
VARA RIGHTS GET A SECOND LIFE

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I. Introduction: VARA Rights and Second Life

The three-dimensional online experience offered by Linden Lab's Second Life has become an online phenomenon. More than twenty million people worldwide have accounts and more than 825,000 people logged into the interface more than once in March of 2010.¹ In fact, some commentators suggest that within the next decade experiences like Second Life will become a primary venue for both entertainment and commerce.² These commentators suggest that because a three-dimensional experience is superior to the two-dimensional experience of websites, it will become the primary way to do business on the Internet.³ Such a shift would make three-dimensional online worlds a multi-billion dollar industry.

If this shift occurs, protection of intellectual property rights within the three-dimensional electronic world will become increasingly important. Second Life provides an interesting model of what these rights might look like for two reasons: (1) users have almost unfettered freedom to manipulate the Second

1. See Don Clarke, *Second Life Creator Linden Lab Downsizes, Morphs*, WALL ST. J. BLOGS (June 10, 2010), archived at <http://www.webcitation.org/5x0n4r2xx> (observing that millions of users signed up for free Second Life accounts when the company launched a few years back); *Second Life*, WIKIPEDIA, archived at <http://www.webcitation.org/5x0moz4p1> (recognizing that Second Life has 21.3 million user accounts).

2. Telephone Interview with Leonard T. Nuara, Shareholder, Intell. Prop. & Tech. Group, Greenberg Traurig, LLP (June 20, 2009) [hereinafter "Nuara Interview"]. Mr. Nuara states that while he does not believe that Second Life itself will ever be the primary way to do business online because there are too many interface issues and too small of a following, the three dimensional interface is superior to the two dimensional websites that consumers currently shop on. See *id.*

3. Nuara Interview, *supra* note 2. Mr. Nuara believes that once three dimensional worlds are available for e-commerce, they will overtake the two dimensional Internet. See *id.* Among the advantages of three dimensional worlds like Second Life is the ability to have an avatar customized to your own body. See *id.* Theoretically, one could use that Avatar to try on clothing, have it tailored, and see how that clothing would look on the real person. See *id.*

Life world, allowing them to create their own intellectual property, and (2) Second Life “respects” the intellectual property rights of its users.⁴ These two features distinguish Second Life from other three-dimensional online experiences.⁵

First, other games in this genre have granted users only a very limited ability to manipulate the world to create new and original objects.⁶ In fact, many games such as World of Warcraft and Age of Conan allow players to make only replicas of items that were previously conceived and created by the game’s staff.⁷ Second Life, on the other hand, provides a platform and interface for an entirely user-created world, enabling a player to create his own intellectual property such as paintings, architecture, and literature.⁸

Second, many online three-dimensional games force players to waive their intellectual property rights for anything

4. See *Second Life Terms of Service Agreement*, LINDEN LAB, 7.1, archived at <http://www.webcitation.org/5wuesCN7q> (reserving intellectual property rights of Second Life user creations to the users themselves).

5. Compare *Second Life Terms of Service Agreement*, *supra* note 4, with *World of Warcraft Terms of Use Agreement*, BLIZZARD ENT., archived at <http://www.webcitation.org/5vym9ungw> (distinguishing the reservation of Second Life intellectual property rights to users from the denial of user intellectual property rights of World of Warcraft users).

6. See, e.g., Candidus Dougherty & Greg Lastowka, *Symposium Review: Virtual Trademarks*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 749, 760 (2008) (detailing the users abilities in World of Warcraft); Kevin VanOrd, *Sims 3 Review*, GAMESPOT, archived at <http://www.webcitation.org/5wtBArqSp> (providing an in depth review of the Sims 3).

7. See Dougherty & Lastowka, *supra* note 6, at 760 (stating players lack control of World of Warcraft creative environment). For example, in World of Warcraft a player can forge an “Icebane Chestguard” but this is because an employee at Blizzard Entertainment, the producer of World of Warcraft, thought of its name, stats, graphics, and icon, as well as the process the user must go through to create it. See *Icebane Chestguard*, THOTBOT, <http://www.webcitation.org/5vypA4Nib>. The user follows this path, but has contributed nothing to the intellectual property. *Id.*

8. See, e.g., *Second Life*, WIKIPEDIA, *supra* note 1 (indicating that users can “create and trade virtual property and services with one another”); Amitabh Avasthi, *Second Life, Other Virtual Worlds Reshaping Human Interaction*, NAT’L GEOGRAPHIC NEWS, Oct. 17, 2006, archived at <http://www.webcitation.org/5wgt1mrDH> (articulating that users can become entrepreneurs by creating products for their avatars); *Knowledge Base*, SECOND LIFE WIKI, archived at <http://www.webcitation.org/5vyq139gK> (providing users with helpful information to build their Second Life world).

the player creates in-game; however, Second Life has agreed to respect the user's intellectual property and does not claim any ownership in it.⁹ This provides an interesting peek into what a bustling three-dimensional online commerce might look like because it is unlikely that authors would give a full waiver of intellectual property rights that could be worth millions of dollars.

This article considers the possible protection and implications of the Visual Artists Rights Act ("VARA") upon Second Life and similar experiences created in the future.¹⁰ If VARA protection attaches to visual works within Second Life, it could create significant difficulties for the platform. The most obvious difficulty presented is the protection afforded to "work[s] of recognized stature."¹¹ Authors of such works are protected against the unauthorized destruction of their work.¹² This could mean that Second Life or similar online services would be liable for server meltdowns that result in lost data or for hackers who destroy works. These services might, for example, be liable for going out of business because it would require shutting down the servers resulting in the destruction of the digital work.

To fully investigate whether Second Life artwork, meaning works that exist only in Second Life, could receive VARA protection, this article examines several relevant VARA requirements. This examination takes the reader on a familiar, if difficult, path through the standard for electronic copies, but with unexpected results. Specifically, in Part II this article examines whether an electronic work could be an appropriate "medium" for a work of visual art as defined by the statute. Part III

9. Compare *Second Life Terms of Service Agreement*, *supra* note 4 (deferring intellectual property rights of creations to the users), with *World of Warcraft Terms of Use Agreement*, *supra* note 5 (withholding intellectual property rights from the users).

10. See 17 U.S.C. § 106A (2006) (providing certain moral rights to authors of qualifying "works of visual art").

11. See 17 U.S.C. § 106A(a)(3)(B) (limiting VARA protection to works of "recognized stature").

12. See *id.* (considering the potential protection the statute could provide to the worlds created by Second Life users from unauthorized changes).

discusses whether electronic works in a Second Life environment can withstand VARA's requirement that works of visual art exist in fewer than 200 copies when thousands of data images of each work are transmitted as an inherent part of the online experience. Part IV examines whether Second Life VARA claims could succeed on the merits in the current legal environment even if they could theoretically pass these hurdles. Finally, Part V analyzes the defenses that three-dimensional online experiences could assert and measures these experiences could take to protect themselves against VARA claims.

At each juncture, this article will focus primarily on arguments that could prevent all or substantially all electronic visual works from VARA protection because even a few successful claims can lead to substantial costs for the proprietors of these online communities.

II. Are Electronic Worlds a Proper Medium for Works of Visual Art?

VARA was enacted in 1990 due to increasing pressure from foreign countries on the United States to comply with the Berne Convention, which the United States signed only a year earlier.¹³ Section 6^{bis} of the Berne Convention requires signatories to recognize certain moral rights, including the right of attribution and the right to integrity, but the treaty left specific legislation to the discretion of the signatories.¹⁴ Moral rights protect authors of works.¹⁵ Specifically, the right of attribution is an inalienable right that entitles the author to have his name be associated with a work, even if he has sold the copyright to the work and the right to integrity allows an author to prevent the destruction of his works even when he has sold the work and its

13. See CRAIG JOYCE ET AL., COPYRIGHT LAW 573 (8th ed. 2010) (noting that the Berne Convention Act of 1988 restructured American law for Berne compliance).

14. See Berne Convention for the Protection of Literary and Artistic Works art. 6^{bis}, March 1, 1989, 1161 U.N.T.S. 3 [hereinafter Berne Convention] (requiring signatories to afford moral protection to authors in their chosen legislation).

