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Mural ©ontroversy: Kerson v. Vermont Law School

Richard H. Chused

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In 1993 Samuel Kerson painted a two-panel mural on the second floor of Vermont Law School's community center with the permission and encouragement of the administration of the school. He intended for the murals to be a tribute to abolitionists, the underground railroad, and other activist opponents of slavery. Among those portrayed are Frederick Douglass, John Brown, Harriet Tubman, and Harriet Beecher Stowe. There also are slave masters, slave auctioneers, and displays of brutality. But in 2020 a number of students and alums objected to the continued presence of the art works in the community center. They saw some of the pictorial images as inept and insulting depictions of the very people Kerson intended to honor. [Images of the murals are posted at the end of this blog for those who wish to see them despite the nature of the controversy.] The school's administration responded by agreeing to remove or permanently cover the murals. Kerson then sued the school claiming that removing or covering the works violated the Visual Artists Rights Act (VARA) that bars the destruction or modification of works of fine art in some settings.

The statute**[1]** provides that artists have limited rights during their lives to "prevent any destruction of a work of recognized stature" and to prevent mutilation or modification of a work of visual art "which would be prejudicial to his or her honor or reputation." During 2021, Judge Geoffrey Crawford of the United States District Court in Vermont denied a preliminary injunction barring interference with the murals.**[2]** After denial of the request for a preliminary injunction, the school constructed a wall blocking observation and study of the murals. On October 20, 2021, summary judgment dismissing Kerson' case was granted by Judge Crawford.**[3]** In an opinion that is strikingly easy to challenge, the court reaffirmed the conclusion reached in its preliminary injunction opinion that concealment is neither a destruction nor a modification of the mural. In addition, Judge Crawford concluded that any damage from "environmental conditions" caused by the work's concealment behind a barrier is not a modification of the work. The case is now on appeal in the Second Circuit Court of Appeals.**[4]** This blog is a dramatically shortened and edited version of an article to be published this spring by the Vermont Law Review. It will provide a detailed history of the dispute and analyze its place in the lengthy and ongoing stream of mural controversies in the United States.**[5]** I conclude in that longer article, and here, that the decisions by Judge Crawford should be reversed.

Summary of the Erroneous District Court Results

In deciding the case in favor of the law school, the court's conclusion that construction of a barrier would be neither a destruction nor a modification in violation of VARA was stated boldly. "After the construction of the acoustic panel wall," Judge Crawford wrote, "the murals will not 'look different' * * *. Indeed, they will not be seen at all. The murals will have the same status as a portrait or bust that is removed from exhibition and placed in storage. Their concealment [does not violate] * * * the right of integrity, as they will not be seen in a manner different from that created by the artist." The court's language claiming that the mural after it is hidden "will not be seen" in a way different from Kerson's presentation is disingenuous on its face. There surely is a stark visual difference between permanently shielding a work from view by construction of a barrier penetrable only by Superman's x-ray vision and allowing it to be publicly viewed. There also is a large difference between covering a work with a permanent barrier and storing it in a place allowing for its quick and easy return to public view.

Simply stating that covering a work is equivalent to long term storage of a painting or other movable work is particularly inappropriate when the work is permanently affixed to a building. When the intention of those constructing a covering of art attached to a building is to permanently hide the work, the impact is akin to destruction, distortion, or mutilation of the work. That is because murals installed on the wall of a building with the consent of the owner are inherently created with the intention of all involved that they be seen for the foreseeable future in the place where they are located. A movable work, however, like a painting hung on a hook, is virtually always subject to relocation in ways wholly different from a mural. The nature of the artistic intent is therefore dramatically different in the two settings. As a result, hiding a mural is mutilating a work while hiding a painting may not be.**[6]** Furthermore, a mutilation that is not permanent is still subject to VARA constraints in both mural and movable art settings. If a vandal slashes or paints over some or all of any work of fine art, that surely would be deemed a destruction, distortion, or mutilation of the art. Even if the vandalism can be repaired, it is hard to believe that the miscreant would escape the imposition of damages for the cost of making that repair, as well as any loss in value if the repair failed to render the damage undetectable. In short, distortion or mutilation of any type of work need not be permanent to raise a problem under VARA.**[7]** That means that reducing the ability of those wishing to view a work of fine art like a mural affixed to a building—a work installed with the clear intention that it be visible—is a mutilation whether long lasting or not.**[8]** It therefore is also a mutilation even if the barrier in front of Kerson's mural causes no harm during its existence or can be taken down without its removal causing harm to the art.

