Visual Artists Rights Act (VARA) and the Protection of Digital Embodiments of Artworks

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I. Introduction

The United States and many other countries provide artists of certain categories of artworks with rights that are separate and different from the "'economic' or 'commercial' interests that are [typically] protected by copyright, trademark, and right of publicity doctrines."[1] These non-economic rights are commonly referenced as "moral rights."

The term "moral rights" originates from the French term "*le droit moral*," which refers to the capture of spiritual, non-economic and personal rights of an artist.[2] These rights exist independent "of an artist's copyright in his or her work," and their recognition primarily stems "from a belief that an artist in the process of creation [of his artwork] injects his spirit" and a portion of his personality into his intellectual work. [3]

Moral rights rules and statutes in most countries attempt to protect and preserve this portion of an author's personality that has been extended to a creative work by allowing the author to prevent distortion, misattribution, mutilation, destruction, and, in some instances, to prevent or control unwanted public disclosure of qualified artworks.[4] These rights are generally "inalienable and unassignable," and, given their independence from the author's copyright in the work, can technically come in conflict with the author's contractual obligations relating to the copyright is his work.[5]

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[1] Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95, 102 (1997).
[2] *Carter v. Helmsley-Spear, Inc*., 71 F.3d 77, 81 (1995) (citing Melville B. Nimmer and David Nimmer, *Nimmer on Copyright,* §8D.04[A][2] (1994)).
[3] *Massachusetts Museum Of Contemporary Art Found., Inc. v. Büche*l, 593 F.3d 38, 49 (1st Cir. 2010) (internal quotations omitted).
[4] Ralph E. Lerner and Judith Bresler*, Art Law, The Guide for Collectors, Investors, Dealers, and Artists* 1071, Practicing Law Institute (4th ed. 2012).
[5] *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, No. 93 CIV. 0373 KTD, 2000 WL 204524, at *2 (S.D.N.Y. Feb. 18, 2000).

For example, the right of disclosure, which is primarily based on "[t]he recognition that public disclosure of a work affects an artist's reputation [and that] the artist [should have] the sole prerogative to determine when and how to make his work public," has been deemed in French jurisprudence as superseding the author's contractual obligations regarding his work.[6] Specifically, the Paris Court of Appeals, in *Whistler v. Eden*, relied on the right of disclosure to excuse an artist, who had contracted to paint a portrait, from specific performance of his contractual agreement.[7] The court held that even when an artist has entered into a contractual agreement to create an artwork, he cannot be compelled to "bring [his work] to the attention of the public" if he, in good faith, believes that his "work is incomplete or a failure."[8]

In the United States, moral rights are defined by statute, under the Visual Artists Rights Act (VARA) provision of the U.S. copyright act, as independent of the exclusive rights provided in section 106 of the copyright code.[9] Therefore, "moral rights [in the U.S.] are distinct from the normal incidents of copyright ownership" and can be retained by the author even after the copyright in the work has been transferred to a third party.[10] This independent yet related nature of moral rights can potentially cause an author's moral rights in her artwork to clash with a third party's copyright or physical ownership of that

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[6] *Art Law*, *Supra* note 4, at 1072.
[7] *Id*.
[8] Jill R. Applebaum, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 Am. U. J. Int'l L. & Pol'y 191, 190-91 (1992).
[9] 17 U.S.C.A. § 106A, *Supra* note 9.
[10] James J. Mastroianni, *The Work Made for Hire Exception to the Visual Artists Rights Act of 1990 (VARA): Carter v. Helmsley-Spear, Inc.*, 4 Vill. Sports & Ent. L.J. 417, 449 (1997) (internal quotations omitted); *See also* Melville B. Nimmer, *Nimmer on Copyright,* §§ 8D.67, n.45 (1996).

artwork, after the copyright or physical ownership is transferred to the third party.[11]

However, VARA does not extend to all works of authorship protected by the Copyright Act.[12] Congress has limited the protection of VARA "only to . . . works of visual art."[13] This narrow category covers artworks such as "paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes" that exist in a single copy or limited edition of 200 copies or fewer."[14]

Since its introduction to the U.S. jurisprudence, VARA has received significant academic attention, with scholars arguing that the language of the statute is vague and ambiguous and includes too many exceptions.[15] Others have argued that "VARA was poorly drafted and offers too little--or too much—protection to visual artists."[16] The ambiguous language of the statute has also been blamed for the frustrations that many have experienced when trying to comprehend the scope and parameters of VARA.[17] Academics and practitioners have also blamed the "relatively limited case law . . . interpreting VARA" for the ambiguities associated with this statute.[18]

Given its ambiguity, it should not be surprising that "it is unclear how VARA will

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[11] Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 Harv. Int'l L.J. 353, 369 (2006)

[12] 17 U.S.C § 106(A)(b)(1990).
[13] *Carter, Supra* note 2, at 83 (noting "[VARA's] principal provisions afford protection only to authors of works of visual arts").
[14] *Id*.
[15] Elizabeth Herbst Schierman, *Moral Rights under Federal Law,* 51 Advocate 23, 24 (2008).
[16] Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA, 12* Vand. J. Ent. & Tech. L. 209, 219-55 (2010).
[17] Megan M. Carpenter, *Drawing a Line in the Sand: Copyright Law and New Museums, 13* Vand. J. Ent. & Tech. L. 463, 487 (2011).
[18] *Martin v. City of Indianapolis,* 28 F. Supp. 2d. 1098, 1104 (S.D. Ind. 1998); *See also* Schierman, *Supra* note 15; *See also* Brian Angelo Lee, *Making Sense of "Moral Rights" in Intellectual Property,* 84 Temp. L. Rev. 71, 79 (2011).

work in the digital age."[19] This lack of clarity is perhaps the reason some academics have been quick to dismiss digital artworks as being excluded from the protection of VARA.[20]

However, with the recent advances in digital technology, a more thorough review of the language of VARA in context of digital artworks is warranted. After all, various forms of art have gone digital since the introduction of VARA. Take photography as an example: nowadays, it is very rare to see anyone using an old-fashioned film camera. Professional or amateur, most photographers use digital cameras for taking photos. Other forms of art have also gone digital. For example, Apple Inc. has manufactures and markets a pencil (Apple Pencil) that can be used in conjunction with Apple's iPad Pro in a drawing application program (app).[21] This electronic pencil can sense the pressure exerted by an artist's hand and allow the artist to create precise digital drawing. There are also software and applications for creating three-dimensional (3D) sculptures.[22] These sculpting applications and software often include tools that can be used to alter, move, mold, pinch, grab, smooth, "or otherwise manipulate a digital object as if it were made of a real-life substance such as clay."[23]