15. See Berne Convention, *supra* note 14 (affording protection to the moral rights of authors' works).

copyright.¹⁶ While Congress claimed that the United States already complied with Article 6^{bis},¹⁷ it nonetheless passed an act protecting the rights of attribution and integrity for certain visual artists.¹⁸ However, VARA was narrowly limited in scope, reflecting Congress' general hesitance to recognize any moral rights.¹⁹

Section 106A of the Copyright Act protects the moral rights of attribution and integrity, but its protection is limited to works of visual art.²⁰ The most obvious hurdle facing a VARA claim arising from Second Life is whether an electronic work can be a "work of visual art" within the meaning of the statute.²¹ This part will address the first component of this question—whether an electronic artwork in Second Life, such as a data image of a "sculpture" or "painting," is an acceptable artistic medium for a work of visual art.

VARA defines a "work of visual art" in Section 101 as:

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture... or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures....; or

(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.²²

16. See 17 U.S.C. § 106A (2006) (granting moral protection to the author's of visual works of art through attribution and integrity of the work).

17. See JOYCE ET AL., *supra* note 13, at 573 (stating that Congress took a minimalist approach toward implementing the Berne Convention).

18. See JOYCE ET AL., *supra* note 13, at 573 (describing the passage of the VARA act recognizing moral rights).

19. See H.R. REP. NO. 101-514, at 8-11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918-21 (discussing the House's decision to limit the scope of VARA to exclude additional moral rights laws).

20. 17 U.S.C. § 106A(a) (2006) (outlining the moral rights of attribution and integrity).

21. See, e.g., 17 U.S.C. § 101 (2006) (defining "work of visual art"); 17 U.S.C. § 106A (limiting the protection of moral rights to "works of visual art").

22. 17 U.S.C. § 101 (defining "work of visual art") (emphasis added).

While works in Second Life are displayed on a user's screen as paintings and sculptures, they are electronic files and whether they fit within VARA's definition of those terms is a key inquiry, and somewhat unclear from the definition itself.²³

On the one hand the Act's legislative history, as embodied in the House Report (hereinafter "Report"), suggests the definition of a "work of visual art" has some flexibility and could include electronic files.²⁴ Congress recognized that "[a]rtists may work in a variety of media, and use any number of materials in creating their works."²⁵ Based upon this, the Report explains that whether a work falls within VARA's definition of visual art "should not depend on the medium or materials used."²⁶ This would seem to suggest that an artist who did not use "paint" to create his work, but instead used bits and pixels, might create a work qualifying as a VARA "painting."²⁷ In further support of a broad definition, the Report 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."²⁸ One district court used this flexibility to find that VARA's definition of painting and sculpture could include a wildflower arrangement.²⁹

The fact that Congress told courts to use "common sense and generally accepted standards of the artistic community" suggests that, as art evolves, the definition of a "work of visual

23. See, e.g., 17 U.S.C. § 101 (defining work of visual art); Hrag Vartanian, *Virtually an Art Market? Artfully Living in Second Life*, THE BROOKLYN RAIL, Apr. 2007, archived at <http://www.webcitation.org/5w1yu0ECH> (discussing the digital art world available on Second Life).

24. H.R. REP. NO. 101-514, at 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, at 6921-22 (outlining the flexibility courts are to use in determining whether a work is protected under VARA).

25. *Id.*

26. *Id.*

27. See *Id.* (explaining the breadth of VARA's definition of a work of art).

28. *Id.*

29. *Kelley v. Chi. Park Dist.*, 2008 U.S. Dist. LEXIS 75791, at *10-16 (N.D. Ill. Sept. 29, 2008) (finding that a wildflower arrangement fits both the definition of sculpture and painting under VARA).

art” evolves with it.³⁰ If virtual paintings and sculptures become an important medium for visual artists, then a court’s common sense could accommodate virtual works with VARA protection.³¹ Further, that the House Report *explicitly* suggests flexibility in medium implies that a work in the electronic medium could receive protection.³²

On the other hand, several elements of the House Report suggest a narrower view of a painting, sculpture, drawing, print, or photograph.³³ The Report states that the definition is “not synonymous with any other definition of the Copyright Act and, in particular, it is narrower than the definition of ‘pictorial, graphic, and sculptural works.’”³⁴ The Report explains that Congress intentionally used a narrow definition for a work of visual art in order to narrow the scope of VARA’s protection.³⁵ In addition, the Report includes Representative Markey’s testimony that “... we have gone to extreme lengths to very narrowly define the works of art that will be covered[.] [T]his legislation covers only a very select group of artists.”³⁶

The examples given in the Report also support a narrow construction—a painting includes murals, works created on *canvas*, and the like; a sculpture includes castings, carving, modelings, and constructions; and a print includes works such as lithographs, serigraphs, and etchings.³⁷ While these lists are inclusive rather than exclusive, they do not include a single

30. See H.R. Rep. 101-514, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, at 6923 (demonstrating Congress’ intent to maintain a flexible definition of “work of visual art”).

31. See *id.* at 11 (stressing that “generally accepted standard of the artistic community” should be utilized to assist in determining the scope of the definition of “visual work of art”).

32. See *id.* (explaining a flexible definition of “visual work of art”).

33. See *id.* (discussing the potentially narrower definition of “visual work of art”).

34. *Id.* at 11.

35. See *id.* at 10 (stating that “the definition of a work of visual art is a critical underpinning of the limited scope of the bill”).

36. H.R. REP. NO. 101-514, at 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, at 6920-21.

37. See *id.* Printed works exclude photographic prints which are covered separately. *Id.*

example of an electronic work.³⁸ This may be due to the early date that the Act was passed—1990.³⁹ Although some electronic works existed when the bill was passed, they were not prevalent as they are today.⁴⁰ In short, the lack of an electronic example, and Congress' express statement of intent that the definition of works of visual art should be narrow, may lead courts to exclude electronic works.⁴¹ Indeed, a recent Seventh Circuit case so concluded, but did so merely because the words "painting" and "sculpture" appeared as nouns rather than as the broad "pictorial, graphic, and sculptural works" defined in the broader statute.⁴²

However, looking at the House Report as a whole, there is enough room for a court, especially one in a world where electronic works are increasingly important to artists, to find that electronic worlds are an acceptable medium for a "work of visual art."⁴³ As a result, it is feasible that a work in Second Life or similar online experience could be in an acceptable medium for the purposes of VARA.⁴⁴

A. What a Work of Visual Art is Not—Posters, and Promotional Items

In addition to defining what a work of visual art *is*, the statutory definition also expends great effort to demonstrate what a work of visual art is *not*.⁴⁵ Posters, maps, diagrams,

38. See *id.* (explaining the inclusivity of included works).

39. See *id.* at 1 (stating the passage of the Act as June 1, 1990).

40. See *A Brief History of Computer Art: Computer Art Now (the 1990s and Onward)*, VICTORIA AND ALBERT MUSEUM, archived at <http://www.webcitation.org/5wujVIAa0> (chronicling the increased incorporation of computers as an artistic tool from the 1990s to modern day).

41. See H.R. REP. NO. 101-514, at 10 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, at 6920-21. Massachusetts Representative Markey stated that "I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered...[T]his legislation covers only a very select group of artists." *Id.*

42. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 300-02 (7th Cir. Feb. 11, 2011) (comparing the language of VARA to that of 17 U.S.C. § 102(a)(5)).

43. See *id.* at 294 (stating that courts should look at the standards in the artistic community in determining the scope of the definition).

44. See *id.* (emphasizing that courts should be flexible and use common sense when determining whether a work qualifies for VARA protection).