In reaching the conclusion that covering the mural did not violate VARA the court relied heavily on Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel.**[9]** Judge Crawford claimed that the *Büchel* court's approval of the museum's partial covering of an incomplete installation of an enormous non-permanent work called "Training Ground" with a tarp was fully analogous to Vermont Law School's concealing of Kerson's murals.
But *Büchel* is inapposite to *Kerson*. The court ignored the intriguing paragraph of the *Büchel* opinion that followed the brief declaration about the legitimacy of covering Büchel's work. The fact that it was near an exhibition about successful art installations at the sprawling museum complex turned out to be crucial:

This is not to say that MASS MoCA was necessarily acting with pure intentions when it created "Made at MASS MoCA" in close proximity to the tarped "Training Ground." It might be a fair inference that the Museum was deliberately communicating its anger with Büchel by juxtaposing his unfinished work with the successful artistic collaborations depicted in its new exhibition. The partial covering of "Training Ground" may have been intended to highlight, rather than hide, the failed collaboration.**22** The right of integrity under VARA, however, protects the artist from distortions of his work, not from disparaging commentary about his behavior. In our view, a finding that the Museum's covering of the installation constituted an intentional act of distortion or modification of Büchel's artistic creation would stretch VARA beyond sensible boundaries.**[10]**

The omission of this segment of the opinion by Judge Crawford was a serious and crucial oversight. It elided two critical aspects of the *Büchel* result. First the *Büchel* court read the partial tarp covering as a derogatory commentary about the artist, *not* about the artwork. The court opined that some level of intention to destroy or modify the creative endeavor itself rather than to make a derogatory statement about the artist must be present to find a VARA violation. That holding, while certainly subject to argument on the facts, does not apply in the *Kerson* case. Quite the contrary. A segment of the law school community did not like the

two-panel mural but they never made critical comments about the artist. In fact, the students who initiated the decision to cover the mural praised Kerson's original intentions. They just didn't think the art properly fulfilled its laudable intentions. Second, the ongoing disagreements over Büchel's behavior during installation of the project that led to Mass MoCA's desire to vent its spleen were completely absent in the *Kerson* setting. The mural was installed seamlessly with the full cooperation of the school administration and was well reviewed at the time. Finally, covering Büchel's work was never intended to be permanent. It was an interim solution to what had become an intractable dispute. As a result, the *Kerson* court never really grappled with the question of whether permanently covering an extant, completed mural may ever be a destruction or mutilation under VARA. That error alone requires reversal by the Second Circuit.

But there are other reasons why reversal is appropriate. The weak analysis of the issue of hiding the Kerson work is minor compared to the court's treatment of "environmental conditions" as non-modifications in all circumstances. The court stated that the covering constructed in front of Kerson's mural would not make it "look different" and that any damage occurring over time caused by the barrier itself cannot be a VARA violation because of 17 U.S.C. §106A(c)(1). That section provides:

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).

