed. 1999); Christopher S. Wood, *Indoor-Outdoor: The Studio Around 1500*, *in* INVENTIONS OF THE STUDIO, RENAISSANCE TO ROMANTICISM 36, 37 (Michael Cole & Mary Pardo eds., 2005). For example, master-painter Raphael, in addition to collaborating with other master artists, had his apprentices paint the backgrounds and draperies in his frescoes while he would concentrate on the more complicated details, such as faces and hands. ROGER JONES & NICHOLAS PENNY, RAPHAEL 147, 162 (1987).

208. Alina Ng, *Authors and Readers: Conceptualizing Authorship in Copyright Law*, 30 HASTINGS COMM. & ENT. L.J. 377, 379 (2008).

209. *See* 17 U.S.C. § 201 (2006).

210. *See* Ng, *supra* note 208, at 381.

vidual.[211] For these works, authorship may be less significant than ownership,[212] which diminishes the impact of the author effect. Moral rights, however, cannot be transferred (although they may be waived).[213] This lack of transferability reinforces the importance of authorship over ownership.[214] The personhood theory underlying moral rights further strengthens the predominance of authorship:[215] the rationale relies on the notion that an artist's personality is inextricable from his works.[216] Thus, moral rights embody the author effect to a greater extent than copyright law by prioritizing and highlighting the figure of a sole creative force, the author.[217] This emphasis on a singular author creates difficulties in determining who is an author—and, therefore, who is entitled to the rights—where more than one person contributes to an artwork.

In VARA, there is a similar overemphasis on sole authorship that makes it problematic to decide when to extend VARA protections to more collaborative works. VARA's definition of a work of visual art includes visual works that are traditionally created by one person, such as paintings and sculpture, but rejects collaborative works such as films.[218] It specifically excludes certain types of works potentially influenced by more than a solitary party, such as "work[s] made for hire."[219] The distinction suggests Congress perceived visual artists as solitary beings who are solely responsible for the inspiration, creation, and execution of their works.[220]

Additionally, VARA affords protection to authors rather than artists.[221] Congress seemingly used the word "author" to align VARA with the rest of the Copyright Act, which likewise

211. *See id.* at 381–82.

212. *See id.*

213. 17 U.S.C. § 106A(e)(1).

214. *Compare id.* § 201 (permitting authors to transfer their copyrights), *with id.* § 106A (precluding authors from transferring their moral rights).

215. *See supra* text accompanying notes 39–46 (explaining personhood theory).

216. *See supra* text accompanying notes 39–41 (describing how personhood theory is based on the idea that a person's self-actualization depends on his or her connection to physical objects).

217. *See* Jaszi, *supra* note 197, at 299.

218. *See* 17 U.S.C. § 101.

219. *Id.*; *cf.* Damich, *supra* note 49, at 964–65 (suggesting that Congress excluded works made for hire from protection because if it had followed copyright principles by allowing employers to claim VARA protection for works made for hire, this result would contradict the philosophy behind moral rights entirely).

220. *See* 17 U.S.C. § 106A.

221. *See id.*

protects "authors."[222] Nevertheless, the term "author," as applied to visual artists, creates interpretive difficulties. The Berne Convention sidesteps the problem by allowing each country to define authorship.[223] Congress has also avoided defining authorship[224] and has only indirectly addressed authorship in collaborative undertakings through the joint-authorship provision and the works-made-for-hire doctrine.[225] Because neither the Copyright Act nor VARA sufficiently address authorship in the case of multiple contributors, the task of defining authorship more concretely has fallen to the courts.

Büchel illustrates how notions of collaborative authorship may go awry when a court has little legislative guidance.[226] Aside from noting that VARA protects jointly authored works,[227] the decision does not directly address authorship.[228] Nevertheless, by concluding that *Training Ground* was a collaborative effort, the court effectively denied Büchel authorship in his work. This contradicts a traditional notion that authorship generally inheres where an artist has "creative control" over the work.[229] An author should not be "denied exclusive authorship status simply because another person render[s] some form of assistance."[230] Büchel categorically stated that he

222. Damich, *supra* note 49, at 964; *see* 17 U.S.C. § 101.

223. *See* Berne Convention, *supra* note 29, art. 6*bis* (granting protection to "authors" but failing to define authorship, although Article 15 establishes several presumptions as to who is the author); Damich, *supra* note 49, at 965 & n.96 (noting, for infringement purposes, it is presumed that if an artist's name appears on a work, he or she is the author). In addition, when the World Intellectual Property Organization (WIPO) attempted to define "author" in its model copyright provisions, there was so much disagreement between members that WIPO eventually abandoned the attempt. Ng, *supra* note 208, at 383–84.

224. *See* 17 U.S.C. § 101 (excluding "author" from the list of definitions).

225. *See* Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1199–1209 (2000).

226. *See* Roberta Rosenthal Kwall, *Narrative's Implications for Moral Rights in the United States*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 93, 103 (Peter K. Yu ed., 2007) (noting that contemporary modes of interactive authorship can confound interpretations of the moral rights provisions).

227. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 259 (D. Mass 2008).

228. *See generally id.*

229. *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1232–33 (9th Cir. 2000) (requiring some significant level of creative control to constitute authorship).