The digital embodiments of artworks created using digital cameras, drawing apps,

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[19] Llewellyn Joseph Gibbons, *Visual Artists Rights Act (VARA) and the protection of Digital Works of "Photographic" Art,* 11 N.C. J. L. & Tech (2010) (quoting Dean Laura Gasaway, *Copyright and Moral Rights, Information Outlook,* Dec 2002, http://www.sla.org/content/Shop/Information/infoonline/2002/dec02830/copycorner.cfm (on file with the North Carolina Journal of Law & Technology).
[20] *Id*.; *See also* Jon M. Garon, *Commercializing the Digital Canvas: Renewing Rights of Attribution for Artists, Authors, and Performers,* 1 Tex. A&M L. Rev. 837, 838(2014) (claiming "[t]he Visual Artists Rights Act excludes digital works from the definition of the work of visual art, thus excluding these works from rights of attribution and integrity.").
[21] Apple Pencil, http://www.apple.com/apple-pencil/ (last visited April 20, 2016).
[22] *Id*.
[23] Digital Sculpting, https://en.wikipedia.org/wiki/Digital_sculpting (last visited March 28, 2016).

and 3D sculpting software are likely to be eligible for copyright protection in the U.S., if they possess sufficient originality and are fixed in a tangible medium of expression for more than a transitory duration.[24] However, the question of whether the protection of VARA extends to these digital embodiments remains unanswered.

I attempt to answer this question by reviewing the categories of works protected under VARA and analyzing whether digital embodiments of artworks are capable of falling under one of these categories. I start my analysis with a brief summary of the nature and origin of the moral rights statute in the United States. In Section II, I present a brief summary of the types of work that are covered under this statute (*i.e.*, VARA) and comment on justifications offered by the United States for enacting VARA. In Section III, I present my analysis on whether VARA extends to digital embodiments. In Section IV, I present a brief summary of the arguments presented and conclude that digital embodiments are unlikely to receive protection under the present language of VARA.

II. Moral Rights in the United States

Moral rights have been traced back to the raise of the "philosophy of individualism" that accompanied the French Revolution and also to the doctrines developed in civil-law nations over the span of the nineteenth and twentieth centuries.[25] Moral rights were also recognized in the German jurisprudence in the late 1800's, where some authorities viewed an author's right in his/her intellectual work as including two inseparable aspects: a

[24] 17 U.S.C. § 101; *See also MAI Sys. Corp. v. Peak Computer, Inc.,* 991 F.2d 511, 518 (9th Cir. 1993).
[25] *Art Law*, *Supra* note 4 at 1071.

personal property rights aspect and a moral or patrimonial rights aspect.[26]

Presently, in Germany, the personal property and moral rights in an intellectual work continue to exist as inseparable parts of one right, both of which expire after seventy years of the artist's death.[27] However, unlike the author's personal property rights, moral rights of the author are not assignable but can be waived "to some extent."[28] In contrast to Germany, France continues to view an artist's moral rights in an intellectual work as being separate from the artist's property rights in that work.[29] In France, *droit moral* can neither be waived nor assigned, even after a third party has assumed possession of the physical embodiment of the work.[30]

Although differences in the moral rights protection offered by various countries exist, state members of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") are required to provide authors with certain minimum standards of moral rights protection.[31] The Berne convention is a multilateral copyright treaty, originally formalized in 1886, that requires member countries to provide authors with certain "minimum standards of copyright protection."[32] Article 6bis of the Berne Convention specifically address authors' moral rights and requires signatory states to provides authors, in addition to their economic rights, with the right to "claim authorship and to object to any distortion, mutilation or other modification of or other derogatory

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[26] *Id*.
[27] *Id*.
[28] *Id*. at 1074.
[29] *Id*. at 1071.
[30] *Id*. at 1074.
[31] *¶ 6010 Berne Convention, Generally*, Copyright L. Rep. (CCH), 2009 WL 3708819; *See also Golan v. Holder* 132 S. Ct. 873 *(Pet.'s Br.* 5, 2011 WL 2423674) (2011).
[32] *Id*.

action in relation to [their] work, which would be prejudicial to [their] honor or reputation."[33]

The United States is a signatory member of the Berne Convention and has enacted VARA in an effort to comply with the moral right provision of the Berne Convention.[34] VARA is codified under Section 106A of the Copyright Act.[35] The exact language of VARA is reproduced in Appendix A of this work.

i. Protected Works in the United States

The protection offered by VARA does not reach all embodiments of works of authorship protected by the Copyright Act.[36] Congress limited the protection of VARA "only to . . . works of visual art."[37] This narrow category covers artworks such as "paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes" that exist in a single copy or limited edition of 200 copies or fewer."[38] Section 101 of the Copyright Act ("Section 101") defines a "work of visual art" as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
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> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

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[33] Charles G. Wentworth, *Don't Deface My Painting! Artists' Rights Under Illinois and Federal Law*, 25 DCBA Brief 20, 21 (2013); *See also* Natalie Suhl, *Moral Rights Protection in the United States under the Berne Convention: A Fictional Work?*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1203 (2002).
[34] 17 USC § 106A(D)(1)-(2)(1990); *See also Carter*, *Supra* note 2, at 77.
[35] *Id*.
[36] 17 U.S.C § 106(A)(b), *Supra* note 9.
[37] *Carter, Supra* note 2, at 83 (noting "[VARA's] principal provisions afford protection only to authors of works of visual arts").
[38] *Id*.

The definition of a work of visual art specifically excludes certain works. Specifically, Section 101 sets forth:

> A work of visual art does not include
> (A)
> (i) 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;
> (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
> (iii) any portion or part of any item described in clause (i) or (ii);
> (B) any work made for hire; or
> (C) any work not subject to copyright protection under this title.

Notably, in defining a work of visual art, the language of the statute outlines specific embodiments of a work of visual art (*e.g.*, painting, drawing, sculpture, still photographic image existing in a single copy, etc.) that can potentially be protected by VARA.[39] Similarly, in defining the excluded categories, subsection (A) lists specific embodiments of works of authorship (*e.g.*, poster, technical drawing, diagram, etc.).[40] However, subsections (B) and (C) employ the term "work" when excluding any "work" made for hire and any "work" not subject to copyright protection.[41]

This shift between the recitation of specific embodiments and the use of the word "work" can imply that Congress only intended to protect certain specific embodiments of works of authorship as "works of visual art." The legislative history of VARA seems to support this proposition.[42] Specifically, the legislative history of VARA states that Congress intended to limit "the bill's scope . . . to certain carefully defined types of works and artists,

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[39] 17 U.S.C. § 101, *Supra* note 24.
[40] *Id*.
[41] *Id*.
[42] H. R. Rep. No. 101-514, at 6919.

and that if claims arising in other contexts are to be considered, [consider those] separately." [43]

Determining whether an embodiment of a work qualifies as a work of visual art is typically a two-part inquiry that requires first evaluating whether the embodiment of the work falls under the inclusive definition of a work of visual art (*i.e.*, whether the embodiment is "a painting, drawing, print, sculpture, or a photographic image") and then ensuring that the embodiment of the work does not belong to one of the excluded categories of the definition of a work of visual art (*i.e.*, ensuring that the embodiment is not an embodiment of a work made for hire, advertising, etc.).[44]

ii. Justifications Offered by the United States for VARA

VARA provides authors of certain classes of works of visual arts with three general categories of rights, namely, the right of integrity, the right of attribution, and the right to prevent destruction.[45] Integrity rights allow authors to prevent "any intentional distortion, mutilation, or other modification of [a] work of visual art that would be prejudicial to the . . . honor or reputation [of its author]."[46] Attribution rights generally protect an author's right to be recognized by his/her own name, to publish under an assumed name or anonymously, prevent the use of another person's name in connection with his/her work, and prevent the use of his/her name in connection with works created by others, including

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[43] *Id*.
[44] *Id*. at 84 (noting "[a] work of visual arts is defined by the Act in terms both positive (what it is) and negative (what it is not).
[45] *Flack v. Friends of Queen Catherine Inc.,* 139 F. Supp. 2d 526, 531 (S.D.N.Y. 2001) (citing *Carter*, *Supra* note 2).
[46] *Id*.