45. 17 U.S.C. § 101 (2006) (defining what a "work of visual art" is not).

books, magazines, and newspapers are not works of visual art; merchandizing items, advertisement and promotional material are not works of visual art.⁴⁶ Most critically, an electronic publication or electronic information service is not a work of visual art.⁴⁷

None of these terms are defined in the statute, and only one circuit court case is helpful in determining whether something falls into one of these categories.⁴⁸ As established in *Pollara v. Seymour*, the intent of the artist and the commissioning party is relevant to whether a work is a promotional or an advertising item.⁴⁹

In *Pollara*, the court was confronted with whether a banner hung in Empire State Plaza was a work of visual art.⁵⁰ The banner at issue was commissioned by a political advocacy group.⁵¹ The painting stressed the importance of the right to legal representation and suggested that the new state budget threatened the availability of representation to many underprivileged citizens.⁵² The district court found that the mural was not a work of visual art because it was both advertising material and promotional material.⁵³ On appeal, Pollara argued that the mural was not advertising or promotional material because it was not commercial in nature.⁵⁴ The court acknowledged the merit of this argument, but found that the banner was promotional because it was being used to “promote,”

46. See *id.* (listing works excluded from the definition of “work of visual art”).

47. See *id.* (limiting the scope of the definition for “work of visual art”).

48. See *Pollara v. Seymour*, 344 F.3d 265, 269-70 (2d. Cir. 2003) (discussing that protection under VARA depends on objective and evident purpose of work).

49. See *Pollara*, 344 F.3d at 269-70 (discussing the standard for determining the classification of a work).

50. See *id.* at 267. The banner depicted people two dozen people waiting outside various legal services to meet with a lawyer.

51. See *id.* at 266 (stating that Gideon was a non-profit organization that provided legal services to the poor).

52. See *id.* (discussing the contents of the work in *Pollara*).

53. See *id.* at 267 (discussing the procedural history).

54. See *id.* at 270 (summarizing Pollara’s argument).

in that it was part of a particular political advocacy group's lobbying effort.⁵⁵

The court suggested that the "intent" of a work is often determinative of whether it fits the definition of a "work of visual art."⁵⁶ For support, the court looked to VARA's treatment of still-photographs, which are works of visual art only if they are "produced for" exhibition purposes only.⁵⁷ The court determined that whether photographs were produced for exhibition was an inquiry into the *intent* of the artist.⁵⁸ As such, the court found that intent was an integral part of VARA's definition of works of visual art, and could inform the analysis of other parts of the definition.⁵⁹ Applying this test to the facts, the court found that the banner was intended to advertise and promote a political cause, and thus was not a work of visual art.⁶⁰ As discussed in Part IV, the court's application of its standard to the facts may not have been entirely warranted; however, its intent analysis helps to establish whether an electronic work warrants VARA protection.⁶¹

The court's intent analysis should not be limited to determining whether an artistic work is promotional or advertisement because it gleaned the importance of intent not from the words "promotional" or "advertisement," or even its surrounding text, but from another part of the definition entirely.⁶² For reference, this part of the statute is reproduced here, and is referred to below:

55. See *Pollara*, 344 F.3d at 270. (discussing Congress' intent to exclude "all advertising and promotional materials").

56. See *id.* at 269-70 (describing how to determine a protected "work of visual art").

57. See *id.* (analyzing the limitation of protection for still photos).

58. See *id.* (holding that intent of the artist is the determinative factor in deciding a "work of visual work").

59. See *id.* at 270 (applying VARA's intent requirement for still photographs to other works).

60. See *id.* (finding that the banner, under the "intent" test, was not a work of visual art).

61. See discussion *infra* Part IV (evaluating the merits of Second Life's VARA claim).

62. See *Pollara*, 344 F.3d at 269-70, 270 n. 2 (referring to the court's reliance on the VARA definition of "work[s] of visual art").

A “work of visual art” is—

- (1) a painting, drawing, print, or sculpture... or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures... ; or
- (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.

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)....⁶³

* * *

The *Pollara* court imported the intent requirement contained in the photos provision in subsection (2) of works *included* as works of visual art into the statute’s *exclusions* from that definition.⁶⁴ As such, if the intent in the photos provision can be applied to advertising, one of many works exempted from the definition of a work of visual art, there is no reason that it cannot be implied into other provisions as well.⁶⁵ As a result, the intent standard should apply not only to other works that are excluded from the definition but also works that are included as works of

63. 17 U.S.C. § 101 (2006) (emphasis added).

64. See *Pollara*, 344 F.3d at 269-270 (applying the intent analysis typically reserved to photographs to the plaintiff’s painted banner).

65. See *id.* at 270 (applying the intent standard to a banner that is considered advertising).

visual art. Indeed, it would seem more reasonable to import the intent standard from the photos provision in subsection (2) into the general provision in subsection (1) because they are more closely related.⁶⁶ As such, an artist's intent to create a painting is relevant in whether he has in fact created a painting within the meaning of a "work of visual art."⁶⁷ An artist's objective intent also helps to determine whether a work is a poster, a map, a diagram, or a merchandizing item.⁶⁸

This principle is important, and is more important in the context of Second Life than in the real world. In the real world, it is frequently clear when something is intended to be a painting. Often it is as simple as asking whether it was created with paint. However, in Second Life, the distinction between a poster, which is not a proper medium for a work of visual art, and a painting is often less clear. All Second Life wall hangings are made out of the same colored graphics and data pieces.⁶⁹ The objective intent of an electronic work is important, for example whether the painting includes slogans or a title, or whether its subject matter would generally be emblazoned on a poster rather than a painting, such as an attractive model or a band, will inform whether a work could potentially qualify for VARA protection.⁷⁰ Further, real-world merchants often distribute posters to be placed in public places to promote or advertise, or to particular individuals who wish to show allegiance to the poster's subject matter.⁷¹ Evidence of a Second Life artist's intent to use the work in such manners will suggest that a claimed Second Life painting

66. See 17 U.S.C. § 101 (2006) (comparing sections (1) and (2) in order to find the similarities between a still photograph and a painting).

67. See *Pollara*, 344 F.3d at 269 (determining that VARA protection depends on a work's objective intent and purpose).

68. See *id.* (observing that Congress limited VARA protection to those works intended for exhibition as opposed to publication).

69. See *Building Tools*, SECOND LIFE WIKI, archived at <http://www.webcitation.org/5w9RICN1o> (instructing Second Life users on building content in the Second Life world).

70. See *Pollara*, 344 F.3d at 270 (maintaining that the message on the plaintiff's banner made it clear that the banner was promotional and advertising material that was not protectable under VARA).

71. See, e.g., Stuart Elliott, *An Irreverent Campaign From Bon Appétit*, N.Y. TIMES, Jan. 23, 2011, archived at <http://www.webcitation.org/5w9UFdFfZ> (reporting a magazine publisher's plan to use posters to promote the magazine).

is a poster.⁷² On the whole, the intent of the author will preclude many Second Life works from VARA protection if they promote a particular objective or they are intended to be posters, magazines, or newspapers.

B. What a Work of Visual Art is Not—Electronic Information Services and Publications

However, in addition to not being a poster or a merchandizing item, a work of visual art cannot be an electronic information service, electronic publication, or similar publication.⁷³ This is a more substantial hurdle, if only because it includes the word “electronic.” Unfortunately, these terms are not defined in the statute.⁷⁴ If Second Life is one of these media, works in Second Life cannot qualify for VARA protection. The first term is the easiest to dispatch. An electronic information service does not properly define Second Life or any similar environment.⁷⁵ While Second Life certainly transmits information in the form of data, and conveys information from one user to another, it is not the platform’s primary purpose.⁷⁶ The service that Second Life provides is an environment for interaction.⁷⁷ The transmission of information is subordinate to this purpose.⁷⁸ As such, Second Life is not an electronic information service.⁷⁹

72. See *Pollara*, 344 F.3d at 269 (noting that VARA does not protect advertisements regardless of their medium).

73. See 17 U.S.C. § 101 (2006) (excluding electronic information services and electronic publications from the definition of “work of visual art”).

74. See *id.* (leaving open the definitions of electronic information service and electronic publication).

75. See WordNet Search 3.0, PRINCETON UNIV., <http://wordnet.princeton.edu> (follow “Use WordNet online”: enter “electronic information service” in “Word to search for”: Search WordNet) (defining “electronic information service” as “a database that can be accessed by computers”).

76. See *The Company, LINDEN LAB, archived at* <http://www.webcitation.org/5w9WZ4Z4u> (characterizing Second Life as a platform which allows “individuals [to] inhabit a 3D landscape and build the world around them”).

77. See *id.* (affording users the opportunity to build an environment and share it with other users).

78. See *id.* (asserting that the purpose of Second Life is for users to build and surround themselves in their own world rather than transmit this data to others).

