Form Over Function: Remedying VARA's Exclusion of Visual Art with Functional Qualities

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ABSTRACT: The Visual Artists Rights Act of 1990 ("VARA") grants certain moral rights to creators of statutorily enumerated "visual art." Excluded from the definition of visual art, however, is the undefined category of "applied art." Courts grappling with how to interpret "applied art" have decided on a test that focuses solely on a work of art's functional or utilitarian characteristics. This Note argues that such an emphasis defeats the goals and purposes underlying VARA, excludes legitimate visual arts from qualification, and contradicts both legislative intent and statutory construction. This Note further argues that a multi-factor test incorporating aspects of subsidiary copyright law more effectively implements the purposes and aims of VARA while remaining true to the narrow focus of the statute.

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I. INTRODUCTION

The United States entered a new era of artist recognition when it enacted the Visual Artists Rights Act of 1990 ("VARA") and simultaneously acceded to the international Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). In passing VARA, the United States signaled to the world that it too would recognize an artist's intangible interests in protecting his or her works from destruction, mutilation, or removal, while also protecting the artist's name and reputation associated with the art itself.[1] Through nearly 25 years of judicial interpretation, however, United States federal courts have systematically disassembled the protections that VARA

1. *See infra* notes 20–33 and accompanying text.

should afford by continuously excluding large categories of art from recognition as "visual art."[2]

Most court decisions narrowing VARA's reach revolve around the definition of "applied art," a term defined nowhere within VARA or Title 17, the copyright title of the United States Code.[3] With little guidance other than some legislative history and ordinary dictionaries, courts crafted tests that refuse to recognize any art with functional characteristics—no matter how small—as visual art.[4] Under this current approach, even sculpture fountains would not be considered visual art and thus not be protected by VARA. As a result, VARA has had a relatively small impact on moral rights protection.

This Note argues that courts wrongly apply a test of functionality for applied art. Part II of the Note examines Congress's understanding and enactment of moral rights and follows the subsequent judicial decisions that narrow VARA's scope and applicability. Part III argues that these decisions gave rise to a functionality test that is too narrow in scope and contrary to the goals and purpose of VARA's enactment. Part IV proposes a new test that creates a multi-factor method of analyzing when art "on the margins" of visual art and applied art warrants protection under VARA. The test is then applied to several categories of art, illustrating both the test's flexibility and adherence to congressional intent. The Note concludes that this new test should supplant the single-inquiry focused functionality test.

II. THE IMPORTATION OF MORAL RIGHTS TO THE UNITED STATES

A. *MORAL RIGHTS GENERALLY*

Moral rights are the rights that come not from economic bases but instead from the rights inherent to the creation of art. Traditionally, moral rights were considered to be "interests" in the works that artists created.[5] These interests took the form of immutable rights that remained with the artist, such that subsequent transfer, sale, or loss would not extinguish the artists' intangible possessions in their creations.[6] The creation of these interests benefits not only the artist in that the right is personal and cannot

2. *See infra* Part II.E.

3. *See infra* Part II.E.

4. *See infra* Part II.E.

5. *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 18 (1989) [hereinafter *Hearing*] (statement of Rep. Edward J. Markey) ("[T]oo often a work is treated simply as a physical piece of property, rather than as an intellectual work, like a novel. But artworks are intellectual expression, not just physical property . . . . This bill recognizes that title to the soul of an artwork does not pass with the sale of the artwork itself."); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95 (1997).

6. Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 44 (1998).

be transferred, but it also benefits the public by ensuring relative stability and continued exhibition of artwork.[7] Moral rights also protect artists' creativity. One law professor writes that "[i]f artists feel more secure about the treatment they as creators and their creations will receive, they are more likely to create. Recognizing moral rights is one way a society can encourage artists to create."[8] The artistic community consistently recognizes four types of moral rights: (1) the right of integrity; (2) the right of attribution or paternity; (3) the right of disclosure; and (4) the right of retraction or withdrawal.[9] Each right gives certain abilities to the artist to retain control over his or her work as an integral component of the whole bundle[10] of rights that comes with art.

Each of the types of moral rights serves various functions. The right of integrity allows the artist to prevent significant changes to the artist's work without his or her consent.[11] The rights of attribution/paternity and disclosure work together to enable the artist to place conditions on how his or her work is displayed, if at all. Under the right of disclosure, an artist may refuse to display a work until he or she deems it ready to be publicly shown,[12] while the right of attribution gives the artist the ability to require that his or her name be prominently credited if and when the work is shown, or, alternately, that a work be shown anonymously.[13] Last, the right of retraction gives the artist the ability to reverse course and to pull a piece from display without showing cause.[14] Together, these rights provide a framework for an

7. *Hearing*, *supra* note 5, at 95 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University) ("[W]e protect artists' rights not only because artists may be particularly worthy strivers, but because the public benefits from identification and preservation of their works."). *See generally* Hansmann & Santilli, *supra* note 5 (discussing artists' moral rights and the external benefits of these rights to both the artist and the public).

8. Liemer, *supra* note 6, at 44.

9. *Id.* at 47–55; Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 362–67 (2006). Some scholars recognize a fifth moral right in "resale royalty rights," wherein artists can recognize a percentage of profits from the resale or other commercial use of their artwork. *See* Liemer, *supra* note 6, at 55–56.

10. In addition to moral rights, most scholars recognize the existence of the economic rights of artists, such as the right to sell or dispose of their art as alienable property. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 949 (1990); *see also* Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 222 [hereinafter Berne Convention] (acknowledging that moral rights function "[i]ndependently of the author's economic rights").

11. Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298 (2003).

12. RONALD B. STANDLER, MORAL RIGHTS OF AUTHORS IN THE USA 23 (2012), http://www.rbs2.com/moral.pdf; Liemer, *supra* note 6, at 52–54.

13. Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 72 (2007); *see also* UNESCO, THE ABC OF COPYRIGHT 32–33 (2010), http://www.unesco.org/file admin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf (providing a set of FAQ's about moral rights); Liemer, *supra* note 6, at 47–49 (discussing the right of attribution and how it encourages artists to boldly create and to take risks).

14. *See* Liemer, *supra* note 6, at 54–55.

artist to exercise significant control over his or her creation without maintaining physical possession of that piece. This framework was developed and refined over the past two centuries. Part B traces the development of moral rights to their origin and details subsequent modifications that laid the foundation for modern recognition of the rights.

B. THE RECOGNITION OF MORAL RIGHTS OUTSIDE THE UNITED STATES

The concept of moral rights originated in the civil-law tradition, although recently common-law countries such as the United Kingdom have imported the concept into their respective systems of law.[15] Originally developed in the realm of French copyright law, the concept of the *droit moral* in France came into being during the late 18th century.[16] Initially conceived of as a property right, *droit moral* evolved to encompass a type of "right of personality" that later came to be characterized as "intellectual property."[17] Germany, widely recognized as another pioneer of the moral rights concept, independently and simultaneously characterized moral rights ("*Urheberpersönlichkeitsrecht*") as part of a unified right falling under the realm of copyright law.[18] Although moral rights developed in Germany and France—both civil-law countries—common-law countries have also recognized moral rights through implementation of statutes.[19]

Most countries that recognize moral rights are signatories to the Berne Convention.[20] Originally passed in 1886, the Berne Convention establishes international standards for copyright protection and recognition.[21] Among its provisions is the recognition of moral rights as a part of copyright law, protecting the rights of attribution and integrity by requiring that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification."[22] While this requirement is

15. For a comprehensive history of moral rights, the scope and depth of which is outside the focus of this Note, see generally Hansmann & Santilli, *supra* note 5; Liemer, *supra* note 6; and Rigamonti, *supra* note 13.

16. 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.A. 1, 9 (1980).

17. *Id.* at 9–10.

18. *Id.* at 11.

19. *See, e.g.*, MAREE SAINSBURY, MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA 33–35 (2003) (Australia); 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, 238–39 (2006) (United Kingdom); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 242–45 (1995) (Canada).

20. *See* Berne Convention, *supra* note 10, at 221. The Berne Convention was revised during conferences in 1908 (at Berlin), 1928 (at Rome), 1948 (at Brussels), 1967 (at Stockholm), and 1971 (at Paris). *Id.*

21. *Id.*

22. *Id.* at 235. Article 6*bis* was added as part of the 1928 Rome Act that amended the Berne Convention. *See id.* at 221.

ultimately dependent on how comprehensive a country's protections are,[23] the 175 countries that are signatories[24] to the Berne Convention nonetheless agree to implement, along with the broader copyright provisions of the Convention, these provisions.[25] The United States is a relatively recent signatory to the Convention; Part C traces the actions that the United States took in assuming signatory status and implementing the Convention's provisions.

C. THE UNITED STATES JOINS THE BERNE CONVENTION

In 1988, before VARA was passed, the United States acceded to the Berne Convention via legislation intended to bring United States law into compliance with the requirements of the Convention.[26] The legislation[27] did not, however, codify the moral rights required by the Convention.[28] In part, this was due to a report published (before implementation) by the ad hoc committee assigned to examine compatibility of United States laws with the Berne Convention. The committee concluded that the United States' laws, such as the Lanham Act, Copyright Act, and various state statutes,[29] granted ample "equivalents" to the moral rights provisions of article 6*bis*.[30] Even though the then-existing laws did not codify moral rights as the Berne Convention required, the legislation implementing the Convention in the United States nonetheless provided that the identified "equivalents" would suffice.[31] In addition, the legislation required that courts not use the text of the Berne Convention to expand moral rights or circumvent the

23. *Id.* at 235. Subsection 3 was added to Article 6*bis* as part of the 1948 Brussels Act that amended the Berne Convention. *See id.* at 221.