230. Thomson v. Larson, 147 F.3d 195, 202 (2d Cir. 1998) (citing Childress v. Taylor, 945 F.2d 500, 504 (2d Cir. 1991)). Although the *Thomson* case dealt with joint authorship and did not expressly address the notion of collaborative efforts, the principle seems equally applicable here.

was the sole author of *Training Ground*.[231] The museum acknowledged Büchel's creative control and only contributed elements according to his instructions or with minor pragmatic changes.[232] Thus, the museum lacked the requisite creative control to establish an authorship interest in the work.[233] Yet, due to MASS MoCA's provision of "funding, logistical and technical support," the court deemed it a collaborator.[234] As the following section will show, the court's interpretation of "collaborative" is at odds with traditional copyright principles and the congressional record concerning VARA.

D. Film and Collaborative Works

Film has posed a consistent problem for copyright law: it is a medium that can involve dozens of significant contributors.[235] Fears about the commercial effects of granting moral rights to each contributor in works with a large number of contributors led Congress to exclude films and other audiovisual works from VARA protection.[236] Granting moral rights to installation artists, however, would not result in these feared commercial effects because there are fundamental differences between installation pieces and films, from the role of and number of "artists" in each setting to the relatively compact commercial nature of museum exhibitions. Furthermore, as the congressional record suggests, the irreplaceable nature of installation pieces—unlike films—weighs in favor of encompassing these works within VARA.[237]

1. The Commercial Viability of Collaborative Efforts

Opponents of moral rights feared the commercial effects of applying what they felt were potentially unwieldy rights to works with a large number of contributors. During the debates

231. Büchel Counterclaims, *supra* note 9, at 6.

232. *See Büchel*, 565 F. Supp. 2d at 254 ("[T]he museum argued that it had followed the artist's instructions, that adjustments could easily have been made, or that logistical constraints, such as the fire code, dictated their decisions.")

233. *See Aalmuhammed*, 202 F.3d at 1233.

234. *See Büchel*, 565 F. Supp. 2d at 251 & n.4.

235. Stuart K. Kauffman, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as "Author"*, 17 CARDOZO ARTS & ENT. L.J. 749, 762 (1999).

236. *See* VARA HOUSE REPORT, *supra* note 26, at 6919.

237. *See id.*

over the ratification of VARA, the film lobby proposed a number of reasons for denying VARA protection to motion pictures: (1) unlike traditional art forms, films are commercial works rather than personal works; (2) moral rights would upset film distribution and marketing and, as a corollary, would result in widespread inefficiency within the industry; and (3) films are not the type of irreplaceable works that Congress should seek to protect with moral rights.[238] The most significant of these reasons maintained that film's highly collaborative nature would engender a large number of potential moral rights claims, thereby inhibiting film distribution and marketing.[239] This contention relied on the nature of the film industry; specifically, that there are many different commercial markets for films, each of which can require modifications to ensure a given film's continued commercial viability.[240] Obtaining permission for *each* modification from *all* of the people who collaborated on a film would be virtually impossible.[241]

Films, however, are a unique medium. A studio owns a film's copyright and assumes the primary economic benefits and risks of a film, regardless of the artistic contributions of the directors, actors, and others.[242] Because of the economic risk and potentially complex distribution structure, Congress set forth limitations regarding collaborative efforts that responded to the film industry's concerns.[243] Read in this context, Congress's concern about collaborative works encompasses only those endeavors where the artist does not have an economic right in the work and where obtaining the artist's permission for alterations would inhibit the work's commercial viability.[244]

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238. *See* Kauffman, *supra* note 235, at 757 & nn.45–48.

239. VARA HOUSE REPORT, *supra* note 26, at 6918–19. *But see* Helen K. Geib, *Classic Films and Historic Landmarks: Protecting America's Film Heritage from Digital Alteration*, 33 J. MARSHALL L. REV.185, 202–03 & n.133 (arguing that even if authorship were to vest in a single director, the reality of film production would prevent a director from becoming an author as defined in copyright jurisprudence).

240. *See* VARA HOUSE REPORT, *supra* note 26, at 6919.

241. *See id.*; *see also Moral Rights Hearings*, *supra* note 73, at 585 (statement of Michael R. Klipper, Counsel, Committee for America's Copyright Community).

242. Geib, *supra* note 239, at 191.

243. *See* VARA HOUSE REPORT, *supra* note 26, at 6919.

244. *See id.*; *see also* Rigamonti, *supra* note 62, at 407 ("Limiting moral rights to a particular set of original works of visual art . . . excludes virtually all controversies in which the interests of authors as actual creators of copyrightable works conflict with the interests of market intermediaries and commercial users.").

The congressional record supports this interpretation of VARA.[245] In the congressional hearings, Representative Carlos Moorhead specifically noted that the proposed bill would not cover works "that are collaborative in nature and [have collaborators] in large numbers such as motion pictures, newspapers, magazines and textbooks."[246] Moorhead justified the exclusion of these works by stating that one of the primary goals of the Subcommittee on Courts, Intellectual Property and the Administration of Justice in drafting the Act was to ensure that the proposed moral rights did not interfere with the constitutional copyright goal of maximizing public access to a variety of artworks.[247] The various restrictions on what constitutes a work of visual art under VARA serve to protect "the ability of [copyright-intensive] industries to produce and disseminate U.S. created works."[248] Because granting installation artists moral rights does not generally hinder the commercial viability of the work, it is specious to suggest that Congress intended to exclude such works from the Act's protection.