79. See, e.g., *id.*; see also *Pollara*, 344 F.3d at 269 (holding that the court

Next, Second Life is probably not an electronic publication. While “electronic publication” is not defined in the statute, the word “publication” is.⁸⁰ The statute essentially defines “publication” as the distribution of copies of a work to the public.⁸¹ However this definition is of the verb form, “to publish,” and has a different scope than the usual definition of the noun, “a publication.”⁸² A simple example illustrates this point: to distribute a sound recording to the public on a CD would publish it within the meaning of the statute, and constitute its “publication,” but no one would argue that the sound recording on the CD was *a publication*; the term implies a literary media of some sort, such as a magazine.⁸³

Further, where the Copyright Act uses the noun form, its context suggests that the drafters intended it to mean print-like literary media such as magazines, periodical compilations and other informational works.⁸⁴ Specifically, the noun form of

should look to the intent of the artist when classifying a medium). Given Linden Lab’s intended purpose for Second Life, it can reasonably be concluded that Second Life is not an information media. *See The Company, supra* note 76.

80. *See* 17 U.S.C. § 101 (2006) (lacking any definition of “electronic publication”).

81. *See id.* (defining “publication” as “the distribution of copies . . . of a work to the public”).

82. *See Definition of Publication*, MERRIAM-WEBSTER ONLINE (2011) [hereinafter *Publication*], archived at <http://www.webcitation.org/5w9YubAvP> (defining publication as either “(1) the act or process of publishing or (2) a published work”).

83. *See, e.g., Publication, supra* note 82 (characterizing a publication as a “published work”); *Definition of CD*, MERRIAM-WEBSTER ONLINE (2011), archived at <http://www.webcitation.org/5wEC2EzCn> (describing a CD as an optical disc containing data in one form or another). Under the established canons of construction *noscitur a sociis* and *ejusdem generis*, a general term that follows a series of specific terms within its ambit is interpreted to be consistent with those terms. *See Definition of Noscitur a Sociis*, BLACK’S LAW DICTIONARY 492 (3d ed. 2006); *Definition of Ejusdem Generis*, BLACK’S LAW DICTIONARY 236 (3d ed. 2006). In the definition of what a work of visual art is not “electronic publication” follows the words book, magazine, newspaper, and periodical, but it does not directly follow them, instead following the outlier “electronic information service.” *See* 17 U.S.C. § 101 (2006). As a result, this canon is not particularly helpful when applied to VARA’s definition. *See Definition of Noscitur a Sociis*, BLACK’S LAW DICTIONARY 492 (3d ed. 2006); *Definition of Ejusdem Generis*, BLACK’S LAW DICTIONARY 236 (3d ed. 2006). Note, this is the author’s hypothetical designed to illustrate his opinion.

84. *See* 17 U.S.C. § 101 (defining what a “work of visual art” is not); 17 U.S.C.

publication appears in Section 121(d)(2) of the Copyright Act in reference to exemptions from liability for the blind.⁸⁵ This provision defines “the blind” as people who are allowed to receive “books and other publications” under another statute.⁸⁶ The words “books and other publications” suggest that a book is a publication, and that other publications would be similar to books.⁸⁷ Next, the noun form appears in Section 122(j)(2)(C), where it refers to the Nielsen Station Index Directory, a printed informational gazette.⁸⁸ This implies that the definition of publications includes informational gazettes, which is consistent with a meaning that includes only print works such as periodicals.⁸⁹ Finally, in Section 707, the noun form is used to refer to compilations of information and bibliographies.⁹⁰ Again, it is used only to refer to a printed work that is similar to a magazine or a periodical.⁹¹

This suggests that an electronic publication refers to only the electronic equivalent of such terms works as, e-books, and the online equivalent of magazines, newspapers, gazettes, and periodicals.⁹² This would also be in line with the normal use of the word “publication.”⁹³ On the whole, it appears that a piece of

§ 121(d)(2) (2006) (using “publication” as a noun).

85. See 17 U.S.C. § 121(d)(2) (demonstrating the use of “publication” as a noun in the context of limiting the exclusive rights of the copyright holder).

86. See *id.* (referencing 2 U.S.C. § 135a, which provides that disabled individuals are eligible to receive certain publications).

87. See *id.* (including books in the publications persons with disabilities are entitled to receive).

88. See 17 U.S.C. § 122(j)(2)(C) (2006) (designating the Nielsen Station Index Directory as a publication). Nielsen compiles data of television stations and viewership; *Nielsen Media Research: Nielsen Station Index*, THE MEDIA RESEARCH HUB, archived at <http://www.webcitation.org/5wE7TIYz4> (providing information on the activities of the Nielsen Station Index).

89. See 17 U.S.C. § 122(j)(2)(C); 17 U.S.C. § 121(d)(2) (coupling the phrase “other publications” with “books”).

90. See 17 U.S.C. § 707(b) (2006) (illustrating what may be considered as “other publications”).

91. See *id.* (including compilations of information and bibliographies as “other publications”).

92. See 17 U.S.C. § 122(j)(2)(C) (outlining what is meant by a designated market area and that is what may refer to a successor publication); 17 U.S.C. § 121(d)(2) (granting access to publications such as books to disabled individuals); 17 U.S.C. § 707(b) (listing the possibilities of what is meant by “other publications”).

93. See WEBSTER’S II NEW RIVERSIDE DICTIONARY 554 (3d ed. 1996) (defining

artwork in the Second Life is not an electronic publication, because the term seems to be directed more to a periodically updated website with print content.⁹⁴

As a result, an electronic painting or sculpture in Second Life would not be exempted from protection because it is included in the definition of what a "work of visual art is not."⁹⁵ And, given that an electronic world may be an appropriate medium for a work of visual art, a work in Second Life could potentially pass its first hurdle to VARA protection.⁹⁶

With the medium requirement at least plausibly satisfied, the next Part of this article will examine whether a work in Second Life, or any electronic work on the Internet, could fulfill the requirement that it exist in fewer than 200 copies.

III. Can a Second Life Work Fulfill the 200 Copies Requirement?

The very nature of a work in Second Life, like many other works on the Internet, is that it is viewed by many people on their personal computers. In order to be viewed, the work must exist in the recipient's RAM and must be transmitted through hundreds of servers along the way.⁹⁷ For a typical work on the Internet, thousands of data images of the work exist in the RAM

publication" as "something published, as a magazine").

94. Compare Steve Mahaley, *A Second Look at Second Life*, CHIEF LEARNING OFFICER MAGAZINE, May 21, 2009, at 23, archived at <http://www.webcitation.org/5wnBz4s1M> (describing the user created content on Second Life), with 17 U.S.C. § 122(j)(2)(C), and 17 U.S.C. § 121(d)(2), and 17 U.S.C. § 707(b) (utilizing "publication" as informational works).

95. See 17 U.S.C. § 101 (2006) (defining what a work of visual art is not).

96. See H.R. REP NO. 101-514, at 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, at 6920-21. (instructing the courts to use "common sense and generally accepted standards of the artistic community" in determining whether a work is protected under VARA); 17 U.S.C. § 101.

97. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (quoting *Apple Computer, Inc. v. Fomula Int'l, Inc.*, 594 F. Supp. 617, 622 (C.D. Cal. 1984)). RAM can be defined as a computer component in which data and computer programs can be temporarily recorded. See *id.* Thus, a person who downloads a piece of software may use it in its entirety due to its existence on the RAM. *Id.* Any data on the RAM is lost when the computer is turned off or when the computer replaces the information in the RAM with new information. See *id.*

of another user's computer and on servers that bounce the data back and forth on its way to a particular user's computer.⁹⁸

These data images must exist in order for another person or player to view the work.⁹⁹ But, the definition of a "work of visual art" requires that the work exist in fewer than 200 copies.¹⁰⁰ Given the fact that thousands of data images are created for every work on the Internet, this requirement is a substantial hurdle to any electronic work posted on the Internet.¹⁰¹ If the data images of the work in RAM and in servers are copies, then no work on the Internet could ever be a work of visual art; there would simply be too many copies to qualify under VARA's statutory definition.