24. *WIPO-Administered Treaties: Contracting Parties > Berne Convention*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Dec. 16, 2017).

25. Berne Convention, *supra* note 10, at 277 ("Any country party to this Convention undertakes to adopt . . . the measures necessary to ensure the application of this Convention.").

26. Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 1 (1988).

27. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

28. Ginsburg & Kernochan, *supra* note 26, at 27 ("[T]he Berne Implementation Act includes no explicit recognition of moral rights. Rather, the Act assumes that the extant U.S. protection of rights of attribution and of integrity meet Berne standards.").

29. For a list and explanation of the equivalency statutes, see generally JUNE M. BESEK & BRAD A. GREENBERG, UNITED STATES RESPONSE TO QUESTIONNAIRE CONCERNING MORAL RIGHTS IN THE 21ST CENTURY (2014), http://web.law.columbia.edu/sites/default/files/microsites/kernochan/alai_2014_questionaire.pdf.

30. Ad Hoc Working Grp. on U.S. Adherence to the Berne Convention, *Chapter VI: Moral Rights*, 10 COLUM.-VLA J.L. & ARTS 547, 547 (1986) ("Given the substantial protection now available for the real equivalent of moral rights . . . the protection of moral rights in the United States is compatible with the Berne Convention.").

31. Ginsburg & Kernochan, *supra* note 26, at 30–31 n.107 ("The provisions of the Berne Convention . . . do not expand or reduce any right of an author of a work . . . .").

"equivalents."[32] The "equivalency" period in United States law was short-lived, as just two years later, the United States passed VARA.[33] Part D illustrates the provisions that VARA brought into effect.

D. THE VISUAL ARTISTS RIGHTS ACT OF 1990: A NARROW APPROACH TO CONVENTION COMPLIANCE

In 1990, Congress passed VARA to more explicitly grant the moral rights required under article 6*bis* of the Berne Convention rather than relying on a patchwork of complementary laws.[34] As the Convention requires, the moral rights of attribution and integrity are protected by VARA.[35] An artist falling within the protection of VARA may assert his or her right of attribution in order "(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create."[36] Further, the right of attribution is protected because artists may decline to have their name adorn a piece that has been modified or destroyed, in order to prevent "prejudic[e] to his or her honor or reputation."[37] The right of integrity is assured by protecting artists from "intentional distortion[s], mutilation[s], or other modification[s]"[38] to their work, as well as from "intentional or grossly negligent destruction of that work."[39] These moral rights are protected for the life of the author.[40]

While Congress protected these rights according to the letter of the Convention, it also fashioned a number of exceptions that violate the spirit of the Convention. The following Subparts explore the exceptions to moral rights protection written into VARA and articulate the narrow scope of applicability that VARA encompasses.

1. Congress Excludes Works for Hire from Moral Rights Protection

Although the Convention articulates that moral rights exist independent of economic rights,[41] VARA divorces moral rights protection from economic rights by preventing commissioned artists from asserting their moral rights. VARA recognizes that visual art "meet[s] a special societal need[] and . . .

32. *Id.*

33. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 603(a), 104 Stat. 5128, 5128 (codified at 17 U.S.C. § 106A (2012)).

34. *See* Eric E. Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1129 (1996).

35. Robert A. Gorman, *Visual Artists Rights Act of 1990*, 38 J. COPYRIGHT SOC'Y U.S.A. 233, 234 (1991) ("The statute accords to artists the two principal moral rights . . . the rights of attribution and integrity.").

36. 17 U.S.C. § 106A(a)(1)(A)–(B).

37. *Id.* § 106A(a)(2).

38. *Id.* § 106A(a)(3)(A).

39. *Id.* § 106A(a)(3)(B).

40. *Id.* § 106A(d)(1).

41. Berne Convention, *supra* note 10, at 235.

serve[s] an important public interest."[42] At the same time, Congress had concerns about art that would be made not for creative purposes but for economic purposes.[43] Fashioning an exclusion for "works for hire," Congress crafted VARA to exclude visual art made for or commissioned by someone else.[44] The result is that any artist who is paid by someone else to create art is not protected by VARA, even if the art is inherently the product of creative processes. By contrast, an artist who creates art independently—without commission or hire—and later sells their piece at a gallery would retain VARA protections. As a consequence, artists must make an important decision when creating art for money: refuse a commission and retain moral rights (but hope to be able to sell the piece later), or accept the commission and lose them.

2. Congress Further Narrows Moral Rights Protections by Limiting VARA to Visual Art

In addition to limiting the type of artist eligible for moral rights protection, VARA also limits the type of art protected, in apparent contravention of the Convention, solely to works of visual art.[45] Congress intended the limitation of visual art to narrow the scope of VARA so it did not "impede the efforts of U.S. copyright owners to exercise the rights described in section 106 of our copyright law."[46] In particular, Congress was concerned that an overly broad definition of visual art would prevent copyright holders in the motion picture or news media industries from practicing their craft due

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42. H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915–16.

43. *See infra* notes 44–46 and accompanying text.

44. 17 U.S.C. § 101 ("A 'work made for hire' is . . . a work prepared by an employee within the scope of his or her employment; or . . . a work specially ordered or commissioned for use . . . ."). For purposes of whether someone is an employee, a number of factors are to be considered as to whether a work is a "work made for hire," including:

> the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) (footnotes omitted) (citations omitted). Application of the *Reid* factors as part of the intent factor clarifies whether the work is one of creative enterprise or one made for hire.

45. *See* 17 U.S.C. § 106A(a); *id.* § 101 (defining a work of visual art and what a work of visual art is not).

46. 136 CONG. REC. E3716-03–E3717 (daily ed. Nov. 2, 1990) (speech of Rep. Carlos J. Moorhead); *see also* H.R. REP. NO. 101-514, at 10–11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6920–21 (discussing how VARA should not limit the rights of artists).

to the wording of VARA.[47] Thus, while VARA implemented moral rights legislation in the United States and brought the country into full compliance with the Convention, moral rights are only protected in limited circumstances. In applying VARA, the courts have generally hewed to the limited aims of the statute. Part E details judicial decisions illustrating those aims.

E. THE SCOPE OF VARA: JUDICIAL INTERPRETATIONS OF VISUAL ART AND APPLIED ART

Among the limitations that VARA placed on visual art was the exclusion of applied art, a term not defined in the text of VARA or in title 17 of the United States Code.[48] Because VARA only protects visual art,[49] defining the scope of art protected by the statute is crucial. In part due to the limited scope of VARA, only a handful of cases have emerged in federal courts requiring interpretation of the phrases visual art and applied art.[50]

One such case is *Pollara v. Seymour*, a case dealing with a destroyed banner that the artist claimed should have received protection under VARA.[51] In *Pollara*, an artist created a banner to advertise for a non-profit legal group.[52] When the banner was hung and left overnight, the defendant destroyed the banner.[53] The plaintiff claimed a violation of VARA, arguing that her banner should be considered visual art protected within the scope of the statute.[54] The Second Circuit concluded that the banner would be visual art only if it passed a threshold test of being "a work of recognized stature."[55] The Second Circuit further concluded that the legislative history indicated that "[p]rotection of a work under VARA will . . . depend . . . upon the work's objective and evident purpose."[56] A "utilitarian" object would not be protected under the Second Circuit's analysis.[57] Thus, *Pollara* established a two-prong test to define visual art under VARA that asks whether (1) the item is "of recognized stature" and (2) is excluded by virtue of being "utilitarian."

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47. 136 CONG. REC. E3716-03–E3717 (daily ed. Nov. 2, 1990) (speech of Rep. Carlos J. Moorhead).

48. *See* 17 U.S.C. §§ 101–1332; Cheffins v. Stewart, 825 F.3d 588, 593 (9th Cir. 2016) ("The VARA does not define the term 'applied art' . . . .").

49. 17 U.S.C. § 106A.

50. *Cheffins*, 825 F.3d at 593 ("[F]ederal courts have rarely had occasion to interpret [applied art's] meaning.").

51. Pollara v. Seymour, 344 F.3d 265, 267 (2d Cir. 2003).

52. *Id.* at 266.

53. *Id.* at 266–67.

54. *Id.* at 267.

55. *Id.* at 269 (quoting 17 U.S.C. § 106A(a)(3)(B) (2012)).

56. *Id.*

57. *Id.* ("VARA does not protect . . . utilitarian works . . . regardless of their artistic merit, their medium, or their value to the artist or the market."). Curiously, the court did not define what "utilitarian" meant. *Id.*

In *Carter v. Helmsley-Spear, Inc.*, the Second Circuit parsed VARA's legislative history to define both visual art and applied art.[58] In *Carter II*, the court determined that VARA defined visual art "in terms both positive (what it is) and negative (what it is not)."[59] Noting that VARA includes sculptures, the court determined that the work in *Carter II* (a collage of auto parts) constituted a sculpture when "considered as a whole."[60] The Second Circuit noted that Congress intended that courts "distinguish works of visual art from other media" and "use common sense and generally accepted standards of the artistic community" to classify art.[61] When defining applied art, for example, the court turned to previous interpretations of applied art as "two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects."[62] Noting, however, that VARA's legislative history allows "new and independent work[s]" that "incorporate elements of, rather than constitute, applied art[,]" the court found that the sculpture did not constitute applied art.[63] The Second Circuit, therefore, found that visual art must be considered as a whole and requires a factual inquiry as to whether a work is new or independent.