"distorted editions of the author's original work."[47] Finally, the right to prevent destruction allows authors "to prevent any intentional or grossly negligent destruction of a work of recognized stature."[48]

The legislative history of VARA implies that Congress enacted this statute based on the "belief that the [category of] art covered by [this provision] meets a special societal need, and its protection and preservation serve an important public interest."[49] This protection and preservation of cultural values and public interest appears to be a recurring theme in the language of the legislative history of VARA, and the legislative history makes very few references to protection of an individual author's personality or spirit.

For example, while the legislative history makes multiple references to protecting the cultural values of a work of art, the only direct reference to the author's personality is made in a portion of the legislative history that attempts to justify the extension of VARA to "the original or limited edition copy of a work of art."[50] Further, the legislative history clearly states that the protection of the artists' personal interests was not the only factor considered in support of VARA, and that the "benefit [rendered by the artists] to the American culture" was also a factor that was considered.[51]

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[47] *Carter*, *Supra* note 2, at 81.
[48] *Art Law*, *Supra* note 4, at 1285.
[49] *Massachusetts Museum Of Contemporary Art Found, Supra note 3.*
[50] H. R. Rep., *Supra* note 42, at 6922 (1990) (stating "The bill recognizes the special value inherent in the original or limited edition copy of a work of art. The original or few copies with which the artist was most in contact embody the artist's "personality" far more closely than subsequent mass produced images"); *See also Id.* (stating "Congress enacted VARA under the recognition that the original copy of each artwork covered under the statute contains "special [cultural] value . . . [in its] physical existence . . . [that is] independent of any communication of its contents."); *See also Id*. at 6916(stating "It is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.");
[51] *Id*.

Similarly, although the protection of the author's reputation appears to have been one of the factors behind enactment of VARA, the legislative appears to even link the protection of the author's reputation to the protection of public interest. Specifically, the legislative history states that visual art works are afforded protection because "any distortion of such works is automatically a distortion of the artists' reputation and cheats the public of an accurate account of the culture of our time."[52]

III. Can VARA Extend to Digital Embodiments of Artworks?

Before exploring whether VARA can extend to digital embodiments of artworks, it is worthwhile to clarify the type of works that this paper intends to explore. The term "digital embodiment," as used in this paper, is intended to describe an embodiment of an artwork that exists in a digital format. For example, a digital embodiment of an artwork can be a digital painting, a three-dimensional ("3-D") digital sculptural model, or a digital photograph. Although these artworks can also have corresponding physical embodiments (*e.g.*, a painting painted on a canvas, a 3-D clay sculpture, or a printed photograph), I only intend to explore whether a digital embodiment of an artwork can be afforded protection. To distinguish digital embodiments form their corresponding physical embodiments, I use the term "physical embodiment" to refer to non-digital embodiments, such as a painting on a canvas or a printed photograph.

As noted, the analysis of whether the protection of VARA can be extended to a particular embodiment of an artwork first requires determining whether that embodiment

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[52] *Id*.

can qualify as a work of visual art.[53] Accordingly, an inquiry into whether a digital embodiment of an artwork can qualify for extension of protection of VARA requires first determining whether such digital embodiment falls under the statutory definition of a work of visual art, as set forth in Section 101.

Based on the language of Section 101, a digital embodiment of an artwork can qualify as a work of visual art only if it is "a painting, drawing, print, or sculpture, . . . or a still photographic image" that does not fall under one of the excluded categories of the definition of a work of visual art.[54] Generally, in cases arising under VARA, "the author . . . has the burden of showing that the particular work falls within the [statutory] definition [of a work of visual art]."[55] For example, a photographer must show that her limited edition "photographic image is produced for exhibition purposes . . . [and] consists of 200 or fewer copies." [56]

The legislative history of VARA outlines a number of differences between the works of visual arts and other types of works and courts have relied on these differences when analyzing whether a work is a work of visual arts."[57] For example, the legislative history of VARA explains that the works produced by visual artists, such as painters and sculptors, differ from works of other artists, such as directors, screenwriters, and other creative collaborators in creating motion pictures, in that visual artists usually retain the economic rights in their intellectual works, whereas "those who participate in a collaborative effort,

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[53] *Id*.
[54] 17 U.S.C. § 101, *Supra* note 24.
[55] H. R. Rep., *Supra* note 42, at 6923.
[56] *Id.*
[57] *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 300.

such as an audiovisual work, do not typically own the economic rights."[58]

The legislative history elaborates on this claim by noting that since "audiovisual works are generally works-made-for-hire," providing the creators of such works with moral rights of attribution and integrity can "conflict with the distribution and marketing of these works."[59] Specifically, the legislative history implies that in contrast to audiovisual works, which are often leased for exhibition or licensed for broadcasting, works of visual arts are limited to signal copies or limited edition.[60] These works differ from other categories of works because "when an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies is altered."[61] According to the legislative history, "these critical factual and legal differences in the way visual arts . . . are created and disseminated [have resulted in] important practical consequences [that] have led the Congress to consider the claims of these artists separately, and have facilitated the progress of legislation to protect the rights of visual artists."[62]

The legislative history of VARA further attempts to stress these distinctions and differences between the works of visual arts and other intellectual works by noting that Congress intended for the term "a work of visual arts" to be read very narrowly."[63] The legislative history elaborates that Congress intended the definition afforded to works of visual arts to not be "synonymous with any other definition in the Copyright Act, . . .