However, there is a plausible interpretation of the Copyright Act and the accompanying case law that would allow a work posted on the Internet to meet the 200 copies requirement. Several factors suggest that these data images would not be copies within the meaning of the Copyright Act. First, this Part of the article will consider the increased burden on an author's

98. See, e.g., R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies*, 2001 U. ILL. L. REV. 83, 141 (2001) (explaining that all transmission of images over the internet involves storage of those images in RAM). The term "data image" is not intended to mean that the computer is storing a visual picture, but instead it is intended to mean, consistent with its programming and mathematical definition, simply a data "representation" of any work. See *Definition of Data Representation*, PC MAG., archived at <http://www.webcitation.org/5wq70bnTY>. As such a "data image" could be a data representation of a literary work, a sound recording and need not be visual in nature. *Id.* In this article the term "data image" is used to reserve the term "copies" for its statutory meaning as a term of art. See 17 U.S.C. § 101 (2006). A colloquial "copy" that is evanescent may not be a "copy" within the meaning of the Act. *Id.*

99. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 41 n.58 (1994) (noting that an image on a user's screen exists "only by virtue of the copy that has been reproduced in the user's computer memory").

100. See, e.g., 17 U.S.C. § 101 (2006) (setting forth the requirements for a work to qualify as a work of visual art). In part (1), the definition requires that paintings, prints and sculptures exist in a single copy [or] in a limited edition of 200 copies or fewer. *Id.* (emphasis added). In part (2), the definition puts a similar requirement on still photographic images. See *id.*; see also H.R. REP. NO. 101-514, at 12 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6922-23 (enumerating the rationale for reserving VARA protection to works in limited editions).

101. See 17 U.S.C. § 101 (restricting the amount of eligible copies to under 200 replications).

attempt to make copies arising from the statute itself, and examine how the higher burden is reflected in the case law. Second, this Part will examine the areas where courts have pushed back on the RAM copy doctrine so that data images in these situations may not qualify as copies.

A. Data Images on RAM

Until recently, cases that have decided whether a RAM data image constitutes a copy of a work have almost all followed the *MAI Systems v. Peak Computer* decision and found that the data is a copy and is fixed within the meaning of the Copyright Act.¹⁰² However, a closer look at the statutory definitions, the legislative history, and the relevant case law reveal a more subtle distinction: A higher standard applies to an author's fixation, so while RAM data is a copy for the purposes of infringement, it may not be for the purposes of an author's fixation.¹⁰³ Furthermore, recent appellate courts' treatment of RAM data images have distinguished *MAI Systems* and substantially narrowed its holding.¹⁰⁴ The fact that RAM data is not a copy for the purposes of an author's fixation and the narrowing of the so called RAM copy doctrine suggest that the author of an online work can meet the 200 copy requirement of VARA.

102. See *MAI Sys. Corp.*, 991 F.2d at 519 (holding digital material copied onto a computer using RAM is a copy under the Copyright Act because it is fixed in nature); *Stenograph L.L.C. v. Bossard Assocs. Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998) (adopting the view of the *MAI Systems Corporation* court that digital RAM copies are copies under the Copyright Act). A few cases implicitly reject that RAM data images are copies. See MARK A. LEMLY ET. AL., *SOFTWARE AND INTERNET LAW* 96-97 (3d ed. 2006) (citing *Hogan Sys. Inc. v. Cybersource Int'l*, 158 F.3d 319 (5th Cir. 1998)); *DSC Commc'n Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996); *Tricom Inc. v. Elec. Data Sys. Corp.*, 902 F. Supp. 741 (E.D. Mich. 1995)).

103. See *infra* Part III (A)(2)(b) (reconciling the technology of RAM data images with the legal concept of fixation for copyright purposes).

104. See, e.g., *Vernor v. Autodesk Inc.*, 621 F.3d 1102, 1109 (9th Cir. 2010) (noting that copying software onto RAM does not always infringe the copyright in the software).

1. Copyright Act's Definition of a "Copy"

The Copyright Act defines a copy as a material object, "in which a work is *fixed* by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated."¹⁰⁵ A work is "fixed" when it is embodied in a copy, "by or *under the authority of the author*, [that] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than *transitory duration*."¹⁰⁶

These definitions create an obvious contradiction in the copyright statute.¹⁰⁷ If copies must be fixed, and fixation requires an embodiment "by or under the authority of the author," then copies require the authority of the author to come into being.¹⁰⁸ Therefore, if someone other than the author made the reproduction without permission, it is not a copy. This simply cannot be the law because the reproduction right, the most important protection of the act, protects the owner against only the reproduction of *unauthorized copies*.¹⁰⁹ If a person cannot create a copy without the author's permission, then it is impossible to make an "unauthorized copy" and this right is impossible to violate.¹¹⁰

105. 17 U.S.C. § 101 (emphasis added).

106. *See id.* (emphasis added). One thing to note is that by its definition a copy exists when it is fixed and a fixation occurs only when it is embodied in a copy. *See id.* Thus, copying references fixation to define itself, and fixation references right back to copy. *See id.* This creates a tautology, where in essence the definition of a copy depends on whether it is a copy. *See* Brian D. Wassom, *Copyright Implications of "Unconventional Linking" On the World Wide Web: Framing, Deep Linking and Inlining*, 49 CASE W. RES. L. REV. 181, 201 (1998) (illustrating a copy defined in terms of fixation). However, the best course, and the one that courts commonly use in dealing with this problem is to simply ignore it and think of copying defined in terms of fixation. *See MAI Sys. Corp.*, 991 F.2d at 519.

107. *See* 17 U.S.C. § 101 (2006) (defining "copy" in terms of being "fixed" and defining "fixed" in terms of a "copy").

108. *See id.* (including the quoted language in the definition of "fixation").

109. *See* 17 U.S.C. § 106(1) (2006) (codifying that "the owner . . . has the exclusive rights to *do and to authorize* . . . (1) to reproduce the copyrighted work in *copies* . . .") (emphasis added).

110. *See Can I Use Someone Else's Work? Can Someone Else Use Mine?*, UNITED STATES COPYRIGHT OFFICE, archived at <http://www.webcitation.org/5wKB3MgyC> (answering the question "can I use

An interpretation of a definition that eviscerates the most fundamental protection of the Copyright Act cannot be correct, even if it is textually required.¹¹¹ The statute cannot mean what it seems to require, so there must be some reconciling solution.¹¹² The words “by or on the authority of the author” cannot have been included by accident or to have *no effect*, but they also cannot apply broadly to all copies, which would undermine the entire statute; therefore, they must apply, but only in limited circumstances.¹¹³ The only reasonable resolution is that the words “by or on the authority of the author,” apply only to an *author’s* potential fixation and not to an *infringing* fixation.¹¹⁴ This solution is tenable because it allows the reproduction right to operate at its full statutory and historical scope.¹¹⁵

someone else’s work” by requiring authorization to make a copy of an author’s work). There is a real distinction between the owner of the copyright and the author of the copyrighted work; however, for the purposes of pointing out this contradiction, the focus is on the author as the owner. *See* 17 U.S.C. § 201(a) (2006). Except in the case of a work for hire, the author is always the original owner of the work. *See id.* Again, in this note it is assumed that the author is the owner to point out this contradiction. *See supra* Part III (A)(1). If the owner was not the author, an equally ridiculous result occurs. *See* H.R. REP NO. 94-1476, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5661. If the owner is not the author, the owner can only sue someone who makes copies, which can only be created by the author (or under his authority). *See* 17 U.S.C. § 101 (2006). Because only the author can make copies, only the author can be an infringer. *See id.* As a result, if someone who is unaffiliated with the author creates a copy, he would not be liable. *See* 17 U.S.C. § 106(1) (2006).

111. *See* *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998) (refusing to allow interpretation that leads to an “absurd conclusion”).

112. *See* *United States v. Granderson*, 511 U.S. 39, 56 (1994) (requiring a construction of statutory language that “avoids attributing to the legislature either ‘an unjust or an absurd conclusion’”) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

113. *See* *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (stating that every word of a statute must be given effect only when such construction of the statute is possible).

114. *See, e.g.*, 17 U.S.C. § 101 (2006) (defining fixation); *South Dakota*, 522 U.S. at 346 (declining to interpret a statute which would result in “absurd conclusion”).

115. *See* H.R. REP NO. 94-1476, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5661 (explaining the copyright owners right to reproduce in copies under § 106).