On the face of the statutory language, however, the court's conclusion was profoundly erroneous. The section clearly refers to the work of art itself—its decay over time due to natural forces or the particular materials used by the artist in crafting the work. The well-known fading of the fugitive red pigments used in an array of Van Gogh paintings,**[11]** for example, clearly is not a modification or mutilation of his work under any moral rights provision. But if someone creates a physical environment surrounding a work of art knowing that it is likely to damage the work in ways that go beyond natural forces or material decomposition, a serious VARA question arises. By construing the statutory language so broadly the court eliminated all issues surrounding the impact of the wall covering Kerson's work, even if those building it were aware of the potential for serious damage that it might cause. The likelihood of the barrier constructed by the law school causing damage to the murals over time was in dispute at the time the summary judgment motion was considered. If the law school was aware of the likelihood that the mural will be damaged by the construction of the barrier and built it anyway, any resulting damage is not due merely to the passage of time. Rather it is the result of knowing, and therefore intentional, creation of an environment likely to cause modification or mutilation of the work. Since the court's interpretation of the meaning of the statutory section dealing with change occurring over time was wrong, factual resolution of that issue actually goes to the heart of the litigation. In such a circumstance, granting summary judgment was not only erroneous as a matter of law, but also seriously out of kilter with the common understanding that material disputes of fact may not be resolved on motion.

An Instructive Counter Example

While it is clear that the lower court result should be reversed, there also are a number of prior disputes raising similar issues that are discussed in the longer essay to be released in the spring that are worth considering in evaluating whether the school's actions were proper, not only legally, but also in consideration of the educational mission of the institution. Only one will be briefly described here. It began during the Great Depression. In 1932 Indiana Governor Harry G. Leslie asked Col. Richard Lieber, Director of the Department of Conservation, to

oversee the state's entry for the Century of Progress Exposition in Chicago opening the following year. Thomas Hart Benton, a then relatively unknown Indiana regional artist, was selected to create a series of murals for use at the exposition. Benton asked for and received permission to present a broad picture of the state's past—events evoking praise, condemnation, and, most importantly, controversy.[12] After the Chicago Exposition, the murals were installed in various locations at the University of Indiana. One of the panels created controversy from the outset. As the university web site notes:

Cultural Panel [9] * * * ("Parks, the Circus, the Klan, the Press") depicts a vivid, startling image of a Ku Klux Klan rally and a burning cross. The Klan had ruled Indiana politics during the 1920s—much to the embarrassment of progressives like Col. Lieber who preferred to bury the state's sins of the past.

In 2017 a petition was circulated seeking removal of Panel 9 from view by members of the university community.[13] Triggered by the Nazi demonstration in Charlottesville that year, the petitioners argued that the mural's presence in a classroom violated the university's diversity statement mandating that diverse communities be "respected and valued," as well as the student Right to Freedom From Discrimination statement noting that "students have the right to study, work, and interact in an environment that is free from discrimination in violation of law or university policy." This removal effort echoed a series of prior objections to the continued presence of the mural in Woodburn Hall, the largest lecture hall on the campus.[14] These sorts of claims obviously echo the ongoing dispute at Vermont Law School. Despite the long extant controversy over the Benton mural, it remained in place when the 2017 petition was circulated and still does.

After circulation of the petition seeking removal of the Benton work, the university elected to leave it in place while ending use of Woodburn Hall as a classroom. The decision was explained in a lengthy statement issued September 29, 2017, by Lauren Robel, the university's executive vice-president and provost.[15] She agreed that the presence of the Benton mural in Woodburn Hall before the "captive audience of classes" was a problem and concluded that the facility would no longer be used for that purpose. But she defended the continued presence of Panel 9, posted at the end of this blog, on campus.

The classroom contains a panel * * *[that] includes a depiction of a Ku Klux Klan rally and a burning cross. The imagery in that panel, entitled "Parks, the Circus, the Klan, the Press," has been controversial since its creation. Benton's intent was to show the role that the press had played in battling the Klan through exposing the Klan's corruption of and infiltration into all levels of Indiana government in the 1920s. * * *

Understood in the light of all its imagery and its intent, Benton's mural is unquestionably an anti-Klan work. Unlike statues at the heart of current controversies, Benton's depiction was intended to expose the Klan's history in Indiana as hateful and corrupt; it does not honor or even memorialize individuals or the organization as a whole. Everything about its imagery—the depiction of the Klan between firefighters and a circus; the racially integrated hospital ward depicted in the foreground suggesting a different future ahead—speaks to Benton's views. Every society that has gone through divisive trauma of any kind has learned the bitter lesson of suppressing memories and discussion of its past; Benton's murals are intended to provoke thought.