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[58] *I* H. R. Rep., *Supra* note 42, at 6919.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id.* at 6920-6921.

narrower than the definition of 'pictorial, graphic, and sculptural works, . . . [and only] encompass certain paintings, drawings, prints, sculpture, and . . . still photographic images."[64]

Courts have relied on these differences and distinctions highlighted by the legislative history (*e.g.*, between works of visual arts and audiovisual works) to conclude that "[t]o qualify for moral-rights protection under VARA, [a work] cannot just be 'pictorial' or 'sculptural' in some aspect or effect, it must actually *be* a 'painting' or a 'sculpture.' Not metaphorically or by analogy, but *really*."[65]

Is a digital embodiment of a painting *really* a painting or one considered a painting by analogy? Does a digital file containing a digital embodiment ultimately used to print a 3-D model of a bronze sculpture constitute a *real* sculpture or metaphorical one?

i. VARA Requires Works of Visual Art to Possess Physical Existence

Opponents of extension of VARA to digital embodiments of artworks may argue that digital embodiments are not the kind of embodiments (*e.g.*, paintings or sculptures) that the statute intended to protect because such digital embodiments neither come in physical contact with their authors (*e.g.*, there is no personal connection, no physical brush strokes, and the artist does not physically touch or mold a sculpture) nor can be viewed, enjoyed, or appreciated without the aid of a machine. In contrast, proponent of extension of VARA may believe that digital embodiments of paintings and sculptures as tangible as their printed or physical counterparts. Proponents can, for example, argue that "digital art is categorically

[64] *Id.* at 6921.
[65] *Kelley, Supra* Note 57 (noting the Copyright Act's "use of the adjectives "pictorial" and "sculptural" suggests flexibility and breadth in application. In contrast VARA uses the specific nouns "painting" and "sculpture.").

accepted by the mainstream today" because young artists in many art colleges are introduced to various digital design courses as a part of their foundational education in fine arts.[66]

Similar line of arguments can be extended in defense of digital embodiments of a sculpture: there is no need for an author to physically touch the sculpture, "the personal connection between art and artist . . . is no less at stake when the creation is [created by hand], or [using] a mouse on pad."[67]

The legislative history of VARA can also be read in a manner that supports the arguments extended in favor of digital embodiments of artworks. For example, the legislative history of VARA instructs courts to "use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition [of a work of visual arts]."[68] Proponent of extension of VARA to digital works can rely on this portion of the legislative history to argue that the legislature, at the time of enactment of VARA, was aware of the "dynamic nature of art," and as such, "intended VARA to be a progressive statute."[69]

Therefore, proponents can further argue that digital embodiments of artworks should be covered under VARA's protection as long as they are recognized as constituting a "painting, drawing, print, or sculpture" by the "generally accepted standards of the artistic

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[66]Peter E. Berlowe et. al., *In This Digital Age*, *Are We Protecting Tomorrow's "Masterpieces"? Protection of the Moral Rights of the Digital Graphic Artist*, 81-OCT Fla. B.J. 30, 32 (2007).
[67] *Id*.
[68] H. R. Rep., *Supra* note 42, at 6921.
[69] Berlowe, *Supra* note 66, at 32.

community."[70] Accordingly, proponents can argue that as long as the artistic community commonly accepts a digital embodiment of an artwork as a form of artwork, that embodiment should fall under the definition of a work of visual art, as recited in Section 101.[71]

The possible arguments extended in favor of extension of VARA can be supported by another portion of the legislative history, which further elaborates that since "artists may work in a variety of media, and use any number of materials in creating their works . . . [determining] whether a particular work falls within the definition should not depend on the medium or materials used."[72] Therefore, proponents of extending the protection of VARA to digital embodiments of artworks can rely on this portion of legislative history to argue that since digital embodiments of artworks only differ from their corresponding physical embodiments (*e.g.*, an oil on canvas painting) in the medium in which they are created, and since the legislature did not intend to limit the works of visual art by the medium in which they are created, digital embodiments of an artwork should receive the same amount of protection as other embodiments of that artwork.

However, these arguments, although seemingly supported by the legislative history of VARA, can be rejected using the same section of the legislative history upon which they rely.

Specifically, in addition to emphasizing the legislature's intent to very narrowly define a work of visual arts, the legislative history provides specific examples of items that

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[70] H. R. Rep., *Supra* note 42, at 6921.
[71] Berlowe, *Supra* note 66, at 32.
[72] *Id*.

can fall under each included category.[73] For example, the legislative history of VARA defines "the term 'painting' [as including] murals, works created on canvas, and the like."[74] Similarly, the term "print" is defined as including items such as "lithographs, serigraphs, and etchings . . . [but excluding] cover photographic prints, which are covered separately."[75] Photographic works are also protected only if produced for exhibition purposes.[76] Sculptures also are defined as including "castings, carvings, modelings, and constructions."[77] In all of these examples, the legislature has named actual and physical works that can only be created through the artist's physical, hands-on interaction with a physical embodiments of the artwork. There is no indication that the legislature intended to protect any item that is not a physical painting, print, sculpture, or photograph.

Further, as noted above, the legislature, in enacting VARA intended to protect only those artworks that contain a "special [cultural] value . . . [in their] physical existence . . . [that is] independent of any communication of [their] contents."[78] Therefore, having a "physical existence" appears to be an important requirement for embodiments of artworks that are afforded protection.

This importance of the original physical embodiment of the artwork is further emphasized in other portions of the legislative history. For example, when discussing the "effect of transfer of rights," the term "physical copy" is used to refer to the original

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[73] H. R. Rep., *Supra* note 42, at 6920-6921.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*. at 6922.

embodiment of the artwork to which the protection of VARA is being extended.[79]

Moreover, the legislative history of VARA further emphasizes this importance of a "physical existence" by indicating that "[t]he . . . copies with which the artist was most in contact embody the artist's 'personality' . . . [and] the physical existence of the original [artwork] itself possesses an importance independent from any communication of its contents."[80] In fact, the structure of the legislative history of VARA seems to indicate that Congress, in enacting this statute, intended to only protect the categories of "works of art that are romantically viewed as 'fine art,' [which have been] touched by the hand of the artist . . . originals and not reproduced copies of the works of authorship embodied in such artifacts."[81] Therefore, the legislative history also seems to support the legislature's intent to only extend the protection of VARA to those embodiments of artworks that by virtue of their "physical existence" and physical "contact" with the artist have acquired a portion of the artist's personality.[82]

Digital embodiments of artworks cannot achieve the levels of "contact" or proximity with their creators that VARA requires because their authors can never come in direct physical contact with the embodiment of artwork. Further, digital embodiments of artworks rely on a digital medium for being accessed and visualized and, as such, cannot achieve the same level of contact or proximity with their authors that physical embodiments of artworks can achieve with their creators. Therefore, opponents of

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[79] *Id*. at 6929 (noting that "a waiver properly entered into does not transfer any ownership rights in the physical copy of the work, or any of the exclusive rights granted under section 106 [of the Copyright Act]").
[80] *Id*.
[81] Dane Ciolino, *Rethinking the Compability of Moral Rights and Fair Use, 54 Wash. & Lee L. Rev. 33*, 76-77 (1997).
[82] H. R. Rep., *Supra* note 42, at 6922.

extension of VARA to digital arts may argue that digital embodiments of artworks should not be provided with protection of VARA because they lack the "touched by the hand of the artist" quality that VARA intends to protect.[83]