In order to avoid an absurd result, we must accept that the word “copy” creates a duality.¹¹⁶ Specifically, a higher standard applies for fixation of an *author’s* copies than an *infringer’s* copies.¹¹⁷ Even though the only additional requirement from the statute for authors’ fixation would be giving their permission, this requirement may reflect a broader legal scheme where authors must do more than infringers to fix a work in copies.¹¹⁸

2. RAM Images as Copies in the House Report and Case Law

The original 1976 Copyright Act included language in its House Report that, in a fairly explicit manner, shows that the 1976 Act did not intend RAM data images to be considered copies.¹¹⁹ The Report states that the “definition of ‘fixation’ would exclude... purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or cathode ray tube, or *captured momentarily in the ‘memory’ of a computer.*”¹²⁰ While this statement does not preclude all possible RAM copies, it clearly suggests that images that are not kept for more than a few “moments” are not fixations or, as a result, copies.¹²¹

Contrary to this language, the case law following the Copyright Act almost unanimously found that all RAM data images were copies within the meaning of the 1976 Act.¹²² In

116. See, e.g., 17 U.S.C. 101 (2006) (defining when “[a] work is ‘fixed’”); 17 U.S.C. 106(1) (2006) (codifying the reproduction right of copyright owners); *Granderson*, 511 U.S. at 56 (requiring statutory construction which avoids “unjust or absurd results”).

117. See H.R. REP NO. 94-1476, at 5-6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 (articulating the standard of “fixation” in the context of creating statutory rights to a copyright and no infringement).

118. See *id.* (considering how statutory copyright protection can be created through various means of fixation).

119. See *id.* at 6 (excluding temporarily saved data in RAM from definition of fixation in 1976 Copyright Act).

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

121. See *id.* (requiring more than a fleeting reproduction to satisfy the fixation requirement).

122. See, e.g., *MAI Sys. Corp.*, 991 F.2d at 519 (holding fixation to the RAM qualifies as fixation to a copy for purposes of copyright infringement); *Stenograph*, 144 F.3d at 100 (holding loading a program onto computer is copyright sufficient to satisfy infringement); *but see* LEMLY ET. AL., *supra* note 106, at 96-97 (providing support that copies made in RAM is not fixation).

addition, and perhaps more importantly, the Digital Millennium Copyright Act's ("DMCA") provisions assumed that RAM data images constituted copies.¹²³ Specifically, by exempting certain transitory digital images, the DMCA implied that liability for a digital image existed in areas not exempted.¹²⁴ As a result, most lawyers and commentators agree that, after the DMCA, the statute contemplates that at least some RAM images are copies.¹²⁵

However, the case law nonetheless supports my proposed dichotomy of fixation—that fixation by the author is held to a higher standard than fixation by potential infringers.¹²⁶ Specifically, cases that involve fixation of a potential infringer hold on much broader grounds than the few decisions that examine an author's fixation.¹²⁷ To see this effect, an

123. See 17 U.S.C. § 512 (2006) (limiting liability of Internet service providers who temporarily stores transitory data which infringes another's copyright); *Costar Grp. v. Loopnet*, 373 F.3d 544, 551 (4th Cir. 2004) (clarifying that when data is transmitted onto the RAM of an Internet service provider's servers it is a transitory duration and therefore does not create a copy).

124. See 17 U.S.C. § 512(a), (b) (creating limitations on liability for online service providers). Under certain circumstances, exempting transitory digital network communications requires as a prerequisite that there be a digital image of the work in a server's RAM. See 17 U.S.C. § 512(a). Similarly, that the statute exempts temporary storage of material from liability while on a passive network suggests that RAM copies or at least ROM copies are frequently deleted. See 17 U.S.C. § 512(b).

125. See *Digital Millennium Copyright Act (DMCA) Section 104 Report: Before the Subcomm. On Courts, the Internet, and Intellectual Comm. on the Judiciary*, 107th Cong. (2001) (statement of Marybeth Peters, Register of Copyrights), archived at <http://www.webcitation.org/5wNMQe0uk> (elaborating on the status of data stored on RAM as a fixed copy under the Copyright Act).

126. See, e.g., *Costar Grp.*, 373 F.3d at 551 (stating in dicta that although an ISP may not be liable for temporary storage in RAM, it does not mean an individual would not be liable); *MAI Sys. Corp.*, 991 F.2d at 519 (holding a copy is made for purpose of infringement through storage in systems RAM); *Midway Mfg. v. Artic Int'l*, 547 F. Supp. 999, 1007-09 (D.C. Ill. 1982) (finding valid fixation from the use of ROM to store data); *Cartoon Network v. CSC Holdings*, 536 F.3d 121, 127 (2d Cir. 2008) (interpreting *MAI Sys. Corp.* to allow a finding storing information in RAM is fixation).

127. Compare *Midway Mfg. Co.*, 547 F. Supp. at 1007-09 (finding valid fixation due to the ability of repeated reproduction due to data stored in the ROM of the user), with *Costar Grp., Inc.*, 373 F.3d at 551 (referring to the potential liability of a private user due to data being saved no longer being transitory), and *MAI Sys. Corp.*, 991 F.2d at 519 (holding a temporary copy found in RAM to be fixed for purpose of finding infringement), and *Cartoon Network*, 536 F.3d at 127 (agreeing with decision in *MAI Sys. Corp.* to find storing in RAM is not so

examination of the case law is required, and there is no better place to start than *MAI Systems*.¹²⁸

a. MAI Systems and RAM Copies in the Infringement Context

MAI Systems involved the software company, MAI, that licensed its software and operating systems to its customers under an extremely narrow licensing provision.¹²⁹ The provision provided that only the employees of the customer had permission to access and use the software, and only three of the customer's *bona fide* employees could use the diagnostic tools for the purpose of repairing the computers and software.¹³⁰ This restrictive provision was used to gain a competitive advantage so that MAI could exclusively service the computers with its fee-based repair service of the computers and software.¹³¹

Peak Computer, Inc. was a competitor of MAI and offered computer repair services for MAI's systems.¹³² After an employee of MAI joined Peak's team, several of MAI's software customers began using Peak for repairs.¹³³ MAI sued for copyright infringement and the district court enjoined Peak from performing further repairs on computers using MAI's software by enjoining its employees from loading MAI's software and diagnostics into a computer's RAM.¹³⁴ Inherent in this injunction was the fact that the district court believed that loading MAI's software into RAM created a copy within the definition of the Act, and thus constituted an infringement.¹³⁵

transitory to excluded as fixation).

128. See *MAI Sys. Corp.*, 991 F.2d at 519 (holding saving to RAM is fixation for purpose of copyright infringement).

129. *Id.* at 517 (elaborating on the nature of the software's use).

130. *Id.* (providing the terms of the *MAI Sys. Corp.* agreement).

131. See *MAI Sys. Corp. v. Peak Computer*, No. CV 92-1654-R, 1992 WL 159803, *1-2 (C.D. Cal. April 14, 1992) (providing factual background to MAI complaint).

132. See *id.* at *7 (characterizing Peak as a competitor of MAI).

133. See *MAI Sys. Corp.*, 991 F.2d at 513 (outlining the origin of the dispute between MAI and Peak).

134. See *id.* at 515 (summarizing the legal outcome of the original lawsuit between MAI Systems and Peak).

135. See *id.* at 518 (explaining the nature of the district court's injunction against Peak). Among the other causes of action brought were misappropriation of trade secrets, trademark infringement, false advertising,

The Ninth Circuit agreed.¹³⁶ While it acknowledged there was no case specifically holding that loading a program into the RAM of a computer constituted copying, it found that RAM was sufficiently fixed within the meaning of the Copyright Act.¹³⁷ The court found that because the data created in RAM can be “perceived, reproduced or otherwise communicated,” it was sufficiently fixed to constitute a copy within the meaning of the Copyright Act.¹³⁸

Courts have generally fallen in line with *MAI Systems*.¹³⁹ For example, in *Stenograph v. Bossard*, the court was confronted with an alleged infringement based upon RAM copying.¹⁴⁰ Stenograph sold computers and software for court reporters that translated the reporter’s notes into English text.¹⁴¹ Like MAI, Stenograph had very strict licensing procedures and required its customers to agree not to copy its software onto any other computer.¹⁴² A former employee, in contravention of this policy, sold several computers with the software installed to Bossard Associates, which then distributed them to customers without any use limitations.¹⁴³ The district court found that Bossard had sold the computers with full knowledge that it did so in contravention of Stenograph’s policies.¹⁴⁴ On appeal, Bossard

and unfair competition. *See id.* at 513.