In the most recent case interpreting applied art under VARA, the Ninth Circuit in *Cheffins v. Stewart* relied on the reasoning of the Second Circuit. In *Cheffins*, the Ninth Circuit confronted the issue of whether a replica of the 16th century Spanish galleon[64] *La Contessa* constituted visual art for purposes of VARA.[65] The Ninth Circuit relied heavily upon the analysis of the Second Circuit in both *Pollara* and in *Carter II*, noting that "VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture."[66] The court agreed that the focus of what constitutes

58. Carter v. Helmsley-Spear, Inc. (*Carter II*), 71 F.3d 77, 84–85 (2d Cir. 1995).

59. *Id.* at 84. *Compare id.* ("VARA defines a work of visual art as 'a painting, drawing, print, or sculpture, existing in a single copy' or in a limited edition of 200 copies or fewer." (quoting 17 U.S.C. § 101 (1994))), *with id.* ("The definition of visual art excludes 'any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work.'" (quoting 17 U.S.C. § 101)).

60. *Id.* ("Although defendants aver that *elements* of the work are not visual art, . . . the work is a single, indivisible whole." (emphasis added)).

61. *Id.* (quoting H.R. REP. NO. 101-514, at 9, 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919, 6921).

62. *Id.* at 84–85 (quoting Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 315 (S.D.N.Y. 1994)).

63. *Id.* at 85 (first quoting H.R. REP. NO. 101–514, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6924; then quoting *Carter*, 861 F. Supp. at 315).

64. A galleon is a square-rigged ship of the 16th and 17th centuries that was frequently used by the Spanish for its cargo and war-waging capabilities. *Galleon*, MARINERS' MUSEUM & PARK, http://exploration.marinersmuseum.org/watercraft/galleon (last visited Dec. 16, 2017).

65. Cheffins v. Stewart, 825 F.3d 588, 591 (9th Cir. 2016). *La Contessa* was built atop a school bus in order to give it mobility. *Id.* The plaintiff in *Cheffins* sued after he stored *La Contessa* on the defendant's land and the defendant burned the ship, destroying it to get to the underlying school bus. *Id.*

66. *Id.* at 593 (quoting Pollara v. Seymour, 344 F.3d 265, 269 (2d Cir. 2003)).

applied art is whether an object is utilitarian.[67] Curiously, the courts never define the word "utilitarian" but nonetheless appear to follow the dictionary definition of the word, i.e., "[c]haracterized by or aiming at utility as distinguished from beauty or ornament."[68] The Ninth Circuit noted that the list of objects that are excluded as visual art all retain aspects of functionality.[69] It created a test that concludes that an object is applied art when it serves a utilitarian function after alteration of some sort; conversely, a piece of art is not "applied" if it has been transformed such "that its utilitarian functions cease."[70] In a concurring opinion, Judge McKeown crafted a slightly different test that focused "on whether a work is primarily directed to a utilitarian purpose."[71] In other words, the proper question is "whether its primary purpose is to serve a useful function."[72]

Under both tests, *La Contessa* was deemed to be applied art: The majority concluded that it was functional because it was built on top of an operational school bus;[73] the concurrence concluded that the primary purpose of *La Contessa* served the "utilitarian purpose[s]" of a stage, mode of transportation around the Burning Man site, and restaurant.[74]

Cheffins created a test that unified the previous decisions of the Second Circuit. The decision combined the *Pollara* requirement (that the original purpose of a work inform its status as visual art under VARA) with the *Carter* requirement (to consider art as a whole to determine if it transformed from functional object to legitimate work of art). The Ninth Circuit thus created a bright-line test for when VARA excludes art: If the art is primarily functional, then it is applied art.[75]

The test of the concurrence created a more flexible test that looks to creator intentions, but the test erroneously focuses on functionality nonetheless. Part III analyzes the impact of these tests on pieces ordinarily considered art; Part IV delves further into the legislative history underlying VARA and the Second and Ninth Circuit decisions. This Note argues that each

67. *Id.*

68. *Utilitarian*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966).

69. *Cheffins*, 825 F.3d at 594.

70. *Id.* (emphasis omitted); *id.* n.7 ("[A] list that also contains, *inter alia*, maps, globes, charts, technical drawings, diagrams, models, newspapers, periodicals, data bases, and electronic information services. . . . leads us to conclude that the listed items are related by their practical purposes and utilitarian functions, requiring a focus on utility . . . ." (citation omitted)).

71. *Id.* at 599 (McKeown, J., concurring).

72. *Id.* at 602.

73. *Id.* at 595 (majority opinion).

74. *Id.* at 603 (McKeown, J., concurring) (identifying *La Contessa*'s various uses as being "driven at high speeds" and a location where "[p]oets, acrobats, and bands performed on its decks").

75. *Id.* at 594 (majority opinion) ("[A]n object constitutes a piece of 'applied art'—as opposed to a 'work of visual art'—where the object initially served a utilitarian function and the object continues to serve such a function . . . .").

court's focus on functionality is misguided and leads to the exclusion of art that Congress intended to be protected by the provisions of VARA.

III. TOO BRIGHT A LINE: WHY FUNCTIONALITY IS TOO NARROW OF A TEST

At a casual glance, renewed emphasis on functionality seems to be appropriate: The rule creates a very distinguishable bright-line. Under this view, either a piece is non-functional visual art or it is functional applied art.[76] Such a black-and-white distinction, however, is not as useful when concerning the enigma that is art. Rarely is an artistic piece easily classified; the question, "what is art?" is nearly impossible to answer.[77] Perhaps more importantly, the court is the entirely wrong forum for answering the question. As Justice Oliver Wendell Holmes once noted, "judges make terrible art critics."[78]

Amidst these considerations, this Part describes the problems that arise from replacing art critics with judges. Subpart A articulates the type of art excluded by a rigorous, inflexible examination of functionality when granting protections under VARA. Subpart B then describes the effect that such exclusions have on art and artists' creative processes. Subpart C concludes first with an examination of specific artists who were not covered by VARA and then contrasts those artists with one whose work was covered.

A. INTENT TO INCLUDE; EFFECT TO EXCLUDE

At the outset, it is important to note that the nomenclature of art within the confines of VARA is ill defined. VARA defines visual art in the negative,[79] articulating that visual art is not applied art.[80] Visual art, however, is usually defined positively, rather than in reference to other types of art: "Visual art is a class of art that is generally interchangeable with 'fine art' and also refers to art forms such as painting, sculpture, printmaking, photography, etc. . . . [T]he term visual art, unlike fine art, includes the field of design. . . ."[81] Professors Schwarzenbach and Hackett, an artist-turned-educator and psychologist, respectively, further note that fine art "is essentially created for aesthetic expression. . . . [and] as a work of art that is appreciated or contemplated for its own sake. Examples might include painting, drawing,

76. *Id.*

77. George Dickie, *What is Art? An Institutional Analysis*, *in* ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS 19–24 (1974).

78. *Cheffins*, 825 F.3d at 599; *see also* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

79. *Carter II*, 71 F.3d 77, 84 (2d Cir. 1995).

80. *Id.* at 84–85; 17 U.S.C. § 101 (2012).

81. JESSICA B. SCHWARZENBACH & PAUL M.W. HACKETT, TRANSATLANTIC REFLECTIONS ON THE PRACTICE-BASED PHD IN FINE ART 36 (2016). This piece adopts this nomenclature and refers to both visual art and "fine art" interchangeably.

sculpture, printmaking, architecture, etc."[82] Forced to define applied art as the opposite of visual art, courts have focused on functionality. This focus necessarily ensnares certain fine arts with functional qualities, the "fine-yet-functional" variety of art, and thus unfairly prevents protection under VARA. As such, a functionality test is inappropriate as the sole determinant of what visual art is, especially so in light of VARA's goal of protecting visual art.

1. Inherently Fine Art with Functional Characteristics

A test that uses functionality as the sole metric inherently excludes fine art from VARA protection if it serves the purpose of fine art (i.e., aesthetic expression) but simultaneously has a functional component. This approach is inaccurate because art does not cease to be art simply because it can be used,[83] as the examples that follow demonstrate.

The Walker Art Center,[84] located in Minneapolis, Minnesota, has commissioned an artist-designed mini-golf course for the past ten years.[85] This golf course certainly meets the criteria of fine art: The course is part of the Art Center's "Sculpture Garden,"[86] a tract of land home to noted works such as the *Spoonbridge and Cherry*.[87] As part of the Sculpture Garden, the course incorporates sculptures; each hole is designed by an artist and incorporates his or her vision to create a green riddled with artistic obstacles.[88] By all counts, the mini-golf course is, in the aggregate, a collection of nine holes imagined as sculptures.[89] However, because the course is functional[90]—the course is, after all, also intended to facilitate a round of putt-putt—the course would not qualify under the functionality test judges have read into VARA. Thus, despite retaining its artistic qualities, the mini-golf course is categorically excluded from protection.