However, proponents of extension of protection to digital artworks may argue that having a physical existence or a physical connection is not necessarily a requirement of VARA.[84] For example, some proponents may argue that the cultural and public benefits embedded in an artwork exist in all embodiments of the artwork, regardless of the medium in which the artwork is embodied (*i.e.*, digital or physical embodiment). Proponents can also argue that as long as an artwork is fixed in a tangible medium of expression, that work falls under the Copyright Act and, as such, should also be eligible for protection of VARA. Others may go a step further and argue that artworks do not need to even be fixed in a tangible medium to qualify for protection of VARA.[85] For example, Professor Kwall has argued that unfixed features such as celebrity personas should qualify for moral right protection, in part, because "fixation in and of itself is not a constitutional requirement under the Copyright Clause."[86]

However, the legislative history of VARA rejects these arguments. Specifically, the legislative history of VARA clearly indicates that the rights afforded by this statute are provided only to those artworks that are "fixed in a tangible medium of expression and fall within the subject matter of copyright as specified in section 102 or 103 of [the Copyright

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[83] Ciolino, *Supra* note 81 at 76.
[84] Roberta Rosenthal Kwall, *Preserving Personality And Reputational Interests Of Constructed Personas Through Moral Rights: A Blueprint For The Twenty-First Century*, 2001 U. Ill. L. Rev. 151, 163.
[85] *Id*.
[86] *Id*.

Act]."[87] Further, in addition to emphasizing the importance of the original physical copy of the work, the legislative history clearly indicates that the rights provided by VARA are supplementary to the rights provided by the Copyright Act and are extended to a narrower category of works than those covered under the Copyright Act.[88] These facts from the legislative history can be used to conclude that not only fixation is required to bring a work within the coverage of the Copyright Act but also something more and perhaps narrower, such as having a physical existence, is required to provide the work with the supplementary protection of VARA.

Existing case law also supports this proposition.[89] In *Kelly v. Chicago Park District*, plaintiff Kelly brought an action under VARA to prevent the Chicago Park District from modifying and reducing the size of the plaintiff's wildflower garden that was located in a Chicago park. The Seventh Circuit rejected Kelly's claim because the wildflower garden lacked "the kind of authorship and stable fixation normally required to support copyright."[90] In rejecting Kelly's claim, the Seventh Circuit elaborated that "without fixation . . . a work . . . cannot be regarded as a 'writing' within the meaning of the constitutional clause authorizing federal copyright legislation."[91] The Seventh Circuit then concluded that Kelly's wildflower garden was not eligible for protection of VARA because "to qualify for moral rights under VARA, a work must first satisfy basic copyright

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[87] H. R. Rep., *Supra* note 42, at 6931.
[88] *Id*. at 6921.
[89] *Kelley, Supra* note 57, at 303.
[90] *Id.*
[91] *Id.*

standards."[92]

Therefore, based on the legislative history of VARA and the available case law, it appears that in order to qualify for protection of VARA, artworks should both be fixed and be embodied in a physical embodiment.

Proponents of extension of protection of VARA to digital works may also argue against the direct physical contact argument by noting that photographs, which are, in certain instances, covered under VARA, are created through the use of a machine or a peripheral interface and do not come in any direct physical contact with their authors.

Proponents of extension of protection of VARA to digital artworks can support their arguments by referring to the portion of the legislative history of VARA indicates that the coverage of VARA extends to both negative and positive images of a photograph, as long as the photograph is a still image exclusively produced for exhibition purposes.[93] Since negative images are similar to digital embodiments of artwork in that they can be used to create numerous positive copies of the image recorded on the negative, proponents of extension of VARA can argue that original digital artworks are protectable under VARA if interpreted under a similar framework as that provided for negative photographic images. Specifically, proponents can argue that a digital embodiment of an artwork, such as the digital copy of a photograph taken for exhibition purposes, should receive similar protection under VARA as negative photographic images do because such digital embodiments are essentially negative photographic images that are produced in a different medium or format (*i.e.*, digital medium and digital format).

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[92] *Id.* at 299.
[93] H. R. Rep., *Supra* note 42, at 6922.

In the case of photographic works, an artist's intent in producing the photographic image is an important factor in determining whether the photo can qualify as a work of visual art.[94] This fact is specifically highlighted by the portion of the legislative history that notes "the initial purpose for which a photograph is produced . . . controls whether a photograph is covered."[95] If a photograph is produced as a work-made-for-hire, for use by newspapers and magazines, and for other non-exhibition purposes, such work is not afforded protection. [96] However, when a photographer produces a photograph for exhibition purposes neither reproduction of the photograph in a different context nor distribution of the reproduction would "deprive the photographer of protection for the original single copy of the photograph or for any limited edition of it."[97]

Accordingly, the proponents of extension of protection of VARA to digital works can argue that digital embodiments of artworks, or at least embodiments of photographs taken for exhibition purposes, should receive similar protection as negative images, as long as the image is created for exhibition purposes.

These arguments, although seemingly valid, ignore the difference between a printed photographic image, which is a physical embodiment of an artwork, and a digital embodiment using which a physical, non-digital, photograph can be produced.

Specifically, in the case of photographic prints that are created through the use of traditional cameras and negative images, the legislative history of VARA indicates that protection extends to both the printed positive photographs and their corresponding

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[94] *Lilley v. Stout*, 384 F. Supp. 2d 83, 86 (D.D.C. 2005).
[95] H. R. Rep., *Supra* note 42, at 6922.
[96] *Id*. at 6921.
[97] *Id*.

negative images as long as they are "produced for exhibition purposes."[98]

The District Court of Columbia, in *Lilley v. Stout*, analyzed the term "produced" in the context of photographical images.[99] The case involved a photographer, Lilley, who had taken a number of photographs for the defendant, Stout's, use in creation of some paintings.[100] Lilley sued Stout for violation of his VARA rights after Stout created a painting using Lilley's photographs without proper attribution to Lilley.[101]

In analyzing Lilley's claim, the District Court noted that the language of VARA uses the term "produced" as opposed to the term "created," which has a specific statutory definition under Section 101 of the Copyright Act.[102] Section 101 of the Copyright Act explains that a work is "'created' when it is fixed in a copy or phonorecord for the first time."[103] The District Court then relied on the legislature's use of the term "produced" to conclude that the plaintiff's intent at the time of creation of the negative images (*i.e.*, when he "clicked the shutter of his camera") was irrelevant to his claim.[104] The District Court elaborated that Lilley's "probably different purpose in developing the negatives to produce the prints" was the determinative factor.[105] Therefore, it did not matter to the court what Lilley's intentions were at the time he created the images (*i.e.*, by clicking his camera shutter), what mattered to the court was whether Lilley intended to use the images for

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[98] *Id*.
[99] *Lilley*, *Supra* note 94.
[100] *Id.* at 84.
[101] *Id*.
[102] *Id.* at 89 n. 3.
[103] *Id*.; *See also* 17 U.S.C. § 101, *Supra* note 24.
[104] *Lilley*, *Supra* note 94, at 88.
[105] *Id*.

exhibition purposes at the time he developed his negative images to produce photos.[106]

The fact that the language of the statute uses the term "produced" as opposed to the term "created" further supports the claims made earlier in this note regarding the legislature's intention to limit protection of to artworks that are not only "created" or "fixed" but also to works that have been "produced" as a physical embodiment, having a physical existence. Therefore, regardless of the photographer's intention at the time he clicks the shutter of his digital camera to fix and create an image, a digital embodiment of a photographic artwork should not be eligible for protection of VARA unless it is printed to produce a physical embodiment of that photographic artwork, with the intention that it would be used for exhibition purposes only.

