

COMMENT

EPHEMERAL BY NATURE: HOW THE U.S. COPYRIGHT OFFICE CAN ENSURE PROTECTIONS OF STREET ART BY FIXING THE DEFINITION OF FIXATION

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INTRODUCTION

Street art is a tool used by marginalized communities to assert their presence and value in an oppressive society.¹ This art form is often synonymous with protest art: a prominent subset of street art historically associated with vandals.² However, characterizing street art as “vandalism” belies the role it has played during momentous historic events.³ For example, the Berlin Wall—grey and isolating on one side while bursting with creativity and contesting totalitarianism through expression and individuality on the other—symbolized a stark cultural divide that the artists helped convey to the world.⁴

As the United States evolved into a major market for art, artists realized their social and economic potential and it became apparent that legal protections were necessary.⁵ Congress addressed this need and passed the Visual Artists Rights Act (VARA),⁶ which extended non-economic moral rights to artists.⁷ Although moral rights are non-economic, “attribution and integrity” play a crucial role in an artist’s economic prosperity and incentivize their creativity.⁸ These rights ensure that artists are recognized for their work free from alteration, which impacts their reputation and the valuation of their enduring artworks.⁹

Non-traditional art forms continue to gain popularity and prominence, which exemplifies the importance of legislative protections for artists.¹⁰

1. Caroline Choi, *Street Art Activism: What White People Call Vandalism*, HARV. POL. REV. (Oct. 21, 2020), <https://harvardpolitics.com/street-art-activism/> (stating that street art “holds the unyielding narratives of humans who have been historically silenced.”); Veronica Oliver, *Civic Disobedience: Anti-SB 1070 Graffiti, Marginalized Voices, and Citizenship in a Politically Privatized Public Sphere*, CMTY. LITERACY J., Fall 2014, at 62.

2. See Choi, *supra* note 1 (illustrating that artists used graffiti to rebel against France’s social hierarchy during the French Revolution and that the upper echelon of society labeled the artworks “vandalism”); see also Natachi Onwuamaegbu, *Preserving Protest Art Before It Gets Washed Away*, BOS. GLOBE (May 19, 2021, 12:48 PM), <https://www.bostonglobe.com/2021/05/19/lifestyle/preserving-protest-art-before-it-gets-washed-away/>.

3. See Choi, *supra* note 1.

4. *Id.*

5. See Carmiña M. Diaz, *Art Law Research: An Introduction*, 86 L. LIBR. J. 335, 335 (1994) (explaining that artists began demanding legal protections in light of the increasingly recognized economic value of their works).

6. Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A.

7. See *infra* Part II.B, at 7–9 (detailing the protections and requirements of VARA).

8. U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES: A REPORT OF THE REGISTER OF COPYRIGHTS 34 (2019) [hereinafter AUTHORS, ATTRIBUTION, AND INTEGRITY].

9. *Id.* at 35.

10. See, e.g., Evan Sult & Paige Brubeck, *A Guide to St. Louis’ Non-Traditional Art Scene*,

Recognition of moral rights by Congress still left VARA eligibility determinations to the courts.¹¹ The broad category of potentially eligible visual artworks has highlighted statutory ambiguity within the Copyright Act and VARA.¹² The regulatory body tasked with overseeing the Copyright Act and VARA—the U.S. Copyright Office (hereinafter the Office)—concedes that moral rights have not received administrative attention since VARA’s enactment.¹³ The Office asserts that a blanket moral rights statute is unnecessary as the existing patchwork of protections largely benefits artists but acknowledges that targeted changes will strengthen individual artist protections.¹⁴ The Office has taken a hands-off approach to regulating moral rights, recognizing that courts struggle with statutory ambiguity and recommending that Congress take action to clarify.¹⁵ A circuit split between the Second and Seventh Circuits denotes the difficulty courts have with VARA eligibility and highlights the confusion that occurs when deciding whether an artwork satisfies the fixation requirement.¹⁶

This Comment explores the different standards courts employ to determine whether a piece of artwork receives VARA protections. Artists continue to prove street art’s cultural, social, and political importance;¹⁷ however, confusion still overwhelms the Judicial Branch.¹⁸ The Office is the administrative body tasked with overseeing both the Copyright Act as well as VARA.¹⁹ The Office has noted that the artistic landscape protected by

RIVERFRONT TIMES (Mar. 15, 2019), <https://www.riverfronttimes.com/stlouis/a-guide-to-st-louis-non-traditional-art-scene/Content?oid=30829088> (noting a diversity of non-traditional art forms in the St. Louis area).

11. See Copyright Act of 1976, 17 U.S.C. § 411(a) (noting that violations of an author’s rights under VARA are exempted from the registration requirement of the Copyright Act); see also *infra* Part IV (illustrating the different methods courts use when determining VARA eligibility).

12. See generally AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8 (compiling a comprehensive review of ambiguous legislative language and concepts surrounding moral rights).

13. *Id.* at 3.

14. See *id.* at 9; see also *infra* Part II.B.

15. See generally AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8.

16. See *infra* Part III.A, pp. 12–14 (analyzing the different standards the Second and Seventh Circuits adopt with respect to VARA’s fixation requirement).

17. See *infra* Part II.A, pp. 5–6 (describing how street art has, and continues to be, a valuable instrument used to highlight social and political issues, and demand change).

18. See generally AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8 (providing the different tests courts employ when determining eligibility for moral rights protections under VARA).

19. Caleb L. Green, *The Visual Artists Rights Act: A Legal Tool to Preserve Modern Protest Art, Landslide*, LANDSLIDE, Nov.–Dec. 2021, at 36, 38, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/january-february/visual-artists-rights-act-legal-tool-preserve-modern-protest-art/#12.

moral rights is subject to change as yet unknown transformations in technology and popular artistic culture come into being;²⁰ as such, the one consistency with respect to art law is the evolutionary nature of the field.²¹ Acknowledging this innovative landscape, resolving the statutory ambiguity, and protecting artists' moral rights is best accomplished through a liberal, rather than limiting, definition of fixation.