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82. *Id.* at 35 (citation omitted).

83. *See generally* Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983) (detailing the "middle ground" between pure design and applied art in the copyright context).

84. WALKER ART CTR., http://www.walkerart.org (last visited Dec. 16, 2017).

85. *Walker Art Center Mini-Golf*, VSTAR ENT. GROUP, http://www.vstarentertainment.com/walker-art-center-mini-golf (last visited Dec. 16, 2017).

86. *Walker on the Green: Artist-Designed Mini Golf 2015*, WALKER ART CTR., http://www.walkerart.org/calendar/2015/walker-green-artist-designed-mini-golf-3 (last visited Dec. 16, 2017).

87. *Minneapolis Sculpture Garden & Wurtele Upper Garden*, WALKER ART CTR., https://www.walkerart.org/garden (last visited Dec. 16, 2017).

88. *See supra* notes 85–86 (detailing the features of the holes on a miniature golf course).

89. James Lileks, *Walker Art Center's Mini-Golf Reaches New Heights*, STAR TRIB. (May 27, 2016, 5:14 PM), http://www.startribune.com/walker-art-center-s-mini-golf-reaches-new-heights/381120841 (noting that the concept is not new, as the course "mix[es] art and putt-putt pleasures" and is art by virtue of being found in the context of a "non-ironic mini-golf course").

90. *See* Darlene Vassil, *Par for the Course: Students Design Their Miniature Golf Course Sculptures While Considering Functional, Technical, and Communication Elements*, 104 SCHOOLARTS 28, 28 (2005) (detailing the functional considerations a sculptural mini-golf course should implement).

The Spanish galleon *La Contessa*, the subject of the litigation in *Cheffins v. Stewart*, is a similar example of unprotected "fine-yet-functional" art ensnared by the inflexible functionality test. A reproduction of the 16th century ship of the same name, *La Contessa* was a full-sized galleon built atop a bus so that the ship could move around.[91]

The galleon would qualify for VARA protection under the Ninth Circuit's test but for its functional qualities:

> The parties agree that *La Contessa*, a Spanish galleon built on the chassis of a school bus by Cheffins and Jones, was a sculpture. The parties also do not contest that *La Contessa* was a work of recognized stature. Thus VARA would prohibit the destruction of *La Contessa* unless it was a work of applied art.[92]

Despite the court's decision to the contrary, *La Contessa* is art. As part of the annual Burning Man celebration—a festival dedicated to "radical self-expression and radical self-reliance"[93]—*La Contessa* served as one of the

91. Brian Wilson, *Burning Man 2005*, SKI-EPIC, https://www.ski-epic.com/burningman2005/index.html (last visited Dec. 16, 2017).

92. Cheffins v. Stewart, 825 F.3d 588, 599 (9th Cir. 2016) (McKeown, J., concurring).

93. *Event FAQ*, BURNING MAN, http://burningman.org/event/preparation/faq (last visited Dec. 16, 2017) ("Burning Man is an annual experiment in temporary community dedicated to radical self-expression and radical self-reliance."); *see First-Timer's Guide*, BURNING MAN, http://burningman.org/event/preparation/first-timers-guide (last visited Dec. 16, 2017).

countercultural festival's most iconic and beloved "art cars."[94] Even with its artistic pedigree, *La Contessa* too fell prey to the functionality test created by the courts.

Saint Louis's City Museum is another example of fine art with functional qualities that defies simple characterization under the bright-line functionality test. Comprised entirely of salvaged industrial parts, fixtures, and other artists' artwork,[95] the City Museum unites sculpture with playground in a four-story former warehouse to invite adults and children alike to let the "imagination run[] wild!"[96] Essentially, the City Museum turns scrap into an interactive art exhibit.[97] That interactivity, however, means that the City Museum would not receive VARA protection due to its functionality.

2. Applied Art with Fine Art Characteristics

The functionality test not only excludes visual art with underlying functional purposes but also catches applied art that, although applied art by classification, is fine art by context. Importantly, Congress appears to have contemplated that applied art could be fine art depending on the presentation of the piece, further demonstrating the inappropriateness of adherence to a functionality test.[98] Consider the following examples in which a strict functionality test excludes typical applied-art items that the public nonetheless recognizes as fine art.

In her 2010 comment, Michelle Moran, of Marquette University Law School, argued for the protection of quilts under VARA because quilts constitute "unique work[s]" created with "professional and personal identity . . . embodied in each work."[99] Moran noted that VARA excluded quilts from

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94. *Arrrr! The Good Ship La Contessa Got Burned*, BURNERS.ME (June 5, 2012), https://burners.me/2012/06/05/arrrr-the-good-ship-la-contessa-got-burned ("La Contessa is remembered as one of the greatest ever art cars."). At Burning Man, art cars are also known as "mutant vehicles," which are "unique, motorized creation[s] that show[] little or no resemblance to their original form, or to any standard street vehicle." *Mutant Vehicles*, BURNING MAN, https://burningman.org/event/art-performance/mutant-vehicles (last visited Dec. 16, 2017). Because of year-to-year limitations, only the best art cars are ever selected for licensing as a Burning Man "mutant vehicle." Wally Bomgaars, *The Department of Mutant Vehicles*, BURNING MAN: BURNING MAN J. (July 30, 2010), http://journal.burningman.org/2010/07/black-rock-city/building-brc/the-department-of-mutant-vehicles.

95. Caleb Kraft, *Junk Yard + Jungle Gym: Visiting the City Museum in St. Louis Missouri*, MAKE: (Dec. 1, 2015, 11:00 AM), http://makezine.com/2015/12/01/junk-yard-jungle-gym-visiting-the-city-museum-in-st-louis-missouri.

96. *Welcome to City Museum, Where Imagination Runs Wild!*, CITY MUSEUM, http://www.citymuseum.org/visit/about (last visited Dec. 16, 2017).

97. Erin McCarthy, *11 Awesomely Unexpected Things in St. Louis's City Museum*, MENTAL FLOSS (Nov. 13, 2012), http://mentalfloss.com/article/13063/11-awesomely-unexpected-things-st-louis%E2%80%99s-city-museum ("[C]alling it a giant playground is a good place to start.").

98. H.R. REP. NO. 101-514, at 13–14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6923–24 (stating applied art is not wholesale excluded under VARA if "a new and independent work [is] created from snippets of [applied art]").

99. Michelle Moran, Comment, *Quilt Artists: Left Out in the Cold by the Visual Artists Rights Act of 1990*, 14 MARQ. INTELL. PROP. L. REV. 393, 409 (2010).

protection because they are applied art that could be used to cover beds and keep a user warm.[100] Nonetheless, Moran recognized that the artistic community and public have come to accept quilts as a medium of expression, and, therefore, quilts should be recognized under VARA.[101] Despite well-reasoned policy rationales, Moran's advocacy for quilts-as-art fails in the face of the judiciary's functionality test.

Similarly, just as the public considers quilts to be fine art, certain famous buildings have become, by virtue of their unique construction or features, a type of fine art.[102] As architecture creates inherently functional buildings, it is often cited as an example of applied art.[103] Despite this general classification, some scholars argue that architecture is and can be viewed as a fine art.[104] Context therefore matters. The Kansas City Central Library, for example, contains a "Community Bookshelf" in which the entire south side of the library's parking garage is covered by gigantic reproductions of famous books' spines like Ray Bradbury's *Fahrenheit 451*.[105] The public has recognized the building for its innovation and its stylish beauty,[106] transforming it from mere applied art to the type of aesthetic expression that fine art contemplates. The fact that the building itself (notwithstanding its bookshelf mural) is considered applied art, however, means that VARA does not apply to its design.

B. THE EFFECT ON ART

VARA's exclusions are wide reaching and exclude a vast swath of visual arts due to their functional characteristics. Consequently, artists in the United States can be neither certain that their artwork will be safeguarded against further changes, nor that they will be fully protected to the extent envisioned by the Berne Convention and by Congress years ago.

Art is a creative process. When an artist is denied moral rights in his or her work, his or her creativity is implicitly stifled through nonrecognition.

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100. *Id.* at 408.

101. *Id.* at 405–07.

102. *See generally* 1 RANDELL L. MAKINSON, GREENE & GREENE: ARCHITECTURE AS A FINE ART (1977) (detailing how the careers of Charles and Henry Greene characterize some of the highest standards for architectural design in homes).

103. SCHWARZENBACH & HACKETT, *supra* note 81, at 35 (concluding architecture is "building design and an applied art"); *Applied Art: Definition & Meaning*, ENCYCLOPEDIA OF ART EDUC., http://www.visual-arts-cork.com/definitions/applied-art.htm (last visited Dec. 16, 2017) ("The first applied art to be practiced in a major way was architecture.").

104. SCHWARZENBACH & HACKETT, *supra* note 81, at 35 ("[A]rchitecture often appears under the category of fine art.").

105. *Community Bookshelf*, KAN. CITY PUB. LIBR., https://www.kclibrary.org/readers-services/reading-lists/community-bookshelf (last visited Dec. 16, 2017) ("The shelf showcases 22 spines which list 42 titles . . . .").

106. *"The Community Bookshelf": The Coolest Looking Building in Kansas City*, ARTS-STEW.COM (Mar. 29, 2014), http://www.arts-stew.com/fab-photos/the-community-bookshelf-the-coolest-looking-building-in-kansas-city.