A similar line of arguments can be used to reject the argument that digital embodiments of artworks should be at least afforded the same protection as that afforded to negative photographic images. Digital embodiments of artworks are merely "fixed" and have not yet been "produced." Negative photographic images, however, have been produced into a physical medium, are directly perceptible without need of a machine, and exist in a physical state using which they assume the "touched by the hand of the artist" quality that VARA intends to protect.[107]

ii. <u>VARA cannot be Extended to Protect Intermediate Digital Embodiments</u>

The electronic nature of digital embodiments of artwork can further complicate the possibility of extending the protection of VARA to these embodiments. Specifically,

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[106] *Id*.
[107] Ciolino, *Supra* note 81 at 76.

computers typically create electronic files by saving "bits and pieces of the [file] leading up to the creation of the final [file] in temporary computer files."[108] These temporary files remain in the memory of the computer and are generally still available even after the completed document is updated or deleted.[109] Similar temporary files can be created and utilized while digital files are being accessed, opened, or read. Opening a digital file, for example, can involve accessing and validating permission flags included in the metadata of a digital file.[110] Similarly, reading, accessing, or displaying a digital file can involve reading the file descriptor of the digital file and creating a buffer to store the read data.[111] Therefore, many intermediate and possibly identical computer files can be created as a digital file is being created and completed.

For example, consider a sculptor who is using a three-dimensional sculpting software or App to create a digital embodiment of a 3D sculpture.[112] In the process of creating the digital embodiment of the 3D sculpture, the sculptor's computer creates a number of intermediate files that contain images (or intermediate embodiments) of the sculpture at various stages of the process.[113] Similarly, the sculptor's computer can create other temporary files, containing a portion of data of the sculpture file, every time the sculpture file is opened, accessed, or displayed.

The existence of these temporary files or temporary embodiments can complicate

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[108] Matt Catalano, *Electronic Evidence Discovery: Understanding A New Discovery Tool*, 17 Andrews Tobacco Indus. Litig. Rep. 14 (2001).
[109] *Id.*
[110] *Open (System Call),* http://en.wikipedia.org/wiki/Open_(system_call) (last visited May 19, 2015).
[111] *Read (System Call),* http://en.wikipedia.org/wiki/Read_(system_call) (last visited May 19, 2015).
[112] Adam Beamish, *Creating a Witch with 123D Creature* (May 19, 2015, 5:04PM), http://www.instructables.com/id/Creating-a-Witch-with-123D-Creature/.
[113] *Id*.

the process of identifying a specific embodiment of the work to which the protection of VARA can extend. Specifically, as noted earlier in this note, the legislative history of VARA suggest that Congress intended to afford moral right protection to original embodiments of artworks whose physical existence, due to being in contact with the artist, has acquired an "importance independent from any communication of its contents."[114] However, given the number of intermediate, temporary, and identical embodiments that can be created in the process of creating, accessing, and displaying of a digital artwork, it is very difficult to confidently identify a specific embodiment of the digital file artwork that enjoys a closer relationship with the author than all other embodiments of that artwork do.

Accordingly, even assuming that having a physical embodiment is not required by VARA and also assuming that digital embodiments of artworks can have the capability to acquire an extension of their authors' personalities and preserve the cultural benefits rendered by the artwork to the public, it would be virtually impossible to pinpoint the exact digital embodiment, the one having the extension of the authors' personality and not its buffered or intermediate embodiments, to which protection should be extended. This lack of clarity as to which digital embodiment of an artwork should be afforded protection can contradict the legislature's intent to "very narrowly define the works of art that will be covered."[115] Specifically, in its attempt to offer limited protection to a limited set of artworks, Congress expressly limited the extension of VARA to "originals: works created in single copies or in [signed] limited editions."[116] However, allowing extension of protection

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[114] *Id*.
[115] H. R. Rep., *Supra* note 42, at 6921.
[116] *Id*. at 6919.

of VARA to buffered or intermediate embodiments can open the doors for admission of many variations of embodiments of an artwork and potentially expand the protection of VARA beyond that intended by the legislature.

One can argue in favor of admission of digital embodiments and/or the intermediate embodiments by pointing out that the legislative history of VARA clearly extends protection to intermediate copies of works of visual arts, such as casting, carvings, and modelings used to produced sculptures.[117] This argument can be further supported by relying on cases, such as *Flack v. Friends of Queen Catherine Inc*., which support extension of VARA to preliminary, unfinished, works of painters (*e.g.*, drawings and sketches), photographers (*e.g.*, certain photographic negatives), and sculptors (*e.g.*, sculptural models)."[118] Therefore, a proponent of extension of VARA to digital works can argue that intermediate digital embodiments of an artwork should receive the same protection that intermediate, and possibly unfinished, physical embodiments of works of visual art can receive under VARA.

This argument, however, ignores the fact that, unlike unfinished physical embodiments of artworks, such as sketches and negatives, intermediate embodiments of digital files are often computer-generated. In fact, the artists may often be unaware of the fact that these temporary files are being generated.[119] Allowing protection of VARA to extend to these computer-generated embodiments would contradict the legislature's intent in enacting VARA, which was, as noted in many occasions in the legislative history, to

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[117] *Id*. at 6921.
[118] *Flack*, *Supra* note 45, at 534.
[119] Catalano, *Supra* note 108.

protect limited editions of "the works of art [that the artists *herself*] create."[120]

iii. Electronically Published Digital Embodiments of Artworks cannot be Protected under VARA

Even assuming that digital embodiments of an artwork can be made to fall under the categories of what constitutes a work of visual arts, opponents of extension of protection can argue that digital embodiments of an artwork should be excluded from protection of VARA because they fall under one of the excluded categories of what constitutes a work of visual arts. Specifically, since the definition of a work of visual arts explicitly excludes an "electronic publication," it can be argued that a digital embodiment of an artwork should be denied protection because it can fall under the definition of an electronic publication.[121]

Although the statutory language of Section 101 and the legislative history of VARA are silent on the specific meaning of the term "electronic publication," the term "publication" has been recognized as including, *inter alia*, "[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display."[122] The legislative history of the 1976 Act also explains that, "a work is 'published' if one or more copies or phonorecords embodying it are distributed to the public-- that is, generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents-- without regard to the manner in which the copies or phonorecords changed hands."[123]

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[120] H. R. Rep., *Supra* note 42, at 6915.
[121] 17 U.S.C. § 101, *Supra* note 24; *See also* Jon M. Garon, *Supra* note 20.
[122] *Id*.
[123] H. R. Rep., *Supra* note 42, at 5659.

