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What Happens When the Public Wants to Remove Public Art? The Second Circuit Weighs In On One Recent VARA Case

BY PAIGE GREEN / ON OCTOBER 10, 2023



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In 1990, the Visual Artists' Rights Act (VARA) became a welcome addition to the federal Copyright Act of 1976.¹ VARA was the first time the "moral rights" of an artist were federally protected in the United States.² Moral rights are commonly understood to provide attribution to artists and protect the integrity of visual art pieces. Under VARA, this means authors have a right to claim authorship on pieces they create, prevent the use of their name on a work they did not create, and prohibit the destruction of works of "recognized stature" (both intentional and through gross negligence).³ The law aims to prevent intentional distortion or modification of visual art pieces that is "prejudicial" to the artists' "honor or reputation."⁴

The public and artists at large appreciate VARA and consider it a successful means for keeping important works in the public eye and empowering artists.⁵ VARA has even provided for monetary recovery when applicable artworks are destroyed.⁶

Inherent in any public discourse on public art is the tension between the artist, the property owner, and the public.⁷ This past August, the Second Circuit was faced with interpreting VARA and the tension between these interested parties.⁸ In 1993, Samuel Kerson painted two massive, eight-by-twenty-four feet murals in the Chase Community Center of Vermont Law

School entitled *The Underground Railroad, Vermont and the Fugitive Slave*.⁹ In 2020, over 100 students and staff at the Vermont Law School petitioned for the removal of the art.¹⁰ "Among the concerns, viewers perceived the Murals as depicting enslaved African people in a cartoonish, almost animalistic style."¹¹ The murals could not be removed from the walls of the school without significantly damaging them, and without the consent of the artist, the law school, under VARA, was unable to remove them.¹² Instead, school officials covered the murals in soundproof paneling.¹³ The Second Circuit affirmed the District Court's opinion that the law school's concealment of the art is proper, holding that "modification means *alteration* of the physical art object," which is distinct from "conceal[ing] it from view" and that VARA does not create a right for works to be displayed *ad infinitum*.¹⁴

The artist himself explains the intent of this mural, and his work more broadly, is to further the goals of social justice and to "fight for free expression and human rights."¹⁵ The issue here is not that Kerson himself has discriminatory views, or that controversial art should never be displayed. Rather, the issue is that while VARA has been successful in protecting public works (even when such works may offend some members of the public), statutorily, the public has no influence over deciding what to protect or remove in community spaces.

The concern of this article is the crossroads between art and artist, and ensuring that the desires of the public at large drive policy decisions. Despite Kerson's intentions, students felt that the mural was "inaccurate and dispiriting."¹⁶ It did not tell a story that resonated with them or their experiences; rather, students felt disheartened by what this mural said about their law school.¹⁷ For the benefit of the public, covering these murals was the right outcome. While the holding of this case may have addressed the concerns of Vermont Law School students, it does not create a permanent, workable, or equitable precedent for future art-purveyor's reception of VARA-protected artwork.

In an article for Northwestern Law School, Maliha Ikram considers similar issues around public works stating that "[u]ltimately, the challenge in resolving this debate requires balancing each party's interests in accordance with the overarching legal schemes, while still acknowledging that the result should be rooted in cultural heritage concerns."¹⁸ Ikram's article centers on confederate memorials, and many of their suggestions are geared toward re-contextualizing these works and or relocating them.¹⁹ For cases like *Kerson*, placing the mural somewhere else was not possible²⁰, and recontextualization had been attempted, but did not satisfy the needs of the community.²¹

The Visual Artists Rights Act protects only works of "recognized stature."²² In *Kerson*, the artist brought forward newspaper reviews of his artwork and testimony from art curators as evidence of their "stature".²³ While there is no clear definition on what "recognized stature" means, courts often rely on the expert opinion of individuals who are related to the artistic community, and not the general public who would be witnessing the art daily.²⁴

In some cases, this view has led to positive outcomes. Recently, a group of aerosol artists who contributed to some 10,000 works painted at a building in Queens, NY, were awarded millions in damages for the destruction of their work.²⁵ The building, known as 5Pointz, had its own curator and formalistic exhibition guidelines, which aided its ability to receive the “recognized stature” designation.²⁶ 5Pointz had been an important space not only for aerosol artists but to locals and visitors alike. At one point, 5Pointz had even become a popular tourist location due to its proximity to Manhattan.²⁷ However, like in *Kerson*, its popularity or value to people who see the art everyday was not part of the court’s decision on “recognized stature.” Other public works, which have less formality in their exhibition and lack newspaper reviews, have not been guaranteed the same level of protection.²⁸

While the *Kerson* case is an important victory for Vermont Law School students, the Second Circuit does not go far enough to empower the public. Future interpretations of VARA must take into account public opinion on art that is made for the public’s benefit and which they will experience on a daily basis. By allowing public opinion to be part of the test for “recognized stature”, courts like the Second Circuit can feel confident removing offensive artwork and still bolster the protection of art which is beloved by its community under VARA.

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1. 17 U.S.C. § 106.
2. Tokunbo Fashanu & Julianne Schmidt, Pre & Post VARA: A Study of the Protection of Public Art, Center for Art Law, (June 29, 2022), <https://itsartlaw.org/2022/06/29/pre-post-vara-a-study-of-the-protection-of-public-art/#post-60581-footnote-0> [<https://perma.cc/QM5B-7B4F>].
3. 17 U.S.C. § 106A.
4. Id.
5. Fashanu & Schmidt, *supra* note 2.
6. Id. at 164.
7. Jessica Schmitz, The Destruction Gap: A Study of the Unprotected Societal Interest in Privately Held Artworks, 87 MO. L. Rev. 313, 314 (2022).
8. *Kerson v. Vt. Law Sch., Inc.*, 79 F.4th 257 (2d Cir. 2023).
9. Id. at 257.
10. Id. at 261.
11. Id.
12. Id. at 262.
13. Id. at 261.
14. Id. at 262. (emphasis added).

15. Sam Kerson, Artist Statement, Dragon Dance Theatre,
<https://dragondancetheatre.wixsite.com/underground-railroad/general-9> (last visited Sept. 25, 2023) [<https://perma.cc/B7YK-PD4W>].
16. Amna Khalid, Artist Invokes the Law to Save His Art, Substack (May 4, 2022)
<https://banished.substack.com/p/artist-invokes-the-law-to-save-his>
[<https://perma.cc/U2VB-AF9R>].
17. See Kerson, 79 F.4th at 261.
18. Maliha Ikram, Long-Term Preservation of Public Art: From Cultural Heritage to the Confederacy, 14 Nw. J. L. & Soc. Pol'y. 37, 41(2018).
19. Id., at 82-90.
20. Kerson, 79 F.4th at 261.
21. Id. at 260.
22. 17 U.S.C. § 106.
23. Kerson v. Vt. Law Sch., Inc., No. 5:20-cv-202, 2021 U.S. Dist. LEXIS 176903 at *10-12 (D. Vt. Mar. 10, 2021).
24. See Scott v. Dixon, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004); Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994).
25. Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).
26. Id. at 162-163.
27. Geoff Cobb, The Tragic Death and Lasting Legacy Of Five Pointz, GreenPointers, (Apr. 30, 2019). <https://greenpointers.com/2019/04/30/the-tragic-death-and-lasting-legacy-of-five-pointz/> [<https://perma.cc/X26U-SCJM>].
28. See Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 102-103 (D. Mass. 2003)