136. *See id.* at 519 (affirming the decision of the district court).

137. *See id.* at 519 (holding that loading software onto a computer can be sufficiently reproduced to be considered a copy under the Copyright Act).

138. *MAI Sys. Corp.*, 991 F.2d at 519. As is relevant to later case law, the court does not specifically reason around the “transitory duration” limitation. *Id.*

139. *See, e.g., Stenograph*, 144 F.3d at 100 (adopting the view that installing software onto a computer is “copying” under the Copyright Act); *NLFC v. Devcom Mid-America*, 45 F.3d 231, 235 (7th Cir. 1995) (acknowledging that both parties agree that installing software is copying under the Copyright Act); *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting*, 421 F.3d 1307, 1311, 1317 (Fed. Cir. 2005) (applying the *MAI Sys. Corp.*’s definition of “copying” to the facts of the case).

140. *See Stenograph*, 144 F.3d at 101-02 (finding that copying occurred when “Premier Power” was loaded onto the RAM of Bossard’s computers).

141. *See id.* at 97 (describing Stenograph’s line of business).

142. *See id.* at 97-98 (implementing a strict licensing agreement with customers in order to prevent the making of third party copies).

143. *See id.* at 98 (illustrating that Bossard failed to enter into and follow the required licensing agreements).

144. *See id.* (requesting a return of the copyrighted material was enough to

contended that no unauthorized copies of the programs had been made.¹⁴⁵

The Court of Appeals for the District of Columbia rejected Bossard's argument.¹⁴⁶ The court noted that, when Bossard installed the software onto the computers and his server, he created copies.¹⁴⁷ However, the court did not stop there.¹⁴⁸ As an alternative holding, the court, citing *MAI Systems*, found without independent analysis that by merely turning on and using the software, Bossard had made unauthorized copies.¹⁴⁹

Several commentators have criticized *MAI Systems* and *Stenograph*.¹⁵⁰ They believe the cases misinterpret the definition of fixation and conflict with the legislative history.¹⁵¹ As described above, the House Report specifically states the "definition of 'fixation' would exclude... purely evanescent or transient reproductions such as those projected briefly on a

put Bossard on notice of his infringement).

145. See *Stenograph*, 144 F.3d at 100 (setting forth an argument that states while copies were made the copies were not of copyrighted material).

146. See *id.* (declining to follow the reasoning Bossard's counsel set forth based on the definition of "copying" under the Copyright Act)

147. See *id.* at 100-01 (turning to the question of how installation on Bossard's computer could be proven).

148. See *id.*

149. See *id.* at 101-03 (stipulating that loading the software on the RAM of Bossard's computers regardless of the content was a copyright infringement).

150. See, e.g., Reese, *supra* note 98, at 84-85, 138-48 (analyzing the strained nature of the RAM "copies" problem, its conflict with the House Report, and its extreme consequences, and presenting the public display right as Congress' intended alternative); Litman, *supra* note 99, at 40-42 (criticizing the proposition that loading a work onto a computer is copying "has long been clear" as dubious at best and lacking support); James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 HARV. J.L. & TECH. 47, 83-94 (1996) (noting that the decision in *MAI Sys. Corp.* is controversial and does not provide a suitable basis for deciding similar cases); Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1420-21 (1996) (reaching the conclusion that it is impossible to determine with any certainty whether a work copied onto one's RAM is fixed and subject to copyright law).

151. See Reese, *supra*, note 98, at 84-85 (asserting that Congress intended the public display right to apply to computer networks); Litman, *supra* note 99, at 40 (maintaining that the RAM doctrine expands the reproduction right beyond Congress' intent); Boyle, *supra* note 150, at 83 (claiming that the RAM doctrine is in direct conflict with the legislative history of the Copyright Act); Cate, *supra* note 150, at 1420 (opining that RAM may not meet the definition of fixation).

screen, shown electronically on a television or cathode ray tube, or *captured momentarily in the 'memory' of a computer.*"¹⁵² As a result, Congress intended that, even though both a projection on a screen and a RAM data image are often sufficiently permanent for a user to perceive or reproduce them, they are not "copies" because they only exist for a transitory duration.¹⁵³

Commentators also criticize these cases because they create liability for activity that society would regard as innocent.¹⁵⁴ The RAM copy doctrine would allow a person who simply "browses the Net and unintentionally runs across infringing material" to be held liable for copyright infringement.¹⁵⁵ It would also allow a website that posts factual information that is free for anyone to use to bring a copyright claim against any technician who extracts that information because he stores the website's expression of that information in his RAM.¹⁵⁶

b. RAM Data Images in the Context of an Author's Fixation

Courts that have confronted fixation and copying in the context of *author* fixation have held that the author met the fixation requirement, but did so on substantially narrower grounds than the cases above.¹⁵⁷ These cases apply no RAM copy

152. H.R. REP NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 (emphasis added).

153. *See* Reese, *supra* note 98, at 140 (concluding that based on the legislative history Congress did not intend such intangible displays to be copies).

154. *See* Reese, *supra* note 98, at 142 (hyperbolizing the various ways individuals could "innocently" infringe through the RAM copy doctrine).

155. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 555 (1997); Reese, *supra* note 98 at 142.

156. *See* Reese, *supra*, note 98 at 145 (citing *Ticketmaster v. Tickets.com*, 2000 U.S. Dist. LEXIS 4553, at *5 (C.D. Cal Mar. 27, 2000) (conceding that transferring copyrighted material to a computer in order to extract noncopyrightable facts may constitute the making of infringing copies)).

157. *See, e.g., Midway Mfg. Co.*, 547 F. Supp. at 1008 (contending that the copyrighted work's recordation on a ROM chip is permanent, rendering the work copyrightable); *Stern Elecs. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982) (relying on the permanence of the program embodied in the ROM chip to uphold copyrightability of the challenged work). Very few cases involve this particular question and they are older cases. *See Midway*, 704 F.2d at 1009; *Stern Elecs.*, 669 F.2d at 852 (deciding the case in 1982). No doubt a lawyer

doctrine.¹⁵⁸ One example is *Midway Manufacturing v. Artic International*.¹⁵⁹ Midway Manufacturing created and distributed arcade games in the United States and owned the copyright to both Pac-Man and Galaxian, games that undoubtedly will make the reader nostalgic.¹⁶⁰ Midway copyrighted its works as audio-visual works, including the familiar audio-visual components of Pac-Man and Galaxian—the character, the ghosts for Pac-Man, and the starships and alien ships for Galaxian.¹⁶¹ Artic International created a “speed up” kit that made Galaxian more difficult for users, and because the users “died” more frequently, they had to feed more quarters into the machine.¹⁶² This modification was popular because it resulted in greater profits for arcades.¹⁶³ Artic also made a knockoff “Puckman” game to compete with Midway’s Pac-Man.¹⁶⁴

Artic argued that Midway’s games were not “fixed” and thus not protected by the Copyright Act.¹⁶⁵ Artic pointed out that

could argue that the only reason that no “RAM copy” doctrine has been applied to author fixation is that in the face of these cases, and the subsequent RAM copy doctrine for *infringement* fixation, lawyers simply stopped challenging the author’s fixation. This is possible, but the current state of the case law is still wide-open to an opposing lawyer’s use of the dichotomy of fixation. See Ira L. Brandriss, *Writing in Frost on a Window Pane: E-Mail and Chatting on RAM and Copyright Fixation*, 43 J. COPYRIGHT SOC’Y U.S.A. 237, 239-40 (1996) (averring that the difference between creation of a work and duplication of a work has not been closely examined).

158. See, e.g., *Midway Mfg. Co.*, 547 F. Supp. at 1008 (making no mention of RAM in determining that the work was fixed by the author); *Stern Elecs.*, 669 F.2d at 856 (deciding the issue of fixation on the basis of the program’s embodiment in ROM, not RAM).