2. The Commercial Viability of Museum Exhibitions

Thus, Congress's preclusion of VARA protection for collaborative works arose from its desire to protect these works' commercial viability. As *Training Ground* was not the type of work whose commercial viability would be impeded by granting Büchel moral rights, the court should not have excluded the work from VARA's scope based on its "collaborative" nature.

As previously discussed, the entertainment and publishing industries sought to prevent American enactment of a moral rights provision because they feared producers would need to obtain permission from every rights holder for virtually any change in the work—such as when products would need to update the work or reformat it in a new medium.[249] The commercial success of museum exhibitions, however, depends primarily on ticket sales and the sale of affiliated merchandise in

245. *See* 136 CONG. REC. 36,950–51 (1990) (statement of Rep. Carlos J. Moorhead) [hereinafter Moorhead Statement].

246. *Id.* at 36,951.

247. *Id.*

248. *Id.*; *see also* Rick Mortensen, *D.I.Y. After* Dastar*: Protecting Creators' Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VAND. J. ENT. & TECH. L. 335, 362–63 (2006).

249. *See supra* text accompanying notes 75–80.

the museum store.[250] Although the *Büchel* court suggested *Training Ground* was the type of collaborative work that had "the possibility of evolving formats in different markets," it did not explain this statement.[251] On closer analysis, the court should have found that recognizing the moral rights of installation artists would not impede either of these avenues because Büchel's large-scale exhibition was not the type of work that would need to be reformatted to be distributed in different markets. *Training Ground* would only be presented in one format: as a large-scale installation piece.[252]

In addition, because of the short time period involved, museums do not face high transaction costs in receiving permission for any changes from the artist who holds the moral rights in the installation. One reason for these diminished costs is that the sale of any tickets and affiliated merchandise would roughly coincide with the exhibition.[253] This coincidence reduces the time frame in which the museum would need to make any requests for alterations (in the exhibit itself or on the associated merchandise). Furthermore, there would be few rights holders. For example, in *Büchel*, there were two potential sources of moral rights: the museum employees and Büchel. The museum did not need to be concerned about moral rights vesting in its employees because VARA denies protection to works made for hire—essentially, works prepared by

250. *See* Andrew J. Noreuil, *Nice Tie: Trade Dress Protection for Visual Artistic Style when Competitors Offer Artist-Inspired Products*, 67 FORDHAM L. REV. 3403, 3406 (1999) (addressing the importance of museum store sales); Jonathan Sweet, *Museum Architecture and Visitor Experience*, *in* MUSEUM MARKETING: COMPETING IN THE GLOBAL MARKETPLACE 226, 226 (Ruth Rentschler & Anne-Marie Hede eds., 2007) (noting that exhibitions "place[ ] a high priority on revenue generation through . . . ticket sales"). Private donations from individuals or corporations are arguably the most important source of overall museum revenue, but as these donations are usually unrelated to specific exhibitions, they are largely irrelevant to the discussion here. *See* Rosanne Martorella, *Corporate Patronage of the Arts in the United States: A Review of the Research*, *in* ART AND BUSINESS: AN INTERNATIONAL PERSPECTIVE ON SPONSORSHIP 17, 18 (Rosanne Martorella ed., 1996) ("Private donations [to United States museums] . . . account for a quarter to half of nonprofit-arts income while the federal, state, and local government support amounts to 14%.").

251. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 256 (D. Mass 2008).

252. *See generally id.* (referring only to the MASS MoCA exhibition and failing to mention any plans for a traveling exhibition or permanent installation).

253. *See* Noreuil, *supra* note 250, at 3407 (noting that a Matisse exhibition raised revenues in 1993, but that these revenues decreased to pre-exhibition levels in 1994, indicating that the merchandising effectively only occurred during the exhibition).

employees in the scope of their employment.[254] Therefore, the museum would only need to obtain Büchel's permission. The transaction costs and difficulty of obtaining a single artist's permission are not the type of prohibitive costs that VARA's drafters feared.[255] Additionally, as the following section will demonstrate, the artwork at stake was the type of high-quality art VARA seeks to protect.

3. The Differences Between Collaborations in Installation Art and Film

Not only do the commercial effects of moral rights differ between installation art and film, the fundamental natures of the two differ. The VARA House Report noted that moral rights are better suited to works that are not produced in multiple copies and are thus irreplaceable.[256] Alleviating concerns that the proposed moral rights act was overbroad, a number of representatives expressly clarified that VARA would only address "the mutilation and destruction of works of fine art which are often one-of-a-kind and irreplaceable."[257] Therefore, when Congress drafted VARA, it defined a work of visual art as an artwork "existing in a single copy."[258] The definition also encompasses photographs of fewer than two hundred copies "produced for exhibition purposes only."[259] These provisions demonstrate that VARA prioritizes singular artworks that were produced in a single copy as well as works created for exhibition purposes.[260] *Training Ground*, a single installation

254. *See* 17 U.S.C. § 101 (2006); Martin v. City of Indianapolis, 982 F. Supp. 625, 633 (S.D. Ind. 1997). Although the Copyright Act permits employers to have copyrights in works made for hire, there is no similar provision in VARA. *Compare* 17 U.S.C. § 201(b), *with id.* §§ 101, 106A.

255. *See generally* VARA HOUSE REPORT, *supra* note 26, at 6919; Moorhead Statement, *supra* note 245.