The similarities between the *Benton* and *Kerson* controversies are stunning. Both involve closely related, controversial subject matter about race found offensive by some members of their educational communities. Both were painted in versions of folk-art style with some

measure of caricaturizing. Both were created by artists with anti-racist intentions. Both were crafted in ways making it impossible to remove them without their destruction. Both presented the same legal issues if made invisible by creating covers of some sort. Both were located in areas available to large segments of the student body. Though disliked by some, both works probably were and are of recognized stature. And both works were installed in or on their present locations with the permission, approval, and encouragement of institutional leadership.

Were Benton's Depression era work at Indiana University covered by the VARA,[16] the institution almost surely would have been barred from removing or covering it. The message of Indiana University's refusal to remove Benton's work is consistent with much copyright law history. Long before the moral rights provisions were adopted, courts resisted efforts to intensely review the aesthetic nature, quality, or message of artistic works as a measure of copyrightability. The roots for that sentiment go back over a century to Justice Oliver Wendell Holmes' famous opinion in Bleistein v. Donaldson Lithographing Company.[17] George Bleistein, an employee of Courier Lithographing Company, was hired by Benjamin Wallace, owner of the Great Wallace Show, to make posters for use in advertising the circus. When Wallace ran out of posters he hired Donaldson Lithographing Company to make more. Donaldson did so by reproducing the Bleistein versions in a somewhat smaller size. When sued, he claimed that commercial advertisements, like the circus posters, were aimed at the masses and therefore did not promote the "useful arts" within the meaning of the intellectual property clause of the Constitution[18]

But the claim made by the attorneys for Donaldson moved well beyond the surface meanings of commercial advertising and public relations functions by also asserting that the scantily clad circus performers pictured in a number of the posters incited lustful behavior among the masses and therefore should be unavailable for protection.[19] In their brief, they claimed that:

[T]he copyright law does not protect what is immoral in its tendency * * *. A print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences, and to attract them to witness the performance of such scenes, is manifestly of that character. It is the young and immature and those who are sensually inclined who are liable to be influenced by such scenes and representations, and it is their influence upon such persons that should be considered in determining their character. [20]

This was certainly not an unusual argument over a century ago. Supposed sexual impropriety and allegedly immoral behavior were a major concern of the era.[21]

In a holding that still resonates when claims are made that controversial or unpopular subjects should not be eligible for copyright or moral rights protection, Justice Holmes strongly rejected Donaldson's claim. Though he did not speak directly to the overt call for using copyright law to control morality and improper behavior, he indirectly did so by composing this famous rationale:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less

educated than the judge. Yet if they command the interest of any public, they have a commercial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.[22]

Conclusion

The breadth and scope of recent disputes about public art with obvious racist overtones or with imagery that may be seen as insulting or demeaning by Black people or other cultural groups has fractured our social fabric. In the minds of some, such controversies place a strain on my preference to leave Kerson's work in place at Vermont Law School. Traditional notions that the best way to counter the social harm caused by the visibility of such highly charged work is with education, public discussions, and open debates have been put under serious stress in the last decade by a deluge of irresponsible, untruthful, and hateful material on social networks and in the media. In a related vein, much of the opposition to removing works commemorating racist historic figures from view has been based not on the propriety of dialog about controversial public works, but on a historic preservation notion that it is better to leave objects displaying unpleasant parts of our history in open view than it is to make them invisible by covering, removing, or destroying them.

Thes conflicts were quite visible in the recent controversies over removal of dozens of monuments celebrating the Confederacy[23] while simultaneously building museums memorializing those who died or suffered under racist regimes.[24] There is no obvious and clear resolution to this cultural dilemma. Pain and anger may surface from viewing either works lauding Confederate leaders or memorials to the victims of their hatred, especially from those whose personal lives and family histories are embedded in racism and the history of slavery. Similar reactions certainly may arise when viewing the Kerson murals at the Vermont Law School.