II. BACKGROUND

A. *Significance of Street Art*

Street art continues to command attention as artists use their platform to participate in social and civil rights protests.²² Most notably, the 2020 Black Lives Matter protests, ignited by the murder of George Floyd by police officer Derek Chauvin, sparked global marches and rallies.²³ In addition to traditional methods of demonstration, street art emerged as a prominent form of protest.²⁴ Protestors not only took to the streets to march but used the pavement as a canvas to boldly and effectively communicate their message.²⁵ Artists all over the world participated in the movement by creating murals protesting racial injustice.²⁶

Street art is increasingly recognized as culturally significant.²⁷ It is appreciated by the communities that are home to the artworks and is

20. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 7.

21. See Diaz, *supra* note 5, at 335 (stating that the emergence of art law as a field coincided with an increase in artists' rights awareness, media attention paid to artists, and a sharp increase in artwork prices).

22. See, e.g., Green, *supra* note 19, at 37–38 (discussing pieces displayed in Las Vegas and along the border between the United States and Mexico to protest immigration practices).

23. *Id.*; Catherine Lankes, *How George Floyd's Death Reignited a Worldwide Movement*, DW NEWS (July 3, 2021), <https://www.dw.com/en/how-george-floyds-death-reignited-a-worldwide-movement/a-56781938> (activists created street murals and other forms of art conveying anti-racist messaging in addition to traditional forms of protest such as marches and rallies).

24. See Green, *supra* note 19, at 37–38; Lankes, *supra* note 23.

25. See Green, *supra* note 19 (describing a District of Columbia mural commissioned by Mayor Bowser, painted by protestors, that read “BLACK LIVES MATTER” over two blocks).

26. Arwa Haider, *The Art of Protest: The Street Art that Expressed the World's Pain*, BBC CULTURE (Dec. 13, 2020), <https://www.bbc.com/culture/article/20201209-the-street-art-that-expressed-the-worlds-pain>.

27. *Street Art and IP Protection. What is the Legal Framework to Consider?*, AD REGUL. NEWS (Jan. 20, 2019), <https://www.adregulationews.com/post/2019/01/20/street-art-and-IP-protection-what-is-the-legal-framework-to-consider/>.

established as artistically, socially, and economically valuable.²⁸ Those opposed to street art in their communities suggest that artists should create under strictly legal circumstances; however, as discussed below, legality is not required for statutory protections to adhere to a piece.²⁹ Alternatively, increased popularity has driven companies to use graffiti-style calligraphy in extensive marketing campaigns, exhibiting the economic value attached to street art without compensating the artists deserving credit or communities fostering this art form.³⁰

The Office identified protest art as a category of works eligible for VARA protections.³¹ Vague instructions in the VARA House Report advised courts to “use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope”³² Protest art, the Office argues, involves the same moral rights concerns as artworks that do not promote political messages or social causes; as such, exclusion based on theme or interpretation should be prohibited.³³ Protecting protest art combats the gentrification of street art by extending moral rights and providing legal recourse to the artists.³⁴

B. Historical Expansion of Artists’ Copyrights

Codified in 1787, the Copyright Clause established protections for scientific and useful artistic progressions.³⁵ Since then, artists have increasingly received protections under the law, mainly under the Copyright Act.³⁶ The Copyright Act allows artists to maintain limited monopolies over their work and establishes rights consistent with First Amendment free speech principles.³⁷ In the most recent iteration of the Copyright Act, artists

28. *Id.* (asserting that street art was once labeled vandalism but is now widely accepted as artwork).

29. *Id.*; see also *infra* Part III.A (explaining that illegally affixed artworks are not barred from receiving statutory protections under VARA).

30. Choi, *supra* note 1.

31. AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 68.

32. H.R. REP. NO. 101-514, at 11 (1990) (leaving to the courts the burden of determining which works of visual art qualify for VARA protections).

33. AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 68.

34. Choi, *supra* note 1.

35. See U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

36. Copyright Act of 1976, 17 U.S.C. §§ 101–106 (2018) [hereinafter Copyright Act].

37. See U.S. CONST. amend. I; see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)

received protections for both published and unpublished works, so long as the artist fixed the piece in a tangible form.³⁸

Congress passed VARA in 1990 as an amendment to the Copyright Act and extended the protection of moral rights to artists.³⁹ Moral rights stem from the French term *droit moral* and embody the idea that artwork expresses the artist's personality and allows for non-economic rights.⁴⁰ When artists retain the moral rights to their work, they retain the rights to attribution and integrity regarding the specific piece.⁴¹ VARA protects visual artists' moral rights for pieces that fall within applicable categories of the Copyright Act.⁴² These categories include paintings, drawings, prints, or sculptures, regardless of medium or materials used.⁴³ VARA protects an artist's work against negligent or intentional mutilation, distortion, or destruction.⁴⁴ The Copyright Act outlines the availability of either actual damages and profits or statutory damages.⁴⁵ However, in both situations the artist is required to present proof of the amount lost.⁴⁶ Furthermore, if an artist chooses to pursue statutory damages, the Copyright Act caps the amount recoverable at \$30,000 per piece or, in the event the artist is able to prove that the destruction was willful, up to \$150,000 per piece.⁴⁷

The Supreme Court has acknowledged Congress's authority to expand upon copyright protections and held that free expression is powered by the same statutory authority.⁴⁸ The Copyright Act secures the notion of free expression, which establishes artists' rights to their work and allows them to

(determining that the purpose of copyright is to promote free expression). The Framers would view the limited monopolies available through copyright as harmonious with free speech principles. Copyright law contains two First Amendment provisions by (1) protecting expressions and not ideas, thereby distinguishing between the two and (2) allowing public "fair use" of facts, ideas, and expressions in certain circumstances. *Id.*

38. Copyright Act, 17 U.S.C. §§ 101–106.

39. *Id.* at §§ 101, 106a.

40. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 6.

41. See *id.* at 3 (defining the right of attribution as "the right to be credited as the author of one's work" and the right of integrity as "the right to prevent prejudicial distortions of one's work").