256. *See* VARA HOUSE REPORT, *supra* note 26, at 6919.

257. 135 CONG. REC. 12,250 (1989) (statement of Sen. Kennedy); Plaintiff MASS MoCA's Memorandum of Law in Support of its Motion for Summary Judgment at 17 n.15, Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245 (D. Mass. 2008) (No. 3:07-cv-30089-MAP) (listing similar statements).

258. 17 U.S.C. § 101.

259. *Id.*

260. *See id.*; *see also* Colleen Creamer Fielkow, *Clashing Rights Under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employee's Moral Rights in a Work Made for Hire*, 7 DEPAUL-LCA J. ART. & ENT. L. 218, 230 (1997) ("The Act is primarily protective of unique, irreplaceable works of visual art.").

designed as an exhibition, falls into both categories. It is thus dissimilar to film and is more akin to the types of irreplaceable works that Congress intended to give the greatest protection.[261] Furthermore, as the following section will suggest, *Training Ground* should be protected because if such works are not protected by VARA, fewer high-profile contemporary artists may choose to exhibit in the United States.

III. POLICY CONCERNS AND THE RAMIFICATIONS OF *BÜCHEL*

Ultimately, because other installation artists are or will be aware of the *Büchel* decision, the holding could negatively impact the number and quality of contemporary artists willing to exhibit in American museums. Although critics of moral rights often raise valid concerns about overextending VARA's scope, these concerns do not relate to the type of collaborative work at issue in *Büchel* and are outweighed by *Büchel*'s potentially negative impact on contemporary artists.

A. Artist Awareness of VARA

The effect of *Büchel* on the art world depends on other artists' awareness of the comparative status of moral rights in the United States and abroad. Historically, American artists have not known much about their moral rights.[262] Prior to VARA, common law moral rights protections generated little case law, which could indicate artists were either uninterested in or unaware of moral rights.[263] Even after VARA, it is unclear how much the average artist really knows. The Copyright Office circulated a survey to artists, artists' representatives, art students, and arts organizations in 1994 to determine their awareness of moral rights.[264] A quarter of the artists

261. *See* VARA HOUSE REPORT, *supra* note 26, at 6919.

262. *See* Cotter, *supra* note 28, at 26 ("[The] Copyright Office Report on the Waiver of Moral Rights in Visual Artworks . . . discloses that more than one quarter of the respondents surveyed by the Copyright Office in 1994–95 were unaware that artists who create certain works of art have moral rights.").

263. *See id.*

264. UNITED STATES COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS (1996), http://www.copyright.gov/reports/exsum.html [hereinafter MORAL RIGHTS REPORT]. Specifically, the office circulated the report to determine whether concerns that VARA's provision allowing moral rights to be waived would result in contracts including moral rights waivers as standard provisions were warranted. JOHN HENRY MERRYMAN & ALBERT EDWARD ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 382 (4th ed., Kluwer Law Int'l 2002).

surveyed were wholly unaware of the concept, and fewer than half knew it was possible to waive these rights.[265] A follow-up survey conducted by one scholar in 2003 indicated no significant changes to artists' awareness.[266] This lack of precise knowledge could indicate that artists generally care little about these rights.[267]

Even if general awareness of moral rights has not changed since the time of these surveys, there are two reasons why those artists most likely to be affected by *Büchel* would, in fact, be conscious of the inadequacy of American moral rights. First, the majority of artists that the Copyright Office surveyed made only $10,000 a year from their artworks and many worked multiple jobs.[268] Museums tend to seek out well-known artists who presumably earn more than $10,000 a year from their art.[269] Therefore, most of the artists involved in the survey were not the type museums typically commission.[270] Furthermore, the survey showed that the artists most concerned about their moral rights were those who made more than $25,000 a year from their art or were represented by an agent.[271] This statistic indicates that more successful and sophisticated artists are more aware of their moral rights.[272] The 2003 survey supports this theory, as it found a significant rise in the number of artists making more than $25,000 who sought to

265. MORAL RIGHTS REPORT, *supra* note 264.

266. RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 144–45 (2005) (noting there was only a 5 percent increase in awareness of moral rights but indicating that, given the smaller size of the 2003 study, this change was likely not statistically significant).

267. *See* Cotter, *supra* note 28, at 52. *But see* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 278 (2003) (suggesting that the low response rate to the survey makes it difficult to make any conclusive determinations).

268. MORAL RIGHTS REPORT, *supra* note 264.

269. *See* STALLABRASS, *supra* note 2, at 26 (suggesting that museums exclusively commission installation pieces "by important artists" to act as a "powerful magnet[ ] for art-world attention"). For example, Büchel had a United States sales representative, a legal team, and at least three assistants, indicating his annual arts-based salary was well over $10,000 a year. *See* Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 250 (D. Mass 2008); Exhibitionist, *supra* note 146.