There is, therefore, some irony in the fact that the VARA is in significant part an historic preservation statute requiring minimal legal intrusion into the social contours of works of art created by living artists. Its terms make weak if any social or cultural judgments about the works of art it protects from destruction, mutilation, or modification. The VARA's limitation of protection to works of visual art and to prints, sculptures, and photographs made with the permission of the author in 200 or fewer copies[25] certainly confirms that preservation partly motivated the legislation. Mass-produced items, as the House Report on the VARA indicates, are unlikely to raise preservation issues; the destruction or modification of one copy of a work with many other extant copies available leaves access intact.[26]In addition, the recognized stature requirement is similar to that used in historical preservations statutes governing buildings and neighborhoods. Here too buildings may be preserved in recognition of their historical or creative importance, even if the history supporting historic designation has ugly overtones.[27]

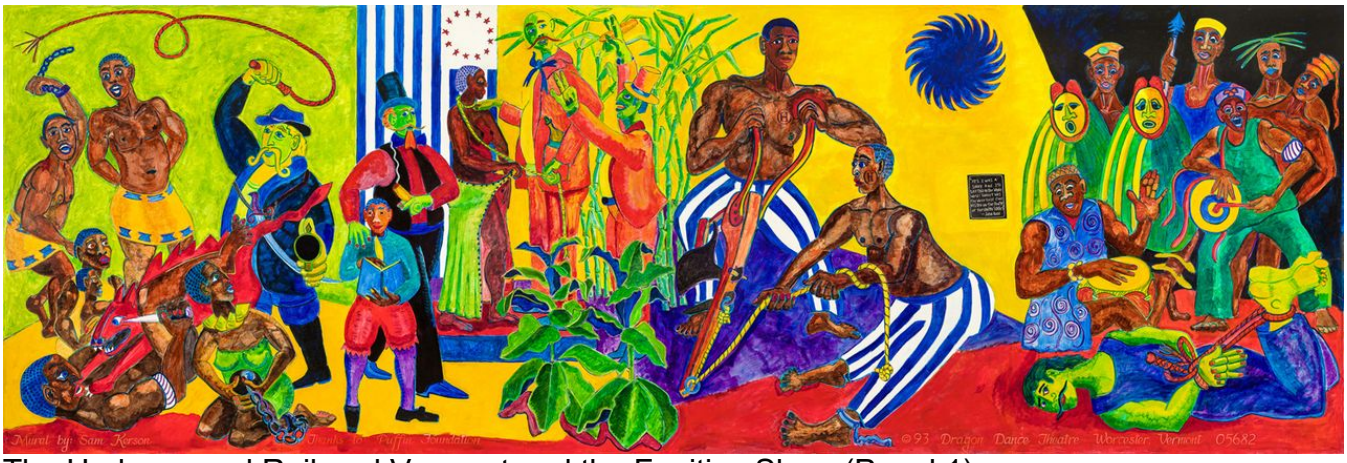
The recognized stature standard for protecting works from destruction and the harm to reputation standard for preventing modification or mutilation of works do not necessarily require evaluation of whether any particular work art is good or bad, or socially acceptable or unacceptable in the minds of most viewers. There must at a minimum, therefore, be a strong reason to allow destruction or modification of works of art with stature or reputational import. But it certainly is not untenable to construe the wording of either standard to mean that a work that has become intensely undesirable and historically unacceptable to a very large number of

people, might lose whatever stature or reputation it once had and thereby forfeit moral right protection.