Based on this definition of publication, given the electronic nature of the digital embodiment of an artwork, unless such embodiment is printed into a physical medium, any act that constitutes publication, such as public distribution (*e.g.*, email to a number of people) or public display (*e.g.*, display through the Internet), can automatically turn the digital embodiment of the artwork into an electronic publication, which is an excluded category under VARA.

Proponents of extension of VARA to digital embodiments of artworks can, however, reject the arguments presented above with respect to electronic publications by noting that since the statues of an artwork under VARA is typically independent of the status of its reproductions, depictions, or portrayals, electronic publication of a digital embodiment should not impact the status of the digital embodiment under VARA.[124] For example, proponents can note that since the act of scanning and electronically publishing scanned copies of a physical embodiment of an artwork (*e.g.*, a painting prepared on canvas) is not expected to result in the loss of the protection afforded to that physical embodiment (*i.e.*, the painting), electronic publication of a digital embodiment of an artwork should also not impact the status afforded to the digital embodiment of that artwork.

Further, proponents of extension of VARA to digital embodiments of artworks can argue that under the definition of the term "publication," a digital embodiment that satisfies the inclusive definition of a work of visual art (*i.e.*, qualifies "a painting, drawing, print, sculpture, or a photographic image") may qualify for protection of VARA if it is not electronically published. For example, a creator of a digital artwork may have a claim

[124] *Lilley*, *Supra* note 94, at 89 n.4; *See also Silberman v. Innovation Luggage, Inc.,* 67 U.S.P.Q.2d 1489, 1494 (S.D.N.Y. 2003).

under VARA if she commits to keeping the digital embodiment of her artwork private, only circulating limited copies of it, and demonstrating personal ties to her work.

iv. The Protection of VARA does not Extend to Digital Embodiments of Artworks

Assuming that a physical embodiment of an artwork produced based on corresponding digital embodiment (*e.g.*, a photograph printed based on a corresponding digital photograph) can qualify as a work of visual art, one may question whether the digital embodiment itself can qualify for protection of VARA as a copy of the digital artwork.

For example, in the case of a photograph produced for exhibition purposes based a digital embodiment created using a digital camera, one may question whether the digital embodiment can qualify for protection of VARA as a copy of the exhibition photograph. This question may arise because VARA extends its protection to the first 200 copies of an artwork as long as the copies "are consecutively numbered by the author and bear the signature or other identifying mark of the author." [125]

The legislative history of VARA notes that the numbering and marking requirements of the statute are not intended to impose "a rigid requirement akin to the copyright notice required by earlier copyright laws."[126] The legislative history elaborates that the "[n]umbering and marking [requirement] serves the primary purpose of the bill, which is to limit the works to which its protection extends. It is an additional advantage that numbering and marking also provides purchasers with notice of the work's protected

[125] 17 U.S.C § 101 (2010).
[126] H. R. Rep., *Supra* note 42, at 5622.

status."[127] Therefore, proponents of extension of VARA to digital embodiments of artworks can argue that this portion of the legislative history can be interpreted as limiting protection to the first 200 copies of the artwork that are marked by the artist, regardless of their format and medium in which they are embodied and/or are signed (*i.e.*, physical embodiment or digital embodiment). Proponents can also rely on the portion of the legislative history of VARA, which indicates that an author is only required to "sign the pieces or place equivalent identifying marks on them," to argue that the signature requirement of VARA is not intended to be a strict requirement, and, therefore, an electronic signature or marking should satisfy the signature requirement of VARA, as long as such signature can be uniquely identify the artist and the specific edition of his/her work.[128]

However, although the digital embodiment of an artwork (*e.g.*, the digital embodiment of a photograph) is likely considered a copy of that artwork under the Copyright Act's definition of the term "copy," it is not entirely clear whether a digital embodiment of an artwork is the kind of copy that the legislature intended to protect under VARA.

Specifically, the digital embodiments of artwork can be considered a copy of the artwork under the Copyright Act because the statutory definition of the term "copy," provided in Section 101, defines copies of a work as "material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise

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[127] *Id*.
[128] *Id*. at 6923.

communicated."[129] The legislative history of the 1976 Copyright Act ("1976 Act") also explains that the term "copies" is intended to comprise the "multitude of material objects in which [copyrightable works] can be embodied."[130] For example, as the legislative history of the 1976 Act elaborates, an author may create a "literary work" that can be embodied in a multitude of material objects "including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth."[131] Therefore, based on the description provided in the legislative history of the 1976 Act, a digital embodiment of an artwork (*e.g.*, digital photograph) is likely to qualify as a copy of the physical embodiment of that artwork (*e.g.*, a photograph printed for exhibition purposes).

However, it is not clear whether the protection of VARA can extend to the digital embodiment of an artwork as a "copy" of the physical embodiment of that artwork. Specifically, as noted above, the legislature, in enacting VARA, intended to limit the scope of the bill to only the first 200 copies of an artwork because those covered copies are the "few copies with which the artist was most in contact."[132] Therefore, it appears that protection was only intended for those copies that were "most in contact" with the author, and not for all copies of the work. Accordingly, the mere fact that both the digital and the physical embodiments of an artwork can constitute copies of the same artwork, under the usual construction of the term copy, does not necessarily imply that the digital embodiments of artworks are the kind of embodiments that the legislature intended to protect under VARA. There appears to be an extra requirement (*i.e.*, having the most contact with the artist) that

[129] 17 U.S.C § 101 (2010).
[130] H. R. Rep. No. 94-1476, at 5666 (1976).
[131] *Id*.
[132] H. R. Rep., *Supra* note 42, at 5622.

an artwork would need to satisfy before it can qualify for protection of VARA.

v. Can Repeated Reproduction or Publication of a Digital Embodiment Result in Loss of Protection Afforded to a Corresponding Physical Embodiment?

Given that identical copies of a digital embodiment of an artwork file can be fairly easily produced, one may question whether repeated acts of reproduction of a digital embodiment of an artwork that corresponds to a protected physical embodiment can result in the loss of protection extended to the physical embodiment. For example, in the case of a photographer who creates a digital photograph and uses the digital photograph to produce a printed photograph for exhibition purposes, one may question whether repeated acts of copying or electronic publication of the digital embodiment of the photograph can result in the loss of protection extended to the exhibition copy.