42. See Copyright Act, 17 U.S.C. §§ 101, 106a.

43. See Copyright Act, 17 U.S.C. § 101.

44. *Id.* at § 106a; see also *English v. BFC & RE. 11th St. LLC*, No. 97-civ-7446, 1997 WL 746444, at *3 (S.D.N.Y. Dec. 3, 1997) (emphasizing that VARA provides the right to prevent destruction to works of "recognized stature" under the umbrella of the right of integrity).

45. See Copyright Act, 17 U.S.C. § 504.

46. See *id.*

47. *Id.* at § 504(c).

48. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (finding that the Framers intended copyright to be "the engine of free expression").

maintain limited monopolies consistent with the First Amendment's free speech principles.⁴⁹ These limited monopolies establish, with the artist, a marketable right to their expressed work, which stimulates the creation and dissemination of ideas.⁵⁰

Although moral rights have been largely accepted internationally since 1928, the United States did not recognize these rights until 1989.⁵¹ Although the United States was under no obligation to provide moral rights to artists until 1989, Congress acknowledged that existing laws, working in concert, provided what amounted to the rights of attribution and integrity to artists.⁵² Congress effectively boosted the many moving parts involved with this patchwork of protections by passing VARA as an amendment to the Copyright Act.⁵³

The Office utilizes its expertise to assist Congress with U.S. copyright law by conducting studies, anticipating changes, and drafting legislation.⁵⁴ The Office accomplishes its administrative mission by supplying the public, as well as the Legislative and Executive Branches, with intellectual property assistance.⁵⁵ When the United States joined the Berne Convention, stakeholders established their positions regarding the existing medley of protections that amounted to U.S. moral rights.⁵⁶ Although Congress decided that U.S. law complied with article 6*bis*, many stakeholders argued, *inter alia*, that the common law only provided recourse for "extreme cases of blatant and outrageous misrepresentations," and that relying on case law evolution was theoretical.⁵⁷ Perhaps foreshadowing the Office's approach to moral

49. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (clarifying that the First Amendment is harmonious with and promoted by copyright).

50. *Harper & Row Publishers*, 471 U.S. at 558.

51. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 6–7 (stating that moral rights were internationally codified at the 1928 Berne Convention—Rome revision).

52. See *id.* at 7 (through a complicated latticework consisting of the Lanham Act, the Copyright Act, and state laws, artists could retain essentially the rights of attribution and integrity to their work); see also Lanham Act, 15 U.S.C. §§ 1051, 1124–25 (creating a national trademark registry and providing protections against infringement or dilution of an owned trademark).

53. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 7.

54. U.S. COPYRIGHT OFF., A BRIEF INTRODUCTION AND HISTORY, <https://www.copyright.gov/circs/circ1a.html>.

55. See *id.* (describing the U.S. Copyright Office's (the Office's) mission as "to promote creativity by administering and sustaining an effective national copyright system").

56. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 23.

57. *Id.* at 23–24. Influential stakeholders argued the sufficiency of existing protections; notably, a Disney representative testified that progress made in trademark, unfair competition, and privacy law prevented a statutory need for moral rights. See *id.* at 23.

rights, then-Register of Copyrights, Ralph Oman, did not take a stance on the issue but rather opined that “careful Congressional examination of moral rights is essential.”⁵⁸

III. OVERVIEW OF COPYRIGHT ACT AND VARA REQUIREMENTS

A. *The Impact of a Piece’s Legality*

Protections extended to artists under the Copyright Act are not contingent upon how the artist affixed the piece.⁵⁹ Neither the Copyright Act nor VARA explicitly bar copyright or moral rights protections for artworks placed illegally.⁶⁰ Courts, however, may consider the circumstances surrounding the creation and the manner of fixation of a piece to determine the availability of protections and, by extension, damages to the artist.⁶¹ Furthermore, while the Copyright Act does not explicitly state that eligibility for copyright protections is dependent upon the legality of the affixed piece, the property owner of the tangible medium retains possessory rights where the piece was illegally placed.⁶²

In *English v. BFC & R East 11th Street LLC*,⁶³ six artists inserted their artwork into a community garden.⁶⁴ The artists described the garden as “a large environmental sculpture encompassing the entire site and comprised of thematically interrelated paintings, murals, and individual sculptures of concrete, stone, wood and metal, and plants.”⁶⁵ The artists painted three of the five murals on the building owned by the plaintiffs; the other two were placed on a building owned by the city—one of which

58. *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the H. Comm. on the Judiciary*, 100th Cong. 48 (1988) [hereinafter 1987 *BCIA Hearings*] (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, Library of Congress).

59. See Barry Werbin, *Street Art and VARA: The Intersection of Copyright and Real Estate*, HERRICK: ARTS & ADVOC., May 2016, at 1, 3, <https://www.herrick.com/content/uploads/2016/05/Street-Art-and-VARA-The-Intersection-of-Copyright-and-Real-Estate.pdf> (comparing the Copyright Act to VARA, in which VARA requires the work to be fixed in a tangible medium).

60. *Id.*

61. See *id.* (indicating that courts may certainly take into consideration the legality, or illegality, of the artwork when determining potentially equitable remedies).

62. See Green, *supra* note 19; see also Sheldon A. Evans, *Taking Back the Streets? How Street Art Ordinances Constitute Government Takings*, 25 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 685 (2015).

63. No. 97-cv-7446, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997).

64. *Id.* at *1.