Professor Roberta Rosenthal Kwall of DePaul University's College of Law wrote about that consequence, noting that an artist's work, no matter the medium, represents a compilation of thought-processes and conscious and unconscious decisions that culminate in the creation of art.[107] At some point, however, Kwall notes that "every modern artist who has chosen to labor with a gift must sooner or later wonder how he or she is to survive in a society dominated by market exchange."[108] The necessary consequence of such thinking is that, in the absence of comprehensive moral rights protection, artists experience a "focus on commodification" that "diminish[es] creative enterprise"—for example, "some authors have experienced blockages of their creativity upon receiving substantial monetary rewards."[109] Therefore, if judges continue to interpret VARA as exclusive of functional items, then artists working in these fields of art may succumb to the pressures of the market and may lose their drive to continue creating solely for the purpose of creating, instead choosing to create art as a commissioned artist unprotected by VARA.[110] That is, knowledge that art may not be protected shifts an artist's motivation from intrinsic creative processes and desire to enrich society to an extrinsic motivation of cash, stifling art as he or she once knew it.[111] In

107. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 11–21 (2009).

108. *Id.* at 22 (quoting LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY, at xiii (1983)).

109. *Id.* (pointing specifically to examples where artists lose the ability to create after receiving large sums of money). *Contra* Melissa Boyle et al., Moral Rights Protection for the Visual Arts 12–13 (Aug. 2008) (unpublished manuscript), http://web.holycross.edu/RePEc/hcx/HCo809-Boyle-OConnor-Nazzaro_MoralRights.pdf ("[A]rtists' earnings do not necessarily correlate with creativity, and thus we are unable to discern the impact of these laws on the level of artistic innovation.").

110. Some would argue that contractual provisions included in an artist's sale of a copyrighted work likewise encourage artists to seek profit over moral rights protections. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 277–78 (2009). While available, the use of contract is both ineffective and an imperfect substitute for the protections afforded by VARA. *Id.* at 278. Most contracts with artists, for example, are orally based, *id.*, but the waiver provisions of VARA contemplate that waiver can only be accomplished in written format. 17 U.S.C. § 106A(e)(1) (2012) ("The rights conferred . . . may be waived if the author expressly agrees to such waiver in a written instrument signed by the author."). Perhaps most significantly, Landes & Posner found evidence that indicated that "artists do value their VARA rights." LANDES & POSNER, *supra*, at 278 (indicating that fewer than ten percent of artists surveyed waived their VARA rights and that of those artists, only one-quarter would choose to do so again).

111. *See generally* KWALL, *supra* note 107 (exploring how artists' intrinsic desires to create, rather than a desire to be wealthy, are what spur the production of most art). *See* Boyle et al., *supra* note 109, at 12 (finding that moral rights protections may reduce an artists' income by up to $4250 per year, but nonetheless that artists "value the protection associated with the laws, and the statement that the laws make (i.e. public support for the artistic community)" because the artists' "net utility rises as a result, in spite of the lost income").

depressing creative forces, VARA undermines the very goal it sought to implement: protection of artists working in the visual arts.[112]

C. THE ROLE MORAL RIGHTS RECOGNITION PLAYS

Denial of VARA protections does not merely implicate creative processes, however, because even still-creative artists lose significant protections—such as the ability to prevent destruction—once their art is denied VARA protection. In the pre-VARA era, such destruction occurred with frequency and few artists could prevent it.[113] A famous, well-litigated example is the *Tilted Arc* sculpture (a large, curved wall placed in the middle of a park in New York City) designed by Richard Serra.[114] A city council vote to remove the sculpture from the park culminated in years of litigation brought by Serra in an attempt to prevent that removal.[115] Serra was ultimately unsuccessful, and on March 15, 1989, the city opted to cut his sculpture into three pieces and hauled it away to a government storage warehouse.[116] To this day, *Tilted Arc* has not been exhibited in public.[117]

In the post-VARA world, recognition of art as visual art still bears crucially on whether art will be protected or left to be unceremoniously destroyed. In New York, a number of artworks painted by street artists in the 5Pointz graffiti art community were destroyed after a judge in the Eastern District of New York denied the artists an injunction that would have saved the art.[118] The court held that graffiti art, while well respected in the community and considered beautiful, was not visual art under VARA meriting the issuance of an injunction.[119] Destruction also occurs to functional works of art, as was the case in *Cheffins v. Stewart*. The action arose when the defendant "intentionally burned the wooden structure of *La Contessa* so that a scrap metal dealer could remove the underlying school bus."[120] Had *La Contessa* not been erroneously

112. H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916 ("If there exists the real possibility that the fruits of this effort will be destroyed after a mere ten to twenty years the incentive to excel is diminished and replaced with a purely profit motivation. The Visual Artists Rights Act mitigates against this and . . . protects our historical legacy.").

113. Laura Gilbert, Editorial, *Why the Visual Artists Rights Act is Failing*, ARTSY (Sept. 29, 2015, 10:20 AM), https://www.artsy.net/article/artsy-editorial-why-the-visual-artists-rights-act-is-failing-to-protect-street-art-and-murals ("In battles between artists' rights and property rights, property rights have a way of winning. . . . Originally, artists had no recourse.").

114. *See generally* HARRIET F. SENIE, THE TILTED ARC CONTROVERSY: DANGEROUS PRECEDENT? (2002) (exploring the history of the *Tilted Arc* from its commission to the controversy surrounding its removal).

115. Christina Michalos, *Murdering Art: Destruction of Art Works and Artists' Moral Rights*, *in* THE TRIALS OF ART 173, 179–82 (Daniel McClean ed., 2007).

116. *Tilted Arc*, NERO, Winter 2013, at 58, 59.

117. *Id.*

118. Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212, 226 (E.D.N.Y. 2013).

119. *See id.* (explaining that the 5Pointz art could not necessarily meet the gatekeeping requirement of "recognized stature").

120. Cheffins v. Stewart, 825 F.3d 588, 591 (9th Cir. 2016).

excluded from VARA protection due to functional characteristics, the creator of the galleon could have asserted his moral right of integrity under VARA to prevent its destruction.[121] Such examples of destruction underscore an important aspect of VARA: The moral right of integrity afforded to VARA-protected art is sometimes the only method of preventing complete eradication.

When properly recognized, art retains a robust set of VARA protections that afford effective recourse. In Massachusetts, a court recognized an artist's moral right of integrity when it declared that installing (then-unfinished) artwork in the absence of the artist could constitute a violation of his artistic vision—and thus an intentional distortion, actionable under VARA.[122] In a different case involving destruction, artist Kent Twitchell asserted his moral right of integrity against the United States for illegally painting over his Ed Ruscha mural in Los Angeles.[123] Although the mural was ultimately destroyed, the resulting $1.1 million settlement for Twitchell reaffirmed the importance of art and the strength of VARA protections.[124] Recognition can make a significant difference in the level of protection afforded to art.

In denying recognition to entire communities of artists based on functionality, judicially created exclusions to VARA evade the purpose of the statute—i.e., to comply with the obligations of the Berne Convention by providing moral rights for the creating artist. The problem to be remedied is that an impermissibly narrow reading of visual art that excludes functional art without truly differentiating applied art is inconsistent with both VARA's legislative history and principles of statutory construction. This matters not only because of the message that nonrecognition sends an artist about their creative processes, but also because without VARA protection, artists cannot protect their work from destruction or mutilation. Part IV addresses this problem by proposing a new multi-factor test resolving VARA litigation's discrepancies.

IV. VISUAL ART RE-ENVISIONED

There is no doubt that VARA is an intricate statute, the interpretation of which has largely been subject to fragmented legislative history analysis. Any solution necessarily must incorporate the language of the statute itself while remaining faithful to the overall spirit of legislative intent.[125] Due to these complexities, this Part's proposed test attempts to conform to those principles

121. *See id.* at 599 (McKeown, J., concurring).

122. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 59–60 (1st Cir. 2010).

123. *See* Diane Haithman, *Artist Kent Twitchell Settles Suit over Disappearing Mural*, L.A. TIMES (May 1, 2008), http://www.latimes.com/la-et-twitchell1-2008may01-story.html.

124. *See id.*

125. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (discussing the use of canons of construction to guide statutory interpretation).

of VARA that both the judicial and legislative texts support. Subpart A introduces a new test that eliminates the bright-line rule of functionality and instead incorporates those elements essential to both effectuating VARA's purpose and validating the purpose of art. Subpart B applies the test to a number of case studies. Subpart C then analyzes the feasibility of the proposed test.

A. THE FOUR-PRONG TEST

Clearly, visual art is much more complex than any definition can encompass; perhaps that realization is why Congress did not explicitly define the term within VARA. This Note proposes that a work of art should constitute visual art if it is (1) of recognized stature as determined by testimony of experts or laypersons; (2) conceptually separable from any function the art may perform; (3) not mass-reproduced; and (4) created by artistic, and not economic, intentions.