The situations at the University of Indiana and Vermont Law School, however, do not meet such a rigorous standard. Indeed, in most cases, the University of Indiana resolution—reducing the settings in which captive audiences viewing the work may create anger and creating an education program to encourage understanding of the artwork itself—crafts the most creative and intelligent way of handling controversial historical art works under the moral rights provisions. As an educational institution, the University of Indiana, as well as the Vermont Law School, should be sensitive to and knowledgeable about ways of dealing with controversial subject matter. That is one of their institutional missions. While a huge statue of a racist like Robert E. Lee on a horse lording it over a central location in a city like Richmond largely populated by black Americans is a constant, dramatically unpleasant, and unavoidably visible reminder to an entire city of an intolerable and unacceptable past, the murals at Indiana and Vermont Law School are laden with different and potentially conflictual cultural meanings and located in single places in the midst of campuses with a great deal of room to mount displays, brief essays, audio visual works, and places for open commentary. In addition, at both Indiana University and Vermont Law School the works were created by artists intending to counter the demoralizing impact of works like that honoring Robert E. Lee by constructing a monument. In both the Indiana and Vermont settings, what appears ugly and unsettling to some may be turned into learning opportunities for others.

If Vermont Law School, like the University of Indiana, was concerned about the presence of the Kerson murals before a somewhat captive audience using the largest lounge on campus, it could have easily constructed a wall some distance from the murals with educational materials affixed that allowed those wishing to see the murals to easily walk behind the barrier to view them.[28] While the VARA's present failure to protect the works of deceased artists allows us to culturally erase the past after one generation even if that is unwise, that does not relieve us of the responsibility to protect most art engendering cultural angst from protection for artistic lifetimes. It must not be forgotten that the ability to trigger controversy is the whole point—not a mere byproduct— of much art. Therefore, Vermont Law School must wait at least until Kerson dies before it hides his art from view in the Chase Community Center.[29]

IMAGES OF THE TWO KERSON MURAL PANELS[30]
AND BENTON'S PANEL 9 ARE BELOW[31]:



The Underground Railroad Vermont and the Fugitive Slave (Panel 1)

The Underground Railroad Vermont and the Fugitive Slave (Panel 2)

Thomas Hart Benton's Panel 9

[1] 17 U.S.C. §106A(a)(3) reads as follows:

> (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—
>
> * * * *
>
> (3) subject to the limitations set forth in section 113(d),**[1]** 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.

[2] Kerson v. Vermont Law School, No. 5:20-cv-202, 2021 WL 4142268 (D.Vt. Mar 10, 2021).

[3] Kerson v. Vermont Law School, Case 5:20-cv-0020-02-gwc, Order on Defendant's Motion for Judgment (Oct. 20, 2021).

[4] Oral argument was held on January 27, 2023.

[5] This blog has been posted with the permission of the Vermont Law Review, for which I give thanks. The journal is published by students at the Vermont Law School.

[6] I say "may" because hiding a mural does not necessarily mean it can never be destroyed. In the most extreme cases, such as a building that must be torn down because of severe and irremediable safety issues, a mural will surely be lost unless there is a way to move it without damage.

[7] See, e.g., the dispute over the white wash covering of the aerosol art at 5Pointz in Queens, New York. Castillo v. G&M Realty L.P. 155, 950 F.3d 155 (2nd Cir. 2020).

[8] Similar issues are raised by the long-term storage of art in freeports and museum vaults. But in most of these situations, the works are easily movable to a public place, unattached to a building and therefore lacking an agreed upon intention to be permanently viewable by the public, and not typically subject to physical harm. Whether long term storage of movable fine art should always be treated as outside the sanctions of VARA is an interesting question that need not be answered here.

[9] 593 F.3d 39 (1st Cir. 2010). The Massachusetts Museum of Contemporary Art, located in North Adams, Massachusetts, is an enormous nineteenth century industrial complex of old buildings that has been imaginatively turned into one of the most important institutions presenting short- and long-term exhibits of two- and three-dimensional art, installations, and other contemporary works, many crafted onsite by artists in residence. The museum's fascinating history is available at https://massmoca.org/about/history/ (last visited June 6, 2022).

22 Indeed, the Boston Globe's art critic, Ken Johnson, described the exhibit as a "self-serving photo and text display" that implicitly conveys criticism of Büchel for the failure of "Training Ground for Democracy." The juxtaposition left Johnson with the impression that MASS MoCA was "exacting revenge" against the artist "by turning his project into a show that misrepresents, dishonors, vilifies, and even ridicules him." [This footnote and its number are from the court's opinion; citations are omitted.]