65. *Id.* (internal citation and quotation marks omitted).

was placed without the city's explicit permission.⁶⁶ The court held that VARA protections were unavailable when artists illegally created removable works and noted that there might be limits for illegally created non-removable artworks as well.⁶⁷ However, the Northern District of New York's ruling contrasts this hardline reading of VARA in *Pollara v. Seymour*,⁶⁸ where the court indicated that removable artwork placed without the property owner's approval could be covered by VARA protections.⁶⁹ In *Pollara*, the Gideon Coalition, a public interest organization, hired the artist to create a protest piece highlighting the potential for budget cuts to create a barrier, keeping the poor from accessing the right to counsel.⁷⁰ The artist installed the piece without a permit and, before the public saw the mural, the property owner removed the artwork from the frame, severely damaging the piece in the process.⁷¹ The court reasoned that a conservative reading of VARA would not advance the underlying policies of the statute, which is to protect artistic works from destruction.⁷² A piece, newly created or perhaps not yet displayed, could still be eligible for VARA protections because it would be contrary to the underlying policies of VARA to degrade the artist's interest in the expression of their labor.⁷³

66. *Id.*

67. *See id.* at *3–5 (Dec. 3, 1997) (mentioning that artists could, without permission of the landowner, place artworks on land actively being developed to stall or halt development of the property, which would be inconsistent with Congress's intent in passing VARA); *see also Intellectual Property – Copyright – Second Circuit Finds Temporary Art Protected Under the Visual Artists Rights Act. – Castillo v. G&M Realty L.P.*, F.3d 155 (2d Cir. 2020), 134 HARV. L. REV. 1881, 1886 (2021) [hereinafter *Second Circuit on VARA*].

68. 150 F. Supp. 2d 393 (N.D.N.Y. 2001).

69. *Id.* at 394–95; *see supra Second Circuit on VARA*, note 67, at 1886–87.

70. *Pollara*, 150 F. Supp. 2d at 394–95.

71. *Id.* (observing that the artist was hired by a coalition whom she believed had obtained the required permission as the coalition participated in an annual lobbying effort).

72. *Id.* at 397 (examining “(1) the society's interest in the preservation of works of artistic merit; and (2) the artist's economic self-interest in preservation of [their] own works so as to enhance [their] reputation as an artist” and finding that pieces could be covered by VARA protections if experts could hold the piece to be of recognized stature even after it had been destroyed. In this type of situation, the preservative purpose of VARA is served regardless of whether the piece has been displayed or its merits debated; this is especially true when the artist has established a reputation within the community).

73. *Id.* at 397–98 (holding that since “an artist's interest in the product of [their] labor is no less significant prior to its public display . . . , [i]t would defy logic to read the phrase ‘work of recognized stature’ in such a way as to ignore the substantial interest which accrue upon the *creation* of a work of art.”).

The issue of legality is generally not contested when the artwork at issue is commissioned.⁷⁴ Property owners who commission artists to create new works may, in writing, designate the piece as made for hire, effectively eliminating the availability of VARA rights for the artist or collective.⁷⁵ While artists retain the moral rights to their work under VARA, regardless of whether they own the copyright, they may waive possessory rights through a written agreement.⁷⁶ VARA waivers further distinguish between possessory rights and moral rights because even when an artist waives the possessory rights to their work, they retain the moral rights protections provided by VARA.⁷⁷ This means that if an artist waives their rights to the physical work, either by written agreement or through the sale of the physical work, the person who owns possessory rights to the piece may not modify or alter the piece, regardless of whether title has officially transferred.⁷⁸ Furthermore, the possessory owner may not copy or in any way reproduce the piece, even if they hold title.⁷⁹

The Copyright Act also identifies other situations in which the artist or artists may be difficult to identify.⁸⁰ For example, an artist may prefer to create works anonymously, under a fictitious name, or as part of a merged project.⁸¹ Congress's purposeful inclusion of these potential situations—where artists are essentially non-identifying with respect to their work—represents the legislative intent to expand upon, rather than narrow, those whose art may fall under the statutory protections.

B. *The Impact of a Piece's Recognized Stature*

Under VARA, artists may protect their work if the piece is of “recognized stature.”⁸² Although this term acts as a gatekeeper by determining which works may fall within VARA protections, it is not defined in the statutory language.⁸³ Courts have primarily determined when a work achieves the notoriety requirement and created a variety of tests to define this

74. Werbin, *supra* note 59, at 5.

75. VARA, 17 U.S.C. § 106A(e).

76. *Id.* §§ 106A(b), (e).

77. Werbin, *supra* note 59.

78. *Id.*

79. *Id.*

80. Copyright Act, 17 U.S.C. § 101.

81. *See id.* (defining “anonymous work,” “joint work,” and “pseudonymous work,” and indicating the protections available to artists preferring to use such identify protections).

82. VARA, 17 U.S.C. § 106A(a)(3)(B).

83. *See* AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 77.

prerequisite.⁸⁴ Relying too heavily on expert testimony, notably those including a scholarly analysis of the artwork, raises the hurdle artists must overcome and restricts VARA protections to those pieces that may be deemed masterpieces rather than works of recognized stature.⁸⁵ Additionally, courts struggle with whether to only consider the notoriety of the artwork irrespective of the artist.⁸⁶

The Office has noted the differing methods of determining recognized stature and identified a preferred method, but not a specific test, for courts to apply.⁸⁷ Depending upon the artwork at issue, tests that rely heavily upon an academic or scholarly analysis are unnecessarily restrictive and fail to consider the piece's value within its community.⁸⁸ Utilizing inclusive methodology is consistent with the congressional intent to protect artists' moral rights and safeguard artistic, cultural contributions.⁸⁹ Analyzing the importance a piece has in its community is consistent with protecting artists' moral rights in marginalized populations and reducing the potential for gentrification of street art.

C. *The Impact of a Piece's Length of Fixation*

The text of the Copyright Act outlines a broad definition for the fixation of an artwork.⁹⁰ VARA allows an artist to retain moral rights to their work, which are distinct from ownership of the physical work itself.⁹¹ VARA protects artists against: (1) intentional or grossly negligent destruction of an artwork that has achieved recognized stature; and (2) intentional distortion,

84. See *id.* (pointing out that the legislature considered creating a non-exhaustive list of those able to attest to the stature of a particular work but declined to adopt the language due to worries of cases becoming “a battle of expert witnesses”).

85. See *id.* at 77–78 (proposing that requiring works to be deemed “meritorious” by artistic experts is restricting the scope of protectable artworks past that which the legislature intended).