270. Museums tend to commission "important" artists like Büchel. *See* STALLABRASS, *supra* note 2, at 26.

271. MORAL RIGHTS REPORT, *supra* note 264. The artists' concern about their moral rights is indicated by the fact that they refused to sign contracts waiving their moral rights. *See id.*

272. *See id.*

protect their moral rights.[273] This more recent statistic indicates highly paid artists are becoming increasingly aware of their moral rights.[274] In the wake of *Büchel*, for example, a small-time artist stated that while most artists would not care about the outcome, it would be more significant for "well-known artists whose work was in demand."[275] Second, the *Büchel* case has received a remarkable amount of press in major U.S. publications, including *The New York Times*[276] and *The Boston Globe*[277] as well as a number of well-known art magazines and blogs.[278] One article directly contrasted the United States' stance on moral rights against the European stance, opining that European courts would likely rule in favor of Büchel because of "European judges' willingness [to] strongly . . . support artists and their works whenever artistic integrity is an issue."[279] This widespread coverage increases the likelihood that high-profile artists or their agents are aware of the potential legal pitfalls of exhibiting in the United States.

B. The Effect of Moral Rights on Artistic Production

Critics of VARA pose a number of arguments explaining why moral rights inhibit artistic production.[280] These argu-

273. Chang, *supra* note 266, at 147 (stating that these artists would turn down offers requiring them to waive their moral rights and comparing them to artists making less than $25,000, who were not also more protective of their rights).

274. *See id.*

275. Jennifer Huberdeau, *Who Owns the Work? Federal Laws Limited in Scope*, N. ADAMS TRANSCRIPT, Aug. 2, 2007.

276. Johnson, *supra* note 5; Kennedy, *supra* note 8; Smith, *supra* note 145.

277. Ken Johnson, *No Admittance: Mass MoCA has Mishandled Disputed Art Installation*, BOSTON GLOBE, July 1, 2007, at N1, *available at* http://www.boston.com/news/globe/living/articles/2007/07/01/no_admittance/?page=full.

278. *See* Huberdeau, *supra* note 275 ("The case is the topic of numerous art-related blogs and Web sites. Clancco.com, a 40-year-old group that investigates the effects of legal, social and economic issues on the arts, has been following the spat closely."); Henry Lydiate, *Christoph Büchel v. Mass MoCA*, ART MONTHLY, Nov. 2007, at 45, 45; Virginia Rutledge, *Institutional Critique: Virginia Rutledge on Christoph Büchel and Mass MoCA*, ARTFORUM, Mar. 2008, at 151.

279. Lydiate, *supra* note 278.

280. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (suggesting that moral rights "reduce the incentive to create by preventing the author or artist from shifting risk to the publisher or dealer"); Arthur B. Sackler, *The United States Should Not Adhere to the Berne Copyright Convention*, 3 J.L. & TECH. 207, 208–09 (1988) (arguing that because moral rights contradict the traditional editorial role, their application to publishing would result in a flood of litigation); Carl H. Settlemyer III, Note, *Between Thought and Possession: Artists' "Moral Rights" and Public*

ments, largely based on reduced prices and an increased risk of litigation, opine that granting moral rights would decrease artistic production and would correspondingly decrease the public availability of art. This line of reasoning relies on an economic analysis that does not affect the type of installation work at stake in *Büchel*.[281] In fact, granting moral rights could result in the increased availability of high-quality installation pieces because artists would be assured of their rights in a work.

1. Public Access to Creative Works

The primary argument against moral rights is that they harm the public interest by chilling investment in creative works. If moral rights exist, art buyers do not fully own any artwork they purchase. Because the purchaser is receiving only a divided interest in the work, he will inevitably pay a lower price for the artwork, as he is not receiving the entirety of the work.[282] This in turn results in decreased artistic production, as the artist's profits are decreased.[283] Eventually the public will have access to fewer artworks.[284]

This economic analysis is not best applied to situations like *Büchel*, where a small number of museums are the "purchasers."[285] The analysis presumes that the museum would be motivated by a desire to fully own the work. This assumption might be appropriate if the museum were making a long-term acquisition. Museum exhibitions, however, tend to be short-term investments, and the hosting institution rarely seeks to permanently acquire large-scale installation pieces.[286] The

Access to Creative Works, 81 GEO. L.J. 2291, 2309–10 (1993) (listing a number of factors, such as increased litigation and decreased prices for artwork, that could affect the production of artistic works).

281. *See* Settlemyer, *supra* note 280, at 2309–10.

282. *Id.* at 2309.

283. *Id.*; *see also* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 100–01 (1997).

284. *See* Settlemyer, *supra* note 280, at 2309.

285. *See, e.g.*, Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 304 (2003) (arguing that moral rights cannot be subject to a simple economic analysis because their value is less economic and more about "the intrinsic worth of such artistic contributions to the cultural landscape").

286. For example, there was never any indication that Büchel's *Training Ground* or any part of the work would enter MASS MoCA's permanent collection.

work's value is primarily based on tickets and merchandise sold during the short time it is on display, not on the work's resale value.[287] Consequently, the museum's long-term ownership interest is of negligible importance[288]—as in *Büchel*, where the work was not sought as an addition to the museum's permanent collection.[289]

Another factor reducing the importance of the museum's ownership interest is the sheer size of installation art pieces. Büchel's work, for example, was intended to occupy the entirety of MASS MoCA's Building 5, "a giant exhibition space the size of a football field."[290] This large size suggests installation pieces are not the type of works that museums would "own" for longer than the exhibition of the work requires. For instance, in the time since *Büchel* was decided, MASS MoCA has hosted new exhibitions by Jenny Holzer and Simon Starling in Building 5.[291] One reason for this quick turnover is the high costs associated with storing and conserving the artwork beyond the exhibition period.[292] Because museums have to dispose of these installation pieces, it may be inferred that they are only concerned about ownership interests during the preparation and exhibition of the work. Museums assume less of an interest in long-term ownership than do normal art consumers.

See Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 565 F. Supp. 2d 245, 246 (D. Mass. 2008).

287. *See* Noreuil, *supra* note 250, at 3405–06.

288. *See* Robert Storr, *To Have and To Hold*, *in* COLLECTING THE NEW 29, 40 (Bruce Altshuler ed., 2007) (suggesting that although museums prefer to retain works in their permanent collections, the scale of the work can make the cost of maintenance prohibitive); *see also* Bruce Altshuler, *Collecting the New: A Historical Introduction*, *in* COLLECTING THE NEW 1, 8 (Bruce Altshuler ed., 2007) (noting that contemporary art, in general, has created a problem in collecting contemporary art because of the new forms and technologies).

289. *See infra* note 291 and accompanying text (explaining that the large size of *Training Ground* would make MASS MoCA unlikely to desire it as a permanent acquisition and describing how, in the time since Training Ground was dismantled, two further exhibitions have been hosted in the exhibition space).

290. *Büchel*, 565 F. Supp. 2d at 249; *see also* Christoph Grunenberg, *The Modern Art Museum*, *in* CONTEMPORARY CULTURES OF DISPLAY 26, 46 (Emma Barker ed., 1999) (describing the recent movement in converting industrial structures into contemporary museums which provide the space requisite for more contemporary, experimental art forms).

291. *See* MASS MoCA, Simon Starling: The Nanjing Particles, Dec. 13, 2008–Nov. 1, 2009, http://www.massmoca.org/event_details.php?id=404 (last visited Feb. 27, 2009); MASS MoCA, Jenny Holzer: Projections, through Nov. 16, 2008, http://www.massmoca.org/event_details.php?id=339 (last visited Feb. 27, 2009).

292. LERNER & BRESLER, *supra* note 46, at 1448; *see also* STALLABRASS, *supra* note 2, at 27 (noting that "[c]ontemporary installation is expensive" and often must rely on some sort of sponsorship).

They therefore have less concern about divided property interests in the work.[293]

2. Increasing the Availability of High-Quality Artworks

Installation art is almost uniformly of a high value, both fiscally and socially.[294] Granting installation artists moral rights in their works could incentivize top-tier installation artists to exhibit in the United States; denying them protection could have the opposite effect.[295]

Museums generally commission installation works from well-known artists, attempting to guarantee the high value of the installation piece.[296] The museum setting itself helps ensure this value because there is less of a "waste" problem than in other settings: whereas homeowners might purchase and preserve art that is merely visually pleasing, museums will

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293. *See* Settlemyer, *supra* note 280, at 2310 (suggesting that these divided interests arise primarily where moral rights " 'prevent altogether the dissemination . . . of a host of cultural and entertainment materials in forms that are varied, appealing and affordable' " in secondary markets (quoting Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 423–24 (1990)).

294. *See, e.g.*, Michael Brenson, *The Curator's Moment*, *in* THEORY IN CONTEMPORARY ART SINCE 1985 55, 56–57, 63 (Zoya Kocur & Simon Leung eds., 2004); Sandy Nairne, *Exhibitions of Contemporary Art*, *in* CONTEMPORARY CULTURES OF DISPLAY 105, 113–14 (Emma Barker ed., 1999) (describing two facets to the value of contemporary art, use value and exchange value, and noting that use value is most important at the time of the exhibition—usually it is only after the exhibition that the work acquires a high exchange value in the art market). *But see* William A. Real, *Toward Guidelines for Practice in the Preservation and Documentation of Technology-Based Installation Art*, 40 J. AM. INST. FOR CONSERVATION 211, 212 (2001) ("The significance of an installation is also generally unknown at the time of its creation or acquisition . . . the fate of an artist's reputation decades hence can never be known in advance [and] the defining characteristics of an artist's oeuvre over the course of a career may not yet be discernible.").

295. *See, e.g.*, Natalia Thurston, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 720 (2005) ("The residual effects of destroying a work of art are two-fold. Not only is the public denied access to the work, but also future works created in response to the work may be thwarted.")

296. The market for installation art is highly competitive, with museums seeking to draw in new visitors by displaying the work of well-known artists who use exciting, unconventional mediums. *See* STALLABRASS, *supra* note 2, at 25–26. However, it may be difficult to estimate the strict "value" of an installation piece prior to an exhibition, as the fact of exhibition tends to increase the market value of the work. *See* Nairne, *supra* note 294, at 114–15; *see also* OLAV VELTHUIS, TALKING PRICES: SYMBOLIC MEANINGS OF PRICES ON THE MARKET FOR CONTEMPORARY ART 113 (2005).

likely not spend their resources protecting works that have little reputational, social, or cultural value.[297] By preserving these high-quality works, museums increase the public's access to artistic and cultural highlights[298]—one of Congress's purposes in enacting VARA.[299]

The *Büchel* decision could significantly affect the contemporary art world and thereby reduce American public access to high-quality artworks. One American sculptor, Weltzin Blix, argued that without moral rights, artists will believe that their works can be altered, displayed, or destroyed without their permission.[300] Consequently, he contended, "the incentive to excel is diminished and replaced with a purely profit motivation."[301] Currently, artists display their works in museums primarily for prestige, not profit.[302] If, however, museums can alter or destroy an artist's work without his permission, the potential prestige value of museum exhibition falls: the artist will no longer know if he can present his vision to the public uncorrupted by undesirable influences.[303] Several articles describing the *Büchel* dispute have noted that—despite Büchel's bad behavior—it is dangerous for a museum to begin to believe it is a coauthor, as that attitude will inevitably com-

297. Hansmann & Santilli, *supra* note 283, at 105; *see also* REISS, *supra* note 2, at XIX (noting that the fact of exhibiting in a museum increases the cultural value of the work). "[T]he status of the spaces vis-à-vis the art world has an effect on the status of the works shown. Institutional context has the power to validate works or relegate them to the margin." REISS, *supra* note 2, at XIX.