1. Codifying Recognized Stature

Despite the *Pollara* court's acknowledgement that "recognized stature" is a pre-requisite to VARA protection, courts have scarcely addressed this requirement. The only case addressing the issue noted that "the recognized stature requirement is best viewed as a gate-keeping mechanism—protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature."[126] The *Carter I* court proposed a two-tiered test: At the time of the VARA action, a work must both have (1) "stature" or merit and (2) "'recogni[tion]' by art experts."[127] To meet the *Carter I* test, expert witness testimony on the merits of the art is usually necessary.[128] The first prong this Note proposes agrees with the *Carter I* court that requiring stature/merit and recognition serves an important gatekeeping function, but this Author disagrees with the conclusion that only art experts can testify to a piece of art's stature.[129] As the *Carter I* court noted, a work can

126. Carter v. Helmsley-Spear, Inc. (*Carter I*), 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, and rev'd on other grounds*, 71 F.3d 77 (2d Cir. 1995).

127. *Id.*

128. *Id.*

129. *Hearing*, *supra* note 5, at 6 (proposed text of H.R. 2690) (indicating that the 1989 draft of VARA included a provision allowing courts to "take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or marketing of works of visual art"). Although the language was eventually removed before VARA's passage, the text still supports the notion that a member of the public, as a person "involved with the . . . appreciation" of visual art, could testify as to the recognized stature of a work. *Id.* Interestingly, however, the *Cheffins* district court did not permit several expert witnesses to testify or supplement other expert reports due to the testimony being "unduly speculative." Cheffins v. Stewart, 825 F.3d 588, 595 (9th Cir. 2016). Such an outcome suggests that while an expert may be a sufficient method of proving that a work of art is not applied art, it is not always a viable method. Moreover, the decision raises concerns that an already steep hurdle of

attain stature within any number of relevant groups: Experts and laypersons alike can come to appreciate the magnitude of an art's beauty.[130] As such, testimony from the public should suffice to furnish the requisite stature. As a result, this Note proposes that a jury can and should hear public, non-art-expert testimony to establish that stature.

The inclusion of this prong in the proposed four-factor test provides additional benefits beyond the gatekeeping function envisioned by the *Carter I* court by harmonizing the moral rights provisions of VARA with the copyright provisions of the Code. Requiring recognized stature ensures that a work is also simultaneously eligible for copyright protection under the broader copyright laws of the United States.[131] Because a work of recognized stature (as recognized by the proposed test) would also be "fixed in any tangible medium of expression"[132] and would be "published" (by virtue of being so public as to be of notoriety), the work would qualify for copyright protection under U.S. law.[133] Indeed, such an approach comports with the overall aims of the Berne Convention—the convention recognizes that moral rights are but one part of broader copyright protection.[134] Inclusion of a "recognized stature" prong, therefore, expands protections for artists by simultaneously qualifying them for both VARA (moral rights) and copyright (economic rights) protections.

2. Conceptual Severability

The second prong of the proposed test argues that if an art piece is conceptually severable, then it constitutes visual art for purposes of VARA protections. In the broader copyright context, an item may not be copyrighted if it is a useful article. Conceptual severability enables one who designs objects with both useful and ornamental features (e.g., a table or lamp) to nonetheless obtain copyright protection if the "pictorial, graphic, or sculptural feature 'can be identified separately from, and [is] capable of existing independently of, the utilitarian aspects.'"[135] When the "aesthetic element is conceptually severable" and is not "inextricably interwoven with the utilitarian aspect of the article," then copyright protection can be

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proving art is not applied art is made higher in requiring experts to demonstrate non-speculative testimony on a subject that is inherently without definition (i.e., art).

130. *Carter I*, 861 F. Supp. at 324–25; *see also* Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212, 220–23 (E.D.N.Y. 2013) (recounting testimony from numerous non-experts on the public impact of graffiti art located at the 5Pointz community).

131. 17 U.S.C. §§ 101–1332 (2012).

132. *Id.* § 102(a).

133. *See* U.S. COPYRIGHT OFFICE, CIRCULAR 40, COPYRIGHT REGISTRATION FOR PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS 1 (2015) ("[A] work is published when . . . publicly distributed or . . . [on] public display.").

134. *See generally* Berne Convention, *supra* note 10 (discussing the protection of moral rights).

135. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (quoting 17 U.S.C. § 101 (1976)) (alteration in original).

granted.[136] The court in *Kieselstein-Cord*, a conceptual severability case, provides such an example: the Running Fence Project (a nearly 25-mile-long fence made of fabric) designed by Christo.[137] There, "the whole point of the work was that the artistic aspects of the work were conceptually separable" from the underlying utilitarian fence and thus protected by copyright.[138] As a result, the fact that Running Fence "did not contain sculptural features that were *physically* separable from the utilitarian aspects of the fence" did not preclude the art from nonetheless being protected under the Code.[139] It is perception, not reality, that determines protections.

By importing the conceptual severability doctrine into VARA analysis, the proposed test harmonizes VARA's interpretation with established principles of statutory construction. Because VARA is part of the title of the United States Code dealing with copyrights, VARA's interpretation necessarily depends on how other copyright material is interpreted. The *in pari materia* canon of statutory construction provides that when a statute is ambiguous, a statute's meaning may be determined by reference to other statutes on the same matter.[140] Such ambiguity can be found here: Both visual art and applied art are ambiguous terms.[141] Defining these two terms by reference to other statutes specifically detailing copyright law is wholly consistent with the *in pari material* canon. The legislative history also supports this outcome: Visual art was intended to be a subset of the "pictorial, graphic and sculptural works" definition contained with the Code.[142] Defining by reference to that subset, which codifies the notion of conceptual severability, accords with Congress's intent.

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136. *Id.* (quoting Esquire, Inc. v. Ringer, 591 F.2d 796, 807 (D.C. Cir. 1978) (Leventhal, J., concurring)). The Supreme Court endorsed this test in *Star Athletica* when it held that "a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium." Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1012 (2017).

137. *Running Fence*, CHRISTO & JEANNE-CLAUDE, http://christojeanneclaude.net/projects/running-fence (last visited Dec. 16, 2017). The work consisted of nylon fencing spanning several miles in Sonoma and Marin Counties, California. *Id.*

138. *See Kieselstein-Cord*, 632 F.2d at 993 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 2A.08(B) (1980)).

139. *See id.* (emphasis added).

140. Wachovia Bank v. Schmidt, 546 U.S. 303, 305 (2006) ("[U]nder the *in pari materia* canon, statutes addressing the same subject matter generally should be read 'as if they were one law[]' . . . ." (quoting Erlenbaugh v. United States, 409 U.S. 239, 243 (1972))); *In Pari Materia*, BLACK'S LAW DICTIONARY (6th ed. 2010).

141. *See* Cheffins v. Stewart, 825 F.3d 588, 593 (9th Cir. 2016) ("VARA does not define the term 'applied art,' and federal courts have rarely had occasion to interpret its meaning.").

142. *Hearing*, *supra* note 5, at 62 (statement of Ralph Oman, Register of Copyrights). Other contributors suggested that the definition of pictorial, graphic, and sculptural works be used to determine the entire scope of VARA protections. *Id.* at 86 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law).

Moreover, applying conceptual severability to art results in the term applied art becoming more judicially manageable and avoids absurd results. As Judge McKeown noted in her concurring opinion in *Cheffins v. Stewart*, a functionality test knows no bounds:

> At what point does the transformation from utilitarian object to work of art occur? Is any residual utilitarian function sufficient to consign a work to the "applied art" label, or must the utilitarian function be significant? Does it matter whether an object within a work retains a possible, but unused or impractical, utilitarian function versus whether it continues to be used for its original purpose? What is the magic dividing line that informs our legal determination?[143]

Applying conceptual severability as opposed to the functionality test articulated in *Cheffins* decreases the number of absurd results that a court could reach under these questions. This outcome is preferred: When interpretation of a statute produces absurd results, that interpretation is to be avoided if another consistent interpretation is available.[144] Consider *La Contessa*: The court did not consider whether *La Contessa* could be considered visual art if the bus it was built upon was simply a non-functional shell of a bus, or if the bus's engine were temporarily disabled for some reason. Under the strict test of functionality employed by the *Cheffins* court, such disabling would render *La Contessa* non-functional and thus subject to protection under VARA. Applying conceptual severability instead removes the possibility of this oddity and brings VARA interpretation in line with the principles of *Griffin v. Oceanic Contractors, Inc.* More importantly, adopting the conceptual severability doctrine for purposes of VARA collapses the inquiry between visual art and applied art into one question, encouraging judicial economy and creating results that do not arbitrarily exclude art simply because of utilitarian function.

3. Mass Reproduction

The third prong focuses on whether a given piece of art is mass-reproduced as a matter of statutory construction. Currently, courts determining that items of art with functional characteristics are *per se* applied art ignore statutory construction canons and legislative intent. This Note seeks to establish the rule that if an item is mass-produced, it is applied art and not eligible for VARA protection.

i. The Noscitur a Sociis *Canon Generally*

As the *Cheffins* and *Carter II* courts recognized, the *noscitur a sociis* canon, which counsels that ambiguous words can be resolved through reference to

143. *Cheffins*, 825 F.3d at 599 (McKeown, J., concurring).

144. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

other words in the statute,[145] may need to be considered when interpreting visual art. In determining whether to invoke this canon, a court must determine whether there is a "self-evident" connection between words in a list. When the connection between words is not self-evident, a court should not "'rob' any one of them 'of its independent and ordinary significance'"[146]—that is, if the words are not somehow connected, the *noscitur* canon is not applicable and each word should be given its ordinary meaning. If, however, a court finds that the words relate to each other—that is, they are "'string[s] of statutory terms' or 'items in a list'"—a court may invoke the canon to define an ambiguous word with reference to those other list items.[147] When the canon is invoked, a court will use the words "common-grouping" (the theme or general idea) to define the ambiguous term.[148]

ii. The Noscitur *Canon Is Not Applicable to Interpreting Applied Art*

Courts should determine applied art according to its ordinary, plain meaning because applied art exists in a list of unrelated words. The list of items defined in the Code are disparate, ranging from electronic distribution systems to reference charts to print media.[149] The legislative history confirms that applied art is a separate category where a connection may not be entirely apparent: "Excluded are works of applied art and audiovisual . . . . [and] [t]echnical works . . . ."[150] Applied art, therefore, is not related to the other list items in any significant way other than exclusion. As such, applied art should be given its plain meaning: the use of design on everyday, useful objects to make them visually appealing.[151] The result is that functionality does not dictate what is and is not applied art—mass reproduction does.

iii. Even if the Noscitur *Canon Applies, Mass Reproduction Is the Proper "Common Grouping" that Defines Applied Art*

In the alternative, if the Code contains "'a string of statutory terms' or 'items in a list'"[152] and thus requires the court to invoke the *noscitur* canon to define applied art, functionality is not the correct common grouping to be derived from the statutory language: mass reproduction is. Visual art is

145. Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 287 (2010).

146. *Id.* at 288 (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 338–39 (1979)).

147. *Id.* at 288–89 (citations omitted).

148. *See id.* at 287.

149. 17 U.S.C. § 101 (2012). Works not constituting visual art are "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication." *Id.*

150. *Hearing*, *supra* note 5, at 62 (statement of Ralph Oman, Register of Copyrights).

151. *Applied Art: Definition & Meaning*, *supra* note 103.

152. *Graham Cty.*, 559 U.S. at 289 (citations omitted).

defined both in the positive and in the negative.[153] In the positive, visual art is limited to items that exist either in a single copy or in fewer than 201 copies.[154] Such language suggests an explicit preference for items that are not mass reproduced.[155] That sentiment is reflected in the definition of what is not visual art: Items designed to be cheaply produced and disseminated en masse (i.e., in more than 200 copies), such as posters and magazines, are excluded from the category of visual art.[156] Focus on reproduction comports with the dictionary's definition of applied art (that applied art is used for common items). The number of copies of any given everyday object in existence (such as a toaster) is usually well above 200. This indicates that the primary operation of applied arts is to objects like toasters, which are numerous and not unique.[157] Therefore, the statute's focus on how many items are made, not how the items are composed, indicates that when applied, the *noscitur* canon of construction should define applied art with reference to quantity—not quality.

iv. The Result Is the Same: Applied Art Is Not About Functionality

Whether one construes applied art using plain meaning or using the *noscitur* canon does not affect how the statute should be correctly construed: VARA's legislative history suggests a preference for excluding mass-produced works either way. In hearings before the House Subcommittee on Courts, Professor Jane Ginsburg, scholar of copyright and intellectual property law at Columbia University, noted that the "[c]reation of limited . . . editions [was] desirable" and that the rights that VARA was implementing, including the right of integrity, "would not in any event apply" to "mass-produced works."[158] Therefore, including this prong honors congressional intent by recognizing that mass-production is the primary concern as to what constitutes applied art.

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153. *See supra* Part II.E.

154. 17 U.S.C. § 101.

155. *Hearing*, *supra* note 5, at 19 (statement of Rep. Edward J. Markey) ("The specific language of the bill addresses only works of which there is no multiplicity. Thus, the bill is not applicable to forms such as video tapes, for the damage to one tape ruins only that particular copy.").

156. *See id.*

157. *See* Paul Greenhalgh, *Introduction: Craft in a Changing World*, *in* THE PERSISTENCE OF CRAFT: THE APPLIED ARTS TODAY 1, 6 (Paul Greenhalgh ed., 2003) ("There are two ways to make money selling artefacts: through exclusivity or quantity. The fine artist classically makes a living by selling a small number of handmade objects very expensively. The designer makes a living by creating templates for objects that go into mass-production."); Gareth Williams, *Creating Lasting Values*, *in* THE PERSISTENCE OF CRAFT: THE APPLIED ARTS TODAY, *supra*, at 61, 67 (describing chairs by German design firm Bär and Knell that are "functional" and "endlessly repeatable").

158. *Hearings*, *supra* note 5, at 86 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law).

4. Artist Intent

Intent matters.[159] If an artist creates work not intending to display creativity or imbue cultural characteristics, then the work is likely not visual art.[160] Recall that Congress attempted to balance the competing concerns of creativity and economic gain by excluding works for hire from VARA protections.[161] Congress found as much when it declared VARA essential to "the integrity and authenticity of [art] in public and private collections and to the public for preserving its cultural legacy."[162] A test purporting to reshape what constitutes visual art must, therefore, be sensitive to the concern that art benefits society at large. The proposed test incorporates this concern by excluding art not meant to benefit the public by considering artist intentions.

To ensure that only true art is protected, a two-step analysis is required. First, the bright-line rule, fashioned by Congress, applies: If an artist creates work as an employee or as a hired individual, then a work is not visual art.[163] This guarantees that concerns about economic prioritization of the copyright provisions of the Code[164] are legitimized, preventing the individual from using the provisions of VARA to hold commissioned art "hostage" using moral rights. Second, a subjective intent standard that focuses on the artist's intentions in non-for-hire scenarios should be introduced. If an artist's *stated* intent was to create the work for profit or promotion, then the art is likely applied art. If, however, the artist expresses a broader purpose (e.g., creation of a unique synthesis of materials for public appreciation), then the court could more easily find that the work constitutes visual art.

Although the subjective nature of the test may be concerning to some jurists, Congress has more or less signed off on this type of approach, indicating during debates about VARA that "[t]he courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition."[165] Using an intent standard gives courts the ability to procure a

159. Pollara v. Seymour, 344 F.3d 265, 269 (2d Cir. 2003) ("Protection of a work under VARA will often depend . . . upon the work's objective and evident purpose.").

160. *Id.* at 269–70 ("In each case, VARA's protections are limited depending on the purpose of the work.").

161. *See supra* Part II.D.1.

162. H.R. REP. NO. 101-514, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916 (alteration in original).

163. For a definition and factors to be applied in determining that a work is "for hire," see *supra* text accompanying note 44. In some ways, the bright-line rule is really a rebuttable presumption that can be overcome by using the *Reid* factors to show that the work is not "truly" made for hire. *See supra* note 45 and accompanying text.

164. Assuming, of course, that normal elements of copyrightability, such as "fixing" and "publication" are met. *See* 17 U.S.C. §§ 101–22 (2012).

165. H.R. REP. NO. 101-514, at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921.

"gut check" as to whether art qualifies.[166] This factor, combined with the ability to ascertain true motive as to whether works are works for hire or not, gives the intent prong the level of flexibility necessary to work with inherently flexible topics such as the visual arts. As a result, this prong prevents exclusion of art commissioned for artistic purposes but with subsidiary economic gain.

B. REDEFINING VISUAL ART BY TEST APPLICATION

Put together, the newly proposed test combines previous judicial opinions on copyright, the text of the Code dealing with copyrights generally, and the text and legislative history of VARA. Some may fear, however, that the application of the test will prove too flexible and destroy VARA's narrow intention.[167] Through application of a case study of several examples of art (architecture, quilts, and the bus-ship *La Contessa*), this Subpart will demonstrate that the newly proposed test is sufficiently flexible to limit visual arts without being so inflexible as to exclude all types of art.

1. Architecture

Reflecting Congress's desire to insulate copyright holders from lawsuits under VARA, architecture should never constitute visual art as defined by statute; otherwise, the architect or designer could file a lawsuit against anyone who ever changed or removed a structure. Application of the test indicates that this outcome occurs, no matter what building is tested as art. While architecture will usually satisfy the first prong of recognized stature[168] and third prong of mass reproduction,[169] it will fail the other two. Building design, for example, can rarely be conceptually separated from its function,[170] thus

166. Such an approach is not unheard of in legal jurisprudence. The infamous concurrence of Justice Stewart in *Jacobellis v. Ohio* underscored that for some material, the only way to define and categorize objects is to employ the "I know it when I see it" test. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

167. H.R. REP. NO. 101-514, at 10–11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6920–21 ("The definition of a work of visual art is a critical underpinning of the limited scope of the bill. As Representative Markey testified, 'I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered . . . [T]his legislation covers only a very select group of artists.'" (alteration in original)).

168. *See generally* CHARLES L. BARSTOW, FAMOUS BUILDINGS: A PRIMER OF ARCHITECTURE (1921) (discussing different types of architecture across cultures). As to the requirement of prong one that a work be copyrightable under title 17 of the United States Code, most architectural buildings would not actually qualify by virtue of being built before 1990. U.S. COPYRIGHT OFFICE, CIRCULAR 41, COPYRIGHT CLAIMS IN ARCHITECTURAL WORKS 1 (2012). Moreover, the requirement of publication is unlikely to be satisfied; a work of architecture cannot be published "unless multiple copies are constructed," which is unusual for buildings likely to achieve recognized stature. *Id.*

169. *See* ALFRED M. KING, EXECUTIVE'S GUIDE TO FAIR VALUE: PROFITING FROM THE NEW VALUATION RULES 30 (2008) ("No two buildings are alike.").