86. Compare *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004), with *Pollara v. Seymour*, 150 F. Supp. 2d 393, 397–98 (N.D.N.Y. 2001), and *Cohen v. G&M Realty L.P.*, No. 13-CV-5612, 2017 WL 1208416, at *3 (E.D.N.Y. Mar. 31, 2017).

87. See *AUTHORS, ATTRIBUTION, AND INTEGRITY*, *supra* note 8, at 77–78 (outlining the different approaches courts take to determine notoriety and weight given to a piece's merit, recognition within the artistic community, awards, expert testimony, and local recognition).

88. *Id.* at 79 (reiterating that the prevailing judicial interpretation is too narrow, the Office agrees that a work's “recognized stature” is more than being “meritorious”).

89. *Id.* at 77–80 (extending the interpretation of “recognized stature” beyond opinions of the academic community coincides with congressional intent).

90. See Copyright Act, 17 U.S.C. § 101 (determining that “fixed” means when a piece can be perceived for more than some transitory period of time in a tangible medium).

91. See *Second Circuit on VARA*, *supra* note 67, at 1881.

mutilation, or other modification prejudiced against the artist.⁹² Paintings, drawings, prints, and sculptures all fall within the scope of VARA.⁹³ The medium and materials used do not necessarily bar artworks from protections if the pieces fall under one of the defined categories of eligible artwork types.⁹⁴

According to the Office's guidelines, if an artist does not intend for the audience to perceive the piece for longer than a "transitory period" or if the medium is constantly changed, the artwork may not be registered.⁹⁵ While copyrights require registration for an artist to own the copyrights to their artwork, VARA protections are specifically exempt from this registration requirement.⁹⁶ Furthermore, the manner or means of fixation are largely irrelevant so long as the piece is fixed in a stable form and is perceivable, either directly or through the use of some type of machinery.⁹⁷

IV. A CIRCUIT SPLIT REGARDING FIXATION

Tasked with determining an artwork's eligibility for VARA, courts have adopted different standards for fixation.⁹⁸ The court in *Kelley v. Chicago Park District*⁹⁹ held that a conservative interpretation of VARA's fixation requirement was necessary and adopted a rule that excluded works created with natural materials.¹⁰⁰ Conversely, a liberal interpretation of the fixation requirement in *Castillo v. G&M Realty L.P.*¹⁰¹ established that even inherently transient works of visual art could receive VARA protections.¹⁰²

In *Kelley*, the Chicago Park District commissioned a garden by a renowned artist.¹⁰³ The Chicago Park District promoted and displayed *Wildflower Works* as a "new form of living art" upon "breathtaking natural canvases."¹⁰⁴ When the garden bloomed, it was met with widespread acclaim, and the Chicago Park District continued to market the work as "living landscape art" that incorporated

92. Green, *supra* note 19.

93. Copyright Act, 17 U.S.C. § 101.

94. *Id.*

95. Werbin, *supra* note 59, at 3.

96. Copyright Act, 17 U.S.C. § 412.

97. See H.R. REP. NO. 94-1476 (1976) (citing the historical and revision notes).

98. Compare *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303–05 (7th Cir. 2011), with *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020) (explaining in *Kelley* that fixation is not necessarily a statutory condition to copyright, while in *Castillo*, a work satisfies recognized stature when it is one of one of high quality, status, or caliber in a community).

99. 635 F.3d 290 (7th Cir. 2011).

100. *Id.* at 291–92.

101. 950 F.3d 155 (2d Cir. 2020).

102. See *id.* at 163.

103. See *Kelley*, 635 F.3d at 291.

104. *Id.* at 292–93.

the forces of nature and produced constant change.¹⁰⁵ Ultimately, the Chicago Park District reduced the size of the garden to half of its original size, which prompted the artist to bring a suit under VARA for the destruction of his work.¹⁰⁶

The court interpreted two of VARA's terms, "painting" and "sculpture," to be words of limitation.¹⁰⁷ While the court acknowledged that the prerequisite requirement of fixation for copyright was broadly defined, *Wildflower Works* was held to be insufficiently fixed to warrant coverage by VARA.¹⁰⁸ The court reasoned that gardens are planted and cultivated, activities that are concededly furthered by the artist, but that focal aspects of the work are subjected to the elements, alive, and inherently interchangeable—furthermore, the court accredited the beauty of gardens to the forces of nature.¹⁰⁹

In *Castillo*, the court found the transient nature of the artworks to be dispositive when determining whether an injunction barring the destruction of the artworks was appropriate.¹¹⁰ Injunctions are rarely granted, as here, even though the Copyright Act explicitly allows courts to grant temporary and permanent injunctive relief.¹¹¹ Here, the property owner commissioned an artist, who in turn commissioned additional artists to create aerosol paintings¹¹² on his property, known by the name of 5Pointz.¹¹³ The works rapidly gained attention and recognition, evolving into a major aerosol artistry site, attracting droves of visitors, extensive media coverage, and acknowledgment by celebrities.¹¹⁴ The court imposed liability on the property owner for destroying all but four works, bringing the settlement amount to \$6.75 million.¹¹⁵ The court held that the four works without liability lacked long-term preservation and had not been sufficiently discussed outside of the 5Pointz site, and most notably, that the destruction of the works was not to the detriment of the artist.¹¹⁶

105. *Id.* at 293–94 (noting that Kelley's permit was renewed because of the success of the display).

106. *Id.* at 295.

107. *Id.* at 300 (limiting the words to be specific to the noun, not to be metaphorical or used by analogy).

108. *Id.*

109. *Id.* at 304 (drawing a line stating that the artist's involvement was insufficient when compared with natural forces and concluding that the artist was not the author of the work).

110. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 163 (2d Cir. 2020).

111. Copyright Act, 17 U.S.C. § 502(a).

112. Jess Blumberg, *Aerosol Art*, SMITHSONIAN MAG. (Feb. 2008), <https://www.smithsonianmag.com/arts-culture/aerosol-art-16256605/> (categorizing graffiti as works of aerosol art).

113. *Castillo*, 950 F.3d at 162–63.

114. *Id.* at 162.

115. *Id.* at 164.