298. Hansmann & Santilli, *supra* note 283, at 110–11.

299. *See* 136 CONG. REC. 12,608 (1990) (statement of Rep. Robert W. Kastenmeier).

300. VARA HOUSE REPORT, *supra* note 26, at 6916.

301. *Id.*

302. *See* REISS, *supra* note 2, at 144 (describing the resultant prestige when an artist exhibits at a major museum); Emma Barker, *The Museum in the Community: the New Tates*, *in* CONTEMPORARY CULTURES OF DISPLAY 178, 180 (Emma Barker ed., 1999) ("Art museums have unrivalled prestige value."). The profit motive also diminishes because art museums in general—and MASS MoCA in particular—are non-profit institutions. For example, in 2000 MASS MoCA's total operating budget was $3.4 million, roughly half of which was raised from donors. CHRISTOPHER EATON GUNN, THIRD-SECTOR DEVELOPMENT: MAKING UP FOR THE MARKET 126 (2004); *see also* BRUSTEIN, *supra* note 1, at 204 (suggesting that MASS MoCA receives most of its financial support from the local populace and temporary visitors). Therefore, while the boost in prestige may result in larger profits for exhibiting artists in the future, exhibitions by themselves are not primarily profit-motivated.

303. *See* Katherine J. Carver & Bruno Chalifour, *The Visual Artists Rights Act of 1990*, AFTERIMAGE, Jan.–Feb. 2004, at 4, 4–5 (reiterating that moral rights seek to protect the reputation of the artist because any alteration to the work can injure the artist's reputation).

promise the artistic integrity of the resultant work.[304] As one article put it, "the notion [of joint authorship] offends the common art-world understanding of what it means when an institution offers to collaborate with an artist."[305] If an artist believes an American museum may claim to be a joint author of his or her work, theoretically, a reduction in the quantity of top-tier artworks available at museums could ensue. Although no well-known contemporary artists have publicly stated their aversion to exhibiting works in the United States because of the *Büchel* decision, MASS MoCA's eventual choice not to display the work suggests that it was concerned about the repercussions in the art community.[306]

3. The Threat of Litigation

Opponents of moral rights further argue that granting these rights might result in an increased threat of litigation.[307] This contention relies on the idea that moral rights "introduce[ ] an element of instability and uncertainty, as well as the frequent possibility, because of the increased threat of litigation, of delay in public access to and enjoyment of entertainment vehicles."[308] As noted earlier, however, because museums rarely transform installation pieces into derivative works such as when a film is altered into a DVD or other media, the threat of instability is minimal—the museum need only obtain the artist's permission once.[309]

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304. *See* Rutledge, *supra* note 278, at 152; Smith, *supra* note 145 ("[T]here are dangers, including the possibility that in controlling the purse strings, a museum starts thinking of itself as a co-author who knows what the artist wants better than he or she does. . . . You are reminded of Hollywood, where directors (that is, artists) are routinely denied 'final cut.' ").

305. *See* Rutledge, *supra* note 278, at 152 ("[T]he implications for future collaborations between other institutions and artists would have been serious. Though one senses the possibility for just such experiments in authorship growing all the time (avant-garde imperative or genuine social shift, who can say), recognition of artistic autonomy is the moral contract that Büchel and those who took his side in this matter so clearly felt was betrayed.").

306. *See infra* text accompanying notes 309–10.

307. Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 424 (1990).

308. *Id.* at 423–24.

309. *Id.* at 424; *see also* Coree Thompson, *Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere*, 23 ARIZ. J. INT'L & COMP. L. 787, 823–24 (2006) (noting that museums are most often hampered when they cannot locate a rights holder).

The threat of litigation still exists, however, as *Büchel* highlights. Although it won the right to exhibit *Training Ground*, MASS MoCA eventually declined to exhibit the piece,[310] undoubtedly influenced by the art community's negative reaction to the lawsuit.[311] Thus, the public was denied access to Büchel's first-ever American exhibition—a work that prompted the judge who adjudicated the case to remark that he had "never been so powerfully affected by a work of contemporary art."[312] Despite this outcome, it is more likely that vesting artists with stronger moral rights would actually decrease the threat of litigation because museums would know with greater certainty what they can and cannot do with a work of art. Granting moral rights would emphasize that only one person—the artist—can enforce rights with regard to the artwork. If the museum and artist wish to alter this de facto arrangement, they can do so contractually by having the artist waive his or her moral rights.[313] Unfortunately, the artistic community's general abhorrence of contracts may prevent museums from altering these arrangements. MASS MoCA's director has stated that he would much rather rely on "goodwill and good faith" rather than resorting to " 'pages and

310. Geoff Edgers, *Behind Doors, A World Unseen: Dispute Cloaks Massive Installation at MASS MoCA*, BOSTON GLOBE, Mar. 28, 2007, at A1, *available at* http://www.boston.com/ae/theater_arts/articles/2007/03/28/behind_doors_a_world_unseen/ (noting that the museum won the right to display the work and initially intended to display it); The MASS MoCA Blog, We'll Remove *Training Ground*, http://blog.massmoca.org/2007/09/ (Sept. 28, 2007) (announcing the museum would no longer display *Training Ground*).