[10] Id. at 61-62.

[11] See, e.g., Sarah Everts, *Van Gogh's Fading Colors Inspire Scientific Inquiry: Lessons Learned from the Chemical Breakdown of Pigments in the Post-Impressionist's Masterpieces,* Chemical and Engineering News (Feb. 1,

2016), https://cen.acs.org/articles/94/i5/Van-Goghs-Fading-Colors-Inspire.html (last visited July 3, 2022).

[12] A brief history of the creation of the Thomas Hart Benton murals now located at the University of Indiana is available: *The Indiana Murals: History*, Indiana University Bloomington https://murals.sitehost.iu.edu/history/index.html (last visited July 20, 2022). The number given to the panel on this site are erroneous, hence the brackets.

[13] It is available on Change.org. See Jacquline Barrie, *Remove KKK Mural in Woodburn Hall at Indiana University*, Change.org, http://bit.ly/2wjoPye (last visited July 20, 2022).

[14] See Ab Tonsing, *IU's Benton Mural with KKK Image Being Challenged Again,* The Herald Times (Aug. 31, 2017, https://www.heraldtimesonline.com/story/news/local/2017/08/31/ius-benton-mural-with-kkk-image-being-challenged-agai/46715635/ (last visited July 20, 2022). Tonsing notes that prior disputes about the mural arose in 1989, 2002, 2005, and 2008. The university's chancellor released a lengthy statement on the issue in 2002. Sharon Brehm, *Statement from Chancellor Brehm on Benton Mural*, Indiana University (Mar. 25, 2002), https://newsinfo.iu.edu/news/page/normal/296.html (last visited July 21, 2022).

[15] Lauren Robel, *On the Benton Murals*, Indiana University (September 29, 2017,https://provost.indiana.edu/statements/archive/robel/benton-murals.html (last visited July 21, 2022).

[16] Since the VARA only governs issues regarding works of living artists, it does not apply in the Benton setting.

[17] 188 U.S. 239 (1903). It is widely recognized as an intellectual property classic that is read in virtually every copyright course in the nation and widely cited by courts handling copyright litigation.

[18] Article I, Section 8, Clause 8 of the Constitution grant Congress the power, "To 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." The useful arts language was not directed to patents, but to other forms of intellectual endeavor.

[19] Even defamatory, pornographic, and offensive works have long been subject to protection, despite periodic objections to this practice. A recent essay suggesting the need for change in this understanding is Michal Shur-Ofry & Noy Lion, *Copyright Neutrality? Lessons From* Mein Kampf, 40 Cardozo Art & Ent. L. Rev. ___ (2022).

[20] Brief for Defendant in Error, Bleistein v The Donaldson Lithographing Company, Supreme Court of the United States No. 117, at 23 (Dec. 3, 1902). The brief contends, at 22-23, that the trial judge reached the correct result when it stated that "the picture which represents a dozen or more figures of women in tights, with bare arms, and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art, or fine art, it is something to be regarded as merely frivolous, to some extent immoral in tendency."

[21] The prohibition movement was largely built on such concerns. See, e.g., Eleanor Flexner, Century Of Struggle: The Woman's Rights Movement In The United States 185–89 (1959); James H. Timberlake, Prohibition and the Progressive Movement, 1900–1920, At 122–23

(1970); Jed Dannenbum, Drink and Disorder: Temperance Reform in Cincinnati from the Washingtonian Revival To The WCTU (1984); Ruth Bordin, Woman and Temperance: The Quest For Power and Liberty, 1873–1900 (1990); Ruth Bordin, Woman and Temperance: The Quest for Power and Liberty, 1873–1900, at 121–23 (1990); Scott C. Martin, Devil of the Domestic Sphere: Temperance, Gender, and Middle-Class Ideology, 1800–1860 (2008); Ian Tyrell, Reforming the World: The Creation Of America's Moral Empire 74–97 (2010);. *The Temperance Movement's Impact on Adoption of Women Suffrage,* 53 Akron L. Rev. 359 (2020).