116. *Id.*

The artists originally sought a preliminary injunction to keep the property owner from destroying the site and, ultimately, their work.¹¹⁷ However, the court did not issue the preliminary injunction, noting that the works embodied a sort of inherent creative destruction.¹¹⁸ Ultimately the court decided that the preliminary injunction was unnecessary because the artists could recover for any potentially destroyed property based upon the moral rights conferred under VARA.¹¹⁹ The court held that VARA protections extended to even temporary works of art, noting that commissioned graffiti aerosol paintings were sufficiently fixed to the buildings.¹²⁰

Congress did not intend to limit VARA protections to only traditional pieces of visual art.¹²¹ Courts have recognized that the artist's status within the community can have significant sway over the eligibility for VARA protections when the public did not view the piece.¹²²

In *Pollara v. Seymour*, the court noted that an artist's reputation could serve to satisfy the VARA notoriety requirement, regardless of whether the painting was affixed long enough for the public to perceive it.¹²³ It would be hard to imagine a court denying VARA protections to well-known artists and their pieces that incorporate flora and fauna were their pieces destroyed. Take, for example, two pieces by Banksy, a street artist widely acknowledged as the best in the world, which incorporate inherently natural and alterable materials.¹²⁴ In the first piece, Steve Jobs is standing with a full bag over his shoulder; the piece is located next to a houseless encampment and situated to make it look as though Jobs is taking from the working class.¹²⁵ The second piece shows the silhouette of a person, holding a shaker can of aerosol paint, bent over and regurgitating flora.¹²⁶ Banksy used the flowers that were growing up the wall to portray the person's vomit.¹²⁷ These two pieces would be substantially changed without the materials used, which the artist had next to zero control over; however, it seems unlikely that a court would consider these pieces to be insufficiently affixed as it pertains to VARA protections.

117. *Id.* at 163.

118. *Id.* at 162.

119. *Id.* at 163.

120. *Id.* at 164.

121. *See* Copyright Act, 17 U.S.C. § 101 (stating that VARA protections could be extended to applicable pieces of artwork regardless of what tangible medium and materials were used to create the piece).

122. *Pollara v. Seymour*, 150 F. Supp. 2d 393, 397–98 (N.D.N.Y. 2001).

123. *Id.*

124. *See* Banksy, <https://banksy.co.uk/out.html> (pieces number fifty-four and sixty-two).

125. *See id.* (piece number fifty-four).

126. *See id.* (piece number sixty-two).

127. *Id.*

V. ADMINISTRATIVE OVERSIGHT OF MORAL RIGHTS

Artists' moral rights are an area of law that the Office has concededly paid little attention to.¹²⁸ The Office pinpointed three pillars to consider when analyzing moral rights: (1) harmonizing changes with existing constitutional and copyright law; (2) appreciating the importance of artistic rights to attribution and integrity; and (3) recognizing that moral rights must be malleable to match the diversity among creative industries.¹²⁹ The Office solicited input from artists, academics, and other stakeholders—as well as from the public—regarding current issues surrounding moral rights.¹³⁰ The Office has put forth recommendations for the legislative improvement of VARA.¹³¹ Additionally, the Office identifies areas of ambiguity within VARA, such as what constitutes a work of “commercial art” and the notoriety requirement.¹³² Finally, the Office has acknowledged that courts struggle with the “recognized stature” requirement due to the relatively broad range of circumstances courts must consider.¹³³

The language within the Copyright Act is ambiguous and merely states that the artwork be affixed for some period of time, long enough for the artwork to be perceived or communicated for more than an instant.¹³⁴ The court in *Kelley v. Chicago Park District* held that *Wildflower Works* was so inherently interchangeable and consistently changing due to the forces of nature.¹³⁵ Subsequently, the court held that the fixation requirement was not met.¹³⁶ In *Castillo v. G&M Realty L.P.*, the Second Circuit took a more liberal approach to the fixation requirement.¹³⁷ There, the court held that

128. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 3 (volunteering that the comprehensive moral rights report was the first to be completed in approximately thirty years).

129. *Id.* at 27–28.

130. See *id.* at 9 (announcing that the Office received over fifty comments and replies from a broad range of interested parties).

131. *Id.* at 5.

132. *Id.*

133. *Id.*

134. “A work is ‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of time more than transitory duration.” Copyright Act, 17 U.S.C. § 101.

135. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011).

136. *Id.*

137. The court held that transience would not bar an artwork from VARA protections if the piece achieved recognized stature and posited that the “temporary quality” of Banksy’s work increased its value. The Seventh Circuit determined that VARA “must have some limits” and held that a living garden could not satisfy the fixation requirement; however, the Second Circuit observed that certain durational limits are outlined by the legislature and “when

prominent aerosol paintings had both achieved the requisite notoriety and that many of the pieces were sufficiently fixed to allow the artists to recover damages under VARA.¹³⁸ The court noted that while any piece affixed for fewer than 1.2 seconds would likely not satisfy the fixation requirement, pieces affixed for more than a few moments could satisfy this requirement.¹³⁹

VARA outlines the exceptional circumstances in which an artist would not be eligible to recover damages for destroyed or mutilated artworks.¹⁴⁰ Works that are degraded or otherwise modified by the nature of the materials used or other natural forces would not allow for VARA protections.¹⁴¹ Furthermore, modifications made to publicly display or to conserve the work are not sufficient alterations to allow for VARA protections.¹⁴² Because the Copyright Act does not bar an artist from retaining moral rights to a piece based upon the medium or materials used, the fact that an artwork incorporates materials inherently and intentionally alterable by nature should not keep the artist from retaining VARA protections.¹⁴³ The Seventh Circuit's reasoning in *Kelley* begs the question of whether all visual works of street art that incorporate plants or otherwise naturally manipulated materials would be barred, de facto, from VARA protections.¹⁴⁴ Would courts be more willing to consider living artworks as visual art, protectable by VARA, if they are vertically affixed to buildings such as Fiddler's Green Living Walls, instead of arranged as a traditional garden?¹⁴⁵

VI. RECOMMENDATION

The Office, through notice-and-comment rulemaking, should amend the definition of “fixation” to clarify that pieces created in a tangible medium, perceivable for at least a few minutes may be eligible for VARA protections—regardless as to whether the works are made using materials that are naturally

Congress wanted to impose durational limits on work subject to VARA, it knew how to do so.” Compare *id.* at 304–05, with *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 168 (2d Cir. 2020).