311. *See, e.g.*, Johnson, *supra* note 277 (criticizing the museum's actions as "affirm[ing] popular perceptions of our most innovative contemporary artists as frauds and charlatans" and noting that museums should be prepared for artists who are more difficult to work with); Smith, *supra* note 145 ("When a museum behaves badly, it's never pretty. But few examples top the depressing spectacle at the Massachusetts Museum of Contemporary Art."). *But see* Posting of Michael J. Lewis to The Horizon, Commentary Magazine's Arts Blog, http://www.commentarymagazine.com/blogs/index.php/lewis/956 (Sept. 23, 2007, 17:19 EST) (debating whether "it is salutary for an overindulged artist to be checked from time to time").

312. Christopher Benfey, *Mess MoCA: An Artist and a Museum Fight over a Work of Art*, SLATE, Sept. 25, 2007, http://www.slate.com/id/2174656/.

313. *See* 17 U.S.C. § 106A(e)(1) (2006) (permitting waiver of moral rights "if the author expressly agrees to such waiver in a written instrument signed by the author"). As many commentators have noted, perhaps the most significant takeaway from *Büchel* is the importance of a signed and valid contract. *See, e.g.*, Daniel McClean, *The Art Institution on Trial*, FRIEZE MAGAZINE, Oct. 15, 2007, http://www.frieze.com/comment/article/the_art_institution_on_trial; Art Observed, http://artobserved.com/christoph-buchels-mess-moca/ (July 24, 2007, 15:51 EST).

pages of contingencies and remedies, papering, all of which is anathema to me.' "[314]

Regardless, the risk of not giving VARA protection to artists of large-scale exhibitions far outweighs this minimal threat of increased litigation. Many contemporary museum exhibitions are the product of collaboration between the artist and museum personnel.[315] Trends in contemporary art necessitate these collaborations because contemporary art is increasingly composed of large-scale works.[316] If contemporary artists are aware that they have no moral rights in their artworks—that the museum may distort, mutilate, or modify the work at its whim[317]—these artists may simply decline to create installations for American museums. Therefore, vesting moral rights in the creators of installation art pieces benefits the American art world by ensuring that American art museums will be able to commission works from well-known contemporary artists in the future.

CONCLUSION

The nature of art is constantly changing. Currently, installation artists like Christoph Büchel rely on museums to supply the logistics and labor for their exhibitions. This evolution of art demands a corresponding evolution in the law: American jurisprudence must develop a means to accommodate new forms of art.

This need is especially critical in the field of moral rights. Congress took a step toward protecting artists when it codified a form of moral rights in VARA. The rights of attribution and integrity potentially afford contemporary artists at least a limited defense against the denigration of their works. Nevertheless, VARA does not solve the problem of extending protections to contemporary art. The statute's limited scope as well as its narrow interpretation by American courts has impaired

314. Daniel Grant, *A Cultural Conversation with Joseph Thompson: Working to Repair a Reputation*, WALL ST. J., Oct. 4, 2007, at D7.

315. *See* Carol S. Jeffers, *Museum as Process*, J. AESTHETIC EDUC., Spring 2003, at 107, 114–15; *see also* REISS, *supra* note 2, at 143, 145 (noting the complexity of installation pieces and positing that museums show installation pieces in part to publicize their relationship and cooperation with the artist, which reinforces the museum's importance).

316. *See* ALEXANDER & ALEXANDER, *supra* note 206, at 40; *see also* sources cited *supra* note 2.

317. *See* 17 U.S.C. § 106A(a)(2).

the Act's ability to address new art forms. Although Congress would need to implement any substantial changes to VARA's scope, courts can partially remedy the interpretive defect by heeding Congress's instruction to use common sense and look to the generally accepted standards of the artistic community to determine whether an art form qualifies for VARA protection.

If the court in *Büchel* had observed this instruction, it would likely have realized that it should not interpret the Act to exclude artworks simply based on their collaborative nature. Congress did caution against extending VARA protection to collaborative efforts such as films because granting moral rights to all participants in these works could significantly damage the works' commercial viability. Nevertheless, the legislative history of the Act indicates that the admonition should apply only to works produced by the large-scale entertainment industries and not to singular works with a sole creative force. The *Büchel* decision illustrates how little the concerns of the film industry apply to museum exhibitors. Indeed, denying contemporary artists moral rights in their works might have a more harmful impact on museums than simply granting them the rights.

What effect *Büchel* will have on American art museums and contemporary artists is yet to be seen. Still, the decision reflects a disturbing tendency of the American courts to deny VARA protection to new and non-traditional art forms. If courts do not halt this trend, American moral rights will increasingly become tied to outmoded art forms that narrow the cultural spectrum available to United States' museums and those who visit them.