[22] 188 U.S. at 251-252.

[23] See, e.g., Vimal Patel, *Virginia Supreme Court Clears Path for Removal of Robert E. Lee Statue*, New York Times (Sep. 2, 2021),https://www.nytimes.com/2021/09/02/us/robert-e-lee-statue-removal-virginia.html (last visited Jan. 31, 2022). CNN reported that 73 confederate monuments were removed or renamed during 2021. Giselle Roden & Dalila-Johari Paul, *73 Confederate Monuments Were Removed or Renamed Last Year, Report Finds*, CNN (Feb. 2, 2022), https://www.cnn.com/2022/02/02/us/confederate-monuments-removed-2021-whose-heritage/index.html (last visited Feb. 3, 2022). And the New York Times reported that over 160 Confederate symbols were removed in 2020. Neil Vigdor and Daniel Victor, *Over 160 Confederate Symbols Were Removed in 2020, Group Says,* New York Times (Feb. 23, 2022), https://www.nytimes.com/2021/02/23/us/confederate-monuments-george-floyd-protests.html (last visited Mar. 7, 2022). The controversy over removal of Confederate symbols has continued beyond the process of actually deciding to make the change. Very few contractors are willing to undertake the work and those that do have faced harassment and threats. See Matt Stevens, *For a Black Man Hired to Undo a Confederate Legacy, It Has Not Been Easy*, New York Times (April 17, 2022), https://www.nytimes.com/2022/04/17/arts/confederate-statue-removal-contractor.html(last visited April 19, 2022).

[24] Among the bevy of such places are The National Civil Rights Museum the Lorrain Motel in Memphis where Dr. Martin Luther King, Jr. was assassinated, https://www.civilrightsmuseum.org (last visited July23, 2022), The National Memorial for Peace and Justice in Montgomery, Alabama, https://museumandmemorial.eji.org/memorial (last visited July 23, 2022), the Smithsonian National Museum of African American History & Culture, https://nmaahc.si.edu (last visited July 23, 2022), The National Museum for Civil and Human Rights in Atlanta, https://www.civilandhumanrights.org (last visited July 23, 2022), and The Birmingham Civil Rights Institute, https://www.bcri.org(last visited July 23, 2022).

[25] See the definition of "visual art" in 17 U.S.C. §101.

[26] H.R. Rep. 101-514, 101st Cong., 2nd Sess. 1990; 1990 U.S.C.C.A.N 6915, 6922.

[27] See, e.g., John Freeman Gill, *The Push to Landmark the Last-Known 'Colored' School in Manhattan,* New York Times (Oct. 7, 2022), https://www.nytimes.com/2022/10/07/realestate/segregated-school-landmark-manhattan.html (last visited Oct. 24, 2022), a story about a movement to preserve one of the last remaining school buildings in New York City from the city's segregated past.

[28] In addition, the school could have hung a curtain in front of the panels that could be opened by those wishing to see the panels. An offer to settle the case in that way proposed by Kerson was rejected by the school. Statement of Steve Hyman at a presentation by the author

of this writing project to members of the faculty and staff at New York Law School on November 8, 2022.

[29] Given the present status of the case, a reversal by the United States Court of Appeals for the Second Circuit probably would require Vermont Law School to remove the barriers now blocking the view of Kerson's work and paying for any repairs that are required to return the work to its original condition.

[30] The mural mages may be found at Marc James Léger, *Artist Sam Kerson will continue to fight Vermont Law School effort to cover up murals commemorating abolition of slavery,* World Socialist Web Site (Oct. 27, 2021), https://www.wsws.org/en/articles/2021/10/28/mura-o28.html (last visited Jan. 21, 2022).

[31] Sarah Cascone, *Students Rally to Remove a Thomas Hart Benton Mural Depicting the KKK at Indiana University*, Artnet (Oct. 31, 2017), https://news.artnet.com/art-world/thomas-