138. *Id.*

139. *Id.* at 168.

140. VARA, 17 U.S.C. § 106A(c).

141. *Id.* § 106A(c)(1).

142. *Id.* § 106A(c)(2).

143. See Copyright Act, 17 U.S.C. § 101.

144. See *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304–05 (7th Cir. 2011) (concluding that a garden's appearance is attributable to the growing and changing plant and “not the intellect of the gardener”).

145. See Corinne Anderson, *Fiddler's Green Living Walls Hold 35,000 Plants that Make Four Beautiful Murals*, 303MAGAZINE.COM (July 9, 2019), <https://303magazine.com/2019/07/fiddlers-green-living-wall/>.

occurring or influenced by nature. Furthermore, because of the ever-changing field of art and the ways in which artists are constantly finding new mediums for and means of expression, Congress did not intend the Copyright Act to give unfettered expansion to areas that are not at least considered already or to act as a complete and exhaustive list of protectable works.¹⁴⁶

The Office analyzes potential changes to moral rights concerning current U.S. law, the artists' interest in protecting their works, and the recognized diversity among the categories of artworks.¹⁴⁷ The Office has acknowledged the ambiguity present in VARA and the difficulties that it has created for both interested parties and courts.¹⁴⁸ Adopting a definition of "fixation," consistent with the Second Circuit will serve each of these three interests.

As to element one, the Office concedes that the current moral rights protections are consistent with the First Amendment and that enhancements to rights of attribution and integrity need not infringe upon free speech.¹⁴⁹ Street art (specifically pieces that incorporate natural elements such as flowers or plants) receiving protection under VARA would be consistent with the historic expansion of copyrights.¹⁵⁰ As stated by the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹⁵¹ free expression is driven by copyright, as the Framers intended.¹⁵² Furthermore, the Office acknowledges that current moral rights protections are consistent with the First Amendment.¹⁵³ An informal rule issued by the Office, stating that pieces created in a tangible medium and capable of perception for at least a few minutes may be eligible for VARA protections regardless of whether the materials used are naturally occurring or influenced by nature, would resolve the statutory ambiguity surround the fixation requirement.

146. H.R. REP. NO. 94-1476, at 51-52 (1976).

147. See AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 4 (explaining that relevant portions of U.S. law to consider are (1) the concept of fair use, (2) constitutionally required copyright term limits, and (3) the First Amendment).

148. See *id.* at 9.

149. *Id.* at 28-29. While the Office acknowledges concerns that an increase in moral rights protections would come at the behest of free speech, it points out that current safeguards, such as the exception for fair use and the distinction between idea and expression, could curb any free speech infringements. *Id.* at 29-30.

150. See H.R. REP. NO. 94-1476, at 51-52 (1976) (communicating that copyright protections have been extended to expressive forms already in existence, once it has become apparent that those forms are recognized as worthy of such protections).

151. 471 U.S. 539 (1985).

152. *Id.* at 558.

153. AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 29.

Second, moral rights are imperative to incentivize creation through both recognition and monetary gain.¹⁵⁴ Decreasing the ambiguity surrounding which pieces are eligible for VARA protections would be consistent with protecting artists' interest and their rights of attribution and integrity. The Office acknowledges the creative and economic value in protecting artists' moral rights,¹⁵⁵ if artists were confident of when their works would receive protection, there would be creative and economic incentives to create street art pieces. For example, following the recent decision in *Castillo*, where artists succeeded in their suit against the property owner who whitewashed their works, artists are beginning to take disputes to the courts regarding their destroyed works.¹⁵⁶ Artists in New York have banded together to demand justice regarding the New York Police Department's campaign against street art, which resulted in the destruction of multiple commissioned or otherwise authorized artworks affixed in the city.¹⁵⁷ An informal rule, issued through notice-and-comment rulemaking by the Office, establishing that artists can achieve VARA eligibility for their pieces if the artwork has been affixed for more than a few minutes, regardless of whether nature alters the materials, would incentivize creation.

Finally, alterations to moral rights should be sector-specific because generalized changes would risk overprotecting some while leaving those artists who lack the power to negotiate vulnerable.¹⁵⁸ The Office considers the vast overlay of moral rights and the significant needs of each sector.¹⁵⁹ As street art has already become an established sector of art, requiring

154. *See id.* at 35 (emphasizing testimony from artist Melvin Gibbs "For us, attribution—that is our currency. I don't exist if people don't know who I am. I mean that in the most literal sense of 'I don't eat.' You know, so every time something goes out that I've participated in that I don't get attribution for, it affects my family. And how that affects the community is that the less I am able to create, the less I am able to help other people create. And the less the community of—it shrinks the art—community of artists, which will eventually shrink the creativity of this country as a whole.").

155. *Id.* at 34–35.

156. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 163, 170 (2d Cir. 2020); *see* Kate Lucas, *Possible Class Action Lawsuit Against NYPD and City Raises New VARA (and Civil Rights) Questions*, GROSSMAN LLP: ART LAW BLOG (June 30, 2021), https://www.grossmanllp.com/Possible-Class-Action-Lawsuit-Against-NYPD-and-Ci?fbclid=IwAR0-mtSihVNCiyfmRITn-fXF192twDc8kjeCVgvkl_IQCzNwB5X6b6iOfI.

157. *See* Lucas, *supra* note 156 (demonstrating that artists whose pieces were destroyed by the New York Police Department alleged that the Department's campaign against street art, an art form that was "long targeted as a sign of 'social decay' under the 'broken windows' approach to policing," was spurred on by an increase in anti-police rhetoric included in pieces and resulted with officers destroying authorized artworks).

158. AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 8, at 36.

159. *Id.*

statutory protections under VARA with guidance that more clearly outlines when the protections are extended would address artists' needs.¹⁶⁰ Like many other art forms, street artists are continually innovating and pushing the boundaries to create new artworks. This type of innovation and creativity is exactly what the Framers intended to protect and foster.¹⁶¹

The Office should, through notice-and-comment rulemaking, amend the definition of "fixation" to clarify that pieces created in a tangible medium, capable of perception for at least a few minutes, may be eligible for VARA protections regardless of whether artists created the artworks using materials that are naturally occurring or influenced by nature.¹⁶² The Office has exercised its rulemaking authority regarding ambiguous terms, following the informal rulemaking notice-and-comment procedure;¹⁶³ additionally, it has solicited input regarding an updated definition of who a claimant may be for purposes of copyright registration.¹⁶⁴ Resolving ambiguity and establishing uniformity regarding visual artists' rights is exactly what Congress expected VARA to accomplish.¹⁶⁵

Congress did not intend the Copyright Act to either give unfettered expansion to areas that are not at least considered already nor was it intended to act as a complete and exhaustive list of protectable works.¹⁶⁶ Experimenting and using new methods and materials is consistent with both the congressional intent of the Copyright Act and VARA, as well as the history of expanding artists' protections under both statutory and common law.¹⁶⁷ Restricting artists from receiving statutory protections for their pieces due to their use of inherently alterable materials places a limit upon the allocation of moral rights inconsistent with the statutory scheme.¹⁶⁸ Relying on case law to define statutory terms is costly and inefficient as it requires the artists Congress intended to protect to foot the bill to find out whether or not they indeed are protected.¹⁶⁹ Many street artists are self-taught, and the

160. *See id.* at 7.

161. *See* U.S. CONST. art. I, § 8, cl. 8; U.S. CONST. amend. I; *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

162. Copyright Act, 17 U.S.C. § 101.

163. Registration of Copyright: Definition of Claimant, 77 Fed. Reg. 29,257 (proposed May 17, 2012) (to be codified at 37 C.F.R. pt. 202).

164. *Id.*

165. H.R. REP. NO. 101-514, at 315.

166. H.R. NO. 94-1476 at 529 (1976).

167. *See* U.S. CONST. art. I, § 8, cl. 8; *see also* U.S. CONST. amend. I; *Eldred*, 537 U.S. at 219; 17 U.S.C. §§ 101–106.

168. Copyright Act, 17 U.S.C. § 101.

169. Terrica Carrington, *A Small Claims Court is on the Horizon for Creators*, COPYRIGHT

Bureau of Labor Statistics does not report income data for these careers; however, classifying street art as a subset of fine art leads to an average annual salary of roughly \$48,000, making it economically infeasible for an artist to finance a suit establishing precedent in the field.¹⁷⁰

The court in *Kelley* placed great importance on nature's impact on the materials used in *Wildflower Works*.¹⁷¹ This limitation—deeming pieces of street art created with materials inherently alterable by its natural surroundings ineligible—sets a precedent that could be a slippery slope in restricting artists' rights.¹⁷² First, this type of legal analysis would create restrictions on VARA eligibility in an area that the statute explicitly leaves unrestricted.¹⁷³ Second, this conservative application of VARA protections opens the door to further restrictions. If the use of flora and fauna as materials in street art creates inapplicability for pieces due to the natural alterability of the materials, then what would constitute a limit? If an artist created a piece in the traditional graffiti style with paint that, for example, changed color when it became wet from rain, would this be deemed insufficiently affixed? The statutory language already includes provisions limiting damages dependent upon how the artwork was damaged.¹⁷⁴ Damages are not available under VARA if a piece is mutilated, damaged, or otherwise destroyed through natural forces.¹⁷⁵ However, VARA does not indicate any exceptions for the artist's pieces with the materials to be altered by nature.¹⁷⁶ The Office should follow the Second Circuit's interpretation, establishing that a piece temporary in nature, but fixed for minutes, may be deemed sufficiently fixed to afford it VARA protections if the artist meets the requisite notoriety; accordingly, this definition would align with the evolution of copyright law as acknowledged by Congress.¹⁷⁷

ALLIANCE (Oct. 4, 2017), <https://copyrightalliance.org/small-claims-court-on-the-horizon/> (reporting that, according to an American Intellectual Property Law Association (AIPLA) report, litigating a copyright infringement claim through appeal costs an average of \$278,000).

170. *Graffiti Artist*, THE ART CAREER PROJECT (July 9, 2021), <https://www.theartcareerproject.com/careers/graffiti-art/> (informing artists that a career in graffiti is limited by the potential criminal implications and that dedication and persistence may not lead to a livable wage).

171. *See Kelley v. Chicago Park District*, 635 F.3d 290, 304 (7th Cir. 2011) (reasoning that, while the artist may have planned and cultivated *Wildflower Works*, ultimately, mother nature was the true driving force behind the beauty of the ensemble).

172. *See id.* at 304.

173. Copyright Act, 17 U.S.C. § 106.

174. Copyright Act, 17 U.S.C. § 113.

175. *Id.*

176. *Id.*

177. *See H.R. NO. 94-1476* at 529 (1976) (establishing that copyright law has historically expanded to protect more works of creative expression).

CONCLUSION

Street art continues to gain cultural recognition as artists prove its social, political, and economic value. The public realizes the economic value of street art, leading to companies and collectors gentrifying street art, while leaving artists and marginalized communities that deserve recognition forgotten. Federal protections acknowledge the worth and the evolutionary nature intrinsic of artistic developments, but ambiguity leaves the courts with the ability to institute limitations, allowing significant works of art to go unprotected. As the administrator of the Copyright Act and VARA, the Office must amend the fixation requirement, clarifying that a work of visual art created using naturally alterable materials, such as flora and fauna, can satisfy the fixation requirement if the artwork was affixed for a few minutes. Art is a field ephemeral by nature; statutory protections for artists should recognize that artistic ingenuity and creativity propel this field forward. Allowing the use of natural materials is consistent with expanding statutory protections of artists' rights and empowering free expression.