170. *See* Raleigh W. Newsam, II, *Architecture and Copyright—Separating the Poetic from the Prosaic*, 71 TUL. L. REV. 1073, 1079–80 (1997) (explaining that the drafters of the Architectural Act recognized this conundrum and explicitly exempted architecture from the provisions of

failing the second prong. Even in cases where the design could be conceptually separated, as is the case with the Kansas City Library,[171] most buildings are commissioned.[172] As works for hire, architecture fails the fourth prong of artist intent. As a result, the new test excludes all but the rarest types of architecture from consideration. The result is desirable: An architectural work is not usually moved, destroyed, or otherwise harmed in such a way that it would damage the reputation of the architect, which makes VARA protection redundant. Moreover, the exclusion of architecture from VARA protection prevents Congress's concerns about artists holding works hostage using VARA. Because an architect cannot use VARA to foreclose alterations or expansions, economic activity can still flourish. While there is no question that architecture can be and is oftentimes art, a policy-oriented test like the one proposed here yields to the reality that aesthetics are usually secondary to the purposes of buildings: occupancy and productive use. Only in the rarest of cases should architecture qualify as visual art, vindicating Congress's intent that VARA apply narrowly.

2. Quilts

Next, if one supposes the validity of Ms. Moran's conclusion that quilts constitute visual art protectable by VARA,[173] the proposed test properly narrows the number of quilts eligible for VARA protections. The first prong of recognized stature excludes a number of quilts made by persons for personal reasons or quilts that are not sufficiently "artistic" so as to merit recognition by experts. For those of recognized stature, however, the third prong of mass reproduction will further limit which can be recognized. Quilts reproduced en masse will be excluded; quilts made with non-unique designs, once numbering more than 200, will be excluded. Certainly, however, some quilts are of sufficient stature and limited production to qualify as visual art. In this case, prong two, the requirement of conceptual severability, further limits eligible quilts. Only those quilts meant for display, i.e., those serving as

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conceptual separability); *see also* H.R. REP. NO. 101-735, at 11, 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6942, 6952 (explaining that architecture was previously protected under conceptual separability in the 1976 Copyright Act, but always protected pursuant to the Architectural Works Copyright Protection Act irrespective of separability).

171. *See supra* Part III.A.2. As a design of book spines attached to a parking garage, the Library's garage art is likely conceptually severable because one can immediately divorce the art from the underlying structure—few people could realistically find giant books integral to the process of parking a car.

172. *See* Erik Ipsen, *So Many Projects, So Few Architects. How Design Firms Are Filling a Talent Gap*, CRAIN'S N.Y. BUS. (June 15, 2015, 12:01 AM), http://www.crainsnewyork.com/article/20150615/REAL_ESTATE/150619936/so-many-projects-so-few-architects-how-design-firms-are-filling-a-talent-gap ("[D]emand is sky-high for architects to design new schools and high-end residential condominiums—even whole new neighborhoods like Manhattan's Hudson Yards.").

173. Moran, *supra* note 99, at 409 ("A quilt artist deserves to be protected by VARA because 'professional and personal identity is embodied in each work.'" (quoting H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925)).

a medium of expression, will be able to be conceptually severable; if an eligible quilt is otherwise meant for warmth or as a bedspread, then the context as a useful article dictates that the quilt not be recognized under VARA.[174] Finally, the fourth prong considers the artist's intent. If one creates a quilt as a gift for another that is subsequently displayed in public, then the quilt is still unrecognizable under VARA because the quilt was not originally fashioned for the benefit of the public.[175] If, however, the artist intended to transform the everyday blanket into a quilt of art, then VARA should properly apply.[176]

3. The Ship *La Contessa*

The test reverses the *Cheffins* decision. As noted in *Cheffins*, *La Contessa* was of recognized stature and is a sculpture.[177] Accordingly, prong one of the test is satisfied. Prong three, the mass reproduction prong, is also satisfied because *La Contessa* was a one-of-a-kind reproduction of a 16th century Spanish galleon; none other like it existed.[178] Prong two is likewise satisfied due to the separability of the underlying bus. *La Contessa* was designed as a galleon, not as a bus with galleon-like features. The very fact that *La Contessa* was created for use at Burning Man imports some level of separability, as festival rules only admit "art cars" that are truly transformative and no longer hint at their underlying automotive status to Burning Man.[179] Moreover, *La Contessa* could survive independently from the bus it was placed on. Removing the bus would give rise to a non–moving but otherwise quite intact, accurate Spanish galleon. In addition, *La Contessa* satisfies prong four. The artist's intent was to create an "art car" for Burning Man.[180] As a festival revolving around the creation and innovation of art, Burning Man is the type of festival that gives rise to art made solely for the purpose of creation—artists create

174. *Id.* at 399 ("[Q]uilts . . . are physically or conceptually separate from the utilitarian aspect of the quilt.").

175. *Id.* at 408 ("[A] quilt made to cover a bed . . . could be precluded from VARA based on the quilter's purpose . . . .").

176. Moran argues for the same outcome. *Id.* ("The quilt is created for display and to be appreciated for its artistic qualities. This quilt artist is personally connected to her work and arguably qualifies as an artist VARA intends to protect.").

177. Cheffins v. Stewart, 825 F.3d 588, 599 (9th Cir. 2016) (McKeown, J., concurring).

178. Steven T. Jones, *The Mystery of La Contessa*, NEWSREVIEW.COM (Feb. 15, 2007), http://www.newsreview.com/reno/mystery-of-la-contessa/content?oid=281971 ("*La Contessa* was a Spanish galleon, amazingly authentic and true to 16th-century design standards in all but a couple respects.").

179. Affidavit of Joanne S. Northrup at ¶ 10, *Cheffins*, 825 F.3d 588 (No. 09-cv-00130), ECF No. 82-1 ("All 'Mutant Vehicles' at Burning Man are produced primarily for aesthetic reasons, and their primary purpose is to visually delight audiences—the enchanting vision of a Spanish Galleon seeming to 'sail' across the desert is most compelling. The function of all Mutant Vehicles, including *La Contessa*, is not intrinsically utilitarian. It is rather a moving sculpture.").

180. *Id.*; Jones, *supra* note 178 ("[The creator] said, 'It was about creation. It was about inspiration. The whole thing was a gift.'").

not for pecuniary gain, but for the love of art.[181] The utilitarian functions that *La Contessa* was used for—restaurant, party venue, and transit device—were subsidiary to the creator's intent to make a work of art.[182] On balance, prong four is satisfied. Therefore, the revised test would validate *La Contessa* as art subject to VARA, reversing the trend of denying otherwise recognized works of art solely because of incidental function.

C. *BALANCING ACT: POLICY AND REALITY*

Any test purporting to re-write VARA must attempt to be truthful to what the courts and the legislature have already decided are the hallmarks of the law: The amount of art must be narrow[183] yet simultaneously incorporate flexibility through use of "common sense,"[184] while addressing statutory "gate–keeping" requirements meant to exclude certain types of art.[185] The test proposed in Part IV.A appropriately does so. Only a narrow amount of art qualifies under the new test, but the art that does not qualify is not artificially restricted by a bright-line rule. Scrutiny of each piece on an individual basis satisfies VARA's requirement of common-sense flexibility. Because each purported visual art piece will be analyzed, the test can necessarily accommodate art forms that vary from the traditional mold. Finally, gatekeeping mechanisms like the requirement of recognized stature are met through the terms of the test itself. Conceptually, then, the test meets the policy rationale behind VARA while acknowledging the characteristics that make art, art.

V. CONCLUSION

The moral rights granted by VARA are important not only to artists but also to the public. Moral rights incentivize artists to create prolific, cultural pieces that embody what it means to be human and explore the world through creative, alternative lenses. These rights only function, however, when the legislation that grants them, VARA, can accurately identify which works of art will be protected and granted moral rights. Current jurisprudence does not neatly or accurately do so. In focusing on functionality as the sole test for

181. Christine Kristen, *The Outsider Art of Burning Man*, 36 LEONARDO 343, 343 (2003) ("Often the work is done simply to realize a vision and to give that vision to an appreciative audience who may develop an intimate relationship with the piece. One does not need an art degree or even any art-making experience at all to build an installation at Burning Man; here people who have never made an art object can do so. In any case, this is art outside of the conventional art world. It is democratic, inclusive, experiential and profoundly affected by its immediate environment.").

182. Jones, *supra* note 178.

183. H.R. REP. NO. 101-514, at 10–11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921.

184. *Id.*

185. *Carter I*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, and rev'd on other grounds*, 71 F.3d 77 (2d. Cir. 1995).

whether art "on the margins" is excluded as applied art, the judiciary currently prevents some art from moral rights recognition.

This Note's proposed test remedies this oversight by reformulating the test in light of conventional statutory construction principles with deference to the legislative history of VARA. Examining recognized stature, conceptual severability, mass-reproduction, and artist intentions for works "on the margins" ensures that art that straddles the line between fine art and applied art is properly considered without summary rejection. VARA did not intend to exclude all functional art—only some. Reformulating how courts make that determination serves art, artists, and the public more effectively. The proposed test does so while preserving Congress's original intent. Its applicability, therefore, strikes an appropriate balance of recognition and nonrecognition under VARA.