Section 106A(c)(3) clearly indicates that the rights of integrity and attribution of VARA do not extend to "any reproduction, depiction, portrayal" of an artwork.[133] The legislative history of VARA explains that these excluded reproductions refer to "reproduction of a qualifying photograph in a different context, such as a newspaper or magazine."[134] According to the legislative history, "the initial purpose for which the image is produced [is the feature that] controls whether a photograph is covered. Thus a qualifying photograph will not fall outside the ambit of the bill's protection simply because it is later used for non-exhibition purposes."[135] The legislative history further elaborates that although Section 106A(c)(3) expressly excludes reproductions of qualified works "in a

[133] 17 U.S.C.A. § 106A(c)(3)(1990).
[134] H. R. Rep., *Supra* note 42, at 6922.
[135] Id.

different context . . . the making and distribution of the reproduction would not deprive the photographer of protection for the original single copy of the photograph or for any limited edition of it."[136]

Accordingly, at least in the case of photographic images, reproduction of a digital embodiment of an artwork that corresponds to a protected physical embodiment should not result in the loss of protection extended to the physical embodiment. Cases such as *Lilley* and *Silberman v. Innovation Luggage* seem to support this conclusion.[137] Specifically, as noted above, the District Court in Lilley stated that although Lilley's negative were entitled to the protection of VARA, the statues of the negatives was irrelevant to the statues of prints that were reproduced from the negatives because only originals or limited editions of originals could acquire the rights granted by VARA.[138]

Silberman further supports this conclusion by suggesting that a "legal or practical distinction [exists] between an original photograph, a poster reproduction of that photograph, a catalogue picture of that poster, and a computer scan of that catalogue picture [and, therefore,] the existence of rights under VARA depends on precisely these distinctions between an original artwork and various reproductions of it."[139]

Silberman involved a photographer that created 200 signed and numbered copies of a photograph featuring the skyline of lower Manhattan and sold some of the photographs "as artworks."[140] Several years later, the photographer, Silberman, entered into a contract

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[136] Id.
[137] *Lilley*, *Supra* note 94, at 89 n.4; *See also Silberman*, *Supra* note 124.
[138] *Lilley*, *Supra* note 94, at 89 n.4.
[139] *Silberman Supra* note 124.
[140] *Id.* at 2.

with a third party entity, Wizard, to reproduce posters based on his photograph.[141] Wizard created the posters and marketed them to its costumers through a catalogue that included a photograph of the poster.[142] The defendant, Innovation Luggage, used a digital scanner to copy a portion of the photograph of Silberman's poster from Wizard's catalogue.[143] Innovation Luggage then enlarged the scanned image and created its own posters based on the enlarged image and displayed those posters in all of its stores.[144] Silberman ultimately found out and sued Innovation Luggage in part for violation of his attribution and integrity rights.[145]

In evaluating Silberman's claim, the Southern District of New York Court noted that "[w]hile Silberman's signed and numbered prints may be protected under VARA, first and second generation reproductions of the photograph clearly are not."[146] The District Court elaborated that whether a photograph or any other piece of work of visual arts is protected under VARA is "irrelevant" to whether other "manifestations" of that work can be protected under VARA.[147] The court also noted that mass production of other manifestations of a protected work (*e.g.*, posters mass produced based on the protected work) should not influence the status of a work under VARA.[148]

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[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id*. at 4.
[146] *Id*. at 5.
[147] *Id.*
[148] *Id*.

vi. Policy Considerations in Favor of Extending Protection to Digital Embodiments of Artworks

Policy and economic considerations also appear to support the extension of VARA to digital embodiment of artworks for authors who commit to keeping their digital embodiments private or limit their circulation.[149] For example, it can be argued that providing digital embodiments of artworks with protection against distortion or deletion can be beneficial to the preservation of culture in the society because any distortion or destruction can result in the loss of the message that the artwork is trying to communicate to the society.[150] Further, it can be argued that these rights have "a distinctly commercial character" in the sense that by protecting digital embodiments of artworks against distortion or destruction they indirectly protect the market value of the digital embodiments.[151] This indirect commercial nature of moral rights can serve as an incentive to create additional artworks and would be in line with the constitutional requirement of promoting "the progress of science and useful arts."[152]

These policy and economic considerations point in the favor of extending the protection of VARA to digital artworks. Specifically, since digital embodiments of artworks can be easily distorted, modified, or deleted, in absence of moral rights, artists who have demonstrated a personal attachment to their digital embodiments, by keeping these files private and limiting their publication, will have no cause of action against potential acts of distortion, destruction, or misattribution. Accordingly, one can argue that digital

[149] Hansmann, *Supra* note 1, at 102.
[150] *Id.*; *See also* Marci A. Hamilton, *Art Speech,* 49 Vand. L. Rev. 73, 107 (1996).
[151] Hansmann, *Supra* note 1, at 102.
[152] *Id.*; *See also* U.S. Const. art. I, § 8, cl. 8.

embodiments of artworks should be protected because "any distortion of such works is automatically a distortion of the artists' reputation and cheats the public of an accurate account of the culture of our time."[153]

IV. Conclusion

Although courts do not seem to have had the opportunity to analyze whether the protection of VARA should be extended to digital embodiments of artworks, existing academic literature appears to support the extension of VARA to these works.[154] Peter Berlowe, for example, states that he views digital art as being "accepted by the mainstream today" and expects the protection of VARA to extend to such artworks.[155] Similarly, Nathan Brown argues that "if virtual paintings and sculptures become an important medium for visual artists," courts may apply common sense to extend the protection of VARA to such works.

Arguments can be extended in favor of both sides. For example, one can argue that the author's personality is reflected in her finished work regardless of whether the work is created using a computer or produced by hand.[156] This argument can be countered by noting that extending VARA to digital embodiments of artworks would be in contradiction with the legislature's intent to only extend protection to those originals that have been "touched by the hand of the artist."[157]

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[153] H. R. Rep., *Supra* note 42, at 6916.
[154] *See e.g.*, Berlowe, Supra note 66; *See also* Nathan Brown, *VARA Rights Get a Second Life,* 11 J. High Tech. L. 280 (2011).
[155] Berlowe, Supra note 66 at 33.
[156] *Id.*at 32.
[157] Ciolino, *Supra* note 81 at 76.

Policy and economic considerations in the favor of each side can also be presented. One can argue that an artist should be protected against misattribution, distortion, or deletion of the digital embodiment of her artwork because such protection serves to protect the economic rights of the author and would be in line with the utilitarian nature of the Copyright Act. Others can argue that affording protection to digital artworks can expand the scope of VARA beyond the legislature's intended purpose and burden the court system by forcing courts into sifting through the temporary, computer-created copies of a digital artwork to determine if one or more files deserving extension of protection can be identified.

Based on the arguments extended in this paper, presently, a digital embodiment of an artwork is unlikely to receive protection of VARA. However, if digital artworks are, in fact, being "accepted by the mainstream today," they should perhaps receive the protection of VARA.[158] Any expansion of the rights under VARA should be left at the discretion of the legislature because, given the complicated nature of digital artworks, only the legislature would be able to define the precise scope of protection that these embodiments of artworks should receive.

[158] Berlowe, Supra note 66 at 33.

V. Appendix A

17 U.S. Code § 106A - Rights of certain authors to attribution and integrity

(a) Rights of Attribution and Integrity.— Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right

(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;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113 (d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) Scope and Exercise of Rights.— Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are co-owners of the rights conferred by

subsection (a) in that work.

(c) Exceptions.

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) Duration of Rights.

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a)

shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) Transfer and Waiver.

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right

under a copyright in that work.