159. See *Midway*, 547 F. Supp. 999; see also *M. Kramer Mfg. v. Andrews*, 783 F.2d 421, 441 (4th Cir. 1986) (following the logic of *Midway Mfg. Co.* in concluding that the video game program was sufficiently fixed in the computer’s memory to be copyrightable).

160. See *Midway Mfg. Co.*, 547 F. Supp. at 1001 (stating the basis of the lawsuit).

161. See *id.* at 1003. The court observes that Pac-man was first published in Japan as “Puckman,” which in many ways makes more sense than its American title. *Id.* The little guy does look a bit like a puck, and not much like a “pac.”

162. See *id.* at 1004 (outlining the defendant’s conduct which led to the lawsuit).

163. See *id.* (increasing the pace of the game makes it more difficult and generates greater profit from the game turnover).

164. See *id.* at 1005 (using “Puckman” circuit boards for the knock-off Namco games).

165. See *Midway Mfg. Co.*, 547 F. Supp. at 1007 (providing the defendant’s argument against copyright protection).

the game's five ROMs separately stored the audio-visual components as data that was combined evanescently and in different ways by the microprocessor that ultimately created an experience on the screen, which was not fixed because it was displayed only briefly and would never be seen again.¹⁶⁶ The court did not directly address the existence in the microprocessor's RAM or on the screen.¹⁶⁷ However, the court found that a work need not be fixed exactly as it is perceived each time by the human eye, and that the games were fixed because their individual pieces were fixed in the ROMs of the video game and could be perceived and reproduced through the use of the microprocessor.¹⁶⁸ As a result, the court held the work was fixed.¹⁶⁹ The court's determination that the individual portions of the work were fixed in the ROM of the computer is significantly narrower than the wide-ranging RAM copy doctrine.¹⁷⁰ In fact the case, dealing with an author's fixation, makes no comment on RAM copies.¹⁷¹

Another case that dealt with an author's fixation found fixation on even narrower grounds. The court in *Stern Electronics v. Kaufman* was also confronted with an arcade game that created a different experience each time it was played.¹⁷² The defendant claimed that, because each experience changed, no single experience was ever fixed because it appeared only fleetingly on the screen.¹⁷³ The court determined that the fact that the each

166. See *id.* (arguing that because an image was temporary during a game, it could not be "fixed" in terms of the Copyright Act).

167. See *id.* (asserting that the program's embodiment on ROM was sufficient to qualify for copyright protection, thus there was no need to explore RAM copies or on screen displays).

168. See *id.* (rejecting the defendant's claim that the work was not copyrightable because it was not "fixed").

169. See *id.* at 1008 (basing the decision on statutory language providing for technology "now known or later developed" to be covered under the Copyright Act).

170. Compare *Midway*, 547 F. Supp. at 1008 (considering ROM operations only) with *MAI Sys. Corp.*, 991 F.2d at 519 (setting forth the RAM Copy Doctrine).

171. See *Midway Mfg. Co.*, 547 F. Supp. at 1007-08 (referring instead to ROMs).

172. See *Stern Elecs.*, 669 F.2d at 855-57 (holding the images were in fact "fixed" as defined by the Copyright Act because of their repetitive nature).

173. See *id.* at 855 (arguing the varying images were not "fixed" within the meaning of the Copyright Act).

experience would differ slightly because each player's choices would change the game sequence was of no moment because the individual copyrightable aspects of the videotape, such as the sounds heard, the terrain, the player's spaceship, all remained constant.¹⁷⁴ Thus, because the individual aspects were repetitive and could be seen each time the game is played, they duplicated substantial portions of the audio-visual submitted to the Copyright Office.¹⁷⁵ As a result, the court found that the arcade game and the video submitted to the Copyright Office were the same work, and concluded that the video submitted to the Copyright Office was the game's fixation.¹⁷⁶

These courts found fixation on significantly more narrow grounds than the courts that confronted infringing copies.¹⁷⁷ They focus not on the RAM, but on alternatives that are clearly fixed, even though the data image in the RAM would more closely correspond to the work a user encounters.¹⁷⁸ The fact that the cases look for fixation even where the work fixed is not the same as the work perceived, suggests that they were unsure whether the RAM would be a fixation under the circumstances. As a result, it seems reasonable to suggest that author-created fixations require a higher standard than infringing fixations. In our situation, VARA only counts copies against the author if the author has created them.¹⁷⁹ As such, they will benefit from this

174. *See id.* at 855-57 (finding the constant nature of various aspects of the game could be constituted as "fixed" within the meaning of the Copyright Act).

175. *See id.* (concluding that the repetition of the same images at certain levels of the game meant that the images were fixed in nature and were therefore improperly copied).

176. *See id.* (upholding the decision of the District Court).

177. *See, e.g., Midway Mfg. Co.*, 547 F. Supp. at 999 (concluding by loading the images on the ROM they become fixed); *Stern Elecs.*, 669 F.2d at 855-57 (focusing on the repetitive and constant nature of the game in finding the images were "fixed").

178. *See, e.g., Midway Mfg. Co.*, 547 F. Supp. at 1007-08 (resolving the issue based on ROM without mention of RAM); *Stern Elecs.*, 669 F.2d at 856 (justifying the images as fixed based upon the repetitive and constant nature of the game instead of relying on the RAM doctrine).

179. *See* 17 U.S.C. § 106A (2006). VARA states that a painting or the like is protected if it "exists" in fewer than 200 copies. 17 U.S.C. §101 (2006) (defining a "work of visual art" at (1)). This would suggest that another person's copies could qualify. *See id.* However, this leads to a bit of a ridiculous conclusion. If a famous artist paints a picture, and then it is ripped off in thousands of posters, this could not reasonably undermine the artist's

increased standard. Consequently, to count against the author, the works must be created “under the authority of the author” and are probably not subject to a strict RAM copy doctrine because they are not copies for the purpose of infringement.

3. Trend Away from the RAM Copy Doctrine

For years, *MAI Systems* stood as an impenetrable wall to anyone doing business on the Internet.¹⁸⁰ However, finally, there is some evidence that the behemoth is crumbling. Two recent decisions significantly weaken the RAM copy doctrine. First, the Fourth Circuit found that the RAM copy doctrine does not apply to data images created by Internet Service Providers (“ISPs”) that create them in transit to the ultimate user.¹⁸¹ Second, the Second Circuit found that *MAI Systems* did not establish a RAM copy doctrine at all because it did not address the transitory duration language of the statute.¹⁸²

In the face of *MAI Systems*, the Fourth Circuit in *Costar Group v. Loopnet* convincingly found that the data images on servers do not constitute “copies” in Copyright, even for the purposes of infringement.¹⁸³ *Costar* involved an Internet Service Provider, Loopnet, which allowed users to list real estate on its server and performed only minimal review of the photos to

protection. *See, e.g.*, 17 U.S.C. § 101; 17 U.S.C. § 106A. The simple answer is that these do not constitute the “work” for the purposes of the act. 17 U.S.C. § 101. The word “existing” must necessarily have some connection to the artist’s work. *Id.* Such a connection is strongly suggested by the fact that the author must sign and number his pieces personally. *See id.* The act states that the works must be “signed and consecutively numbered by the author.” *Id.*

180. *See MAI Sys. Corp.*, 991 F.2d at 519 (setting forth the RAM Copy Doctrine).

181. *See Costar Grp.*, 373 F.3d at 544 (citing to *MAI Sys. Corp.* in regards to the transitory nature of RAM operation).

182. *See Cartoon Network*, 536 F.3d at 130 (differentiating the facts of this case from *MAI Sys. Corp.* based on the way the RAM in a computer operates).

183. *See Costar Grp.*, 373 F.3d at 551 (evaluating whether the fixation standard set forth in *MAI Sys. Corp.* in proper); *accord Cartoon Network*, 536 F.3d at 130-34 (explaining that the transitory nature of RAM does not necessarily result in fixed copies). This article argues above that a higher standard applies to author fixation. *See supra* Sec. b. As a result, if the server data images do not qualify as copies for the purposes of infringement, they certainly do not qualify as copies for the purposes of an author’s fixation. *See supra* Sec. b.

determine if they were infringing.¹⁸⁴ Costar owned the copyrights to many of the photographs on the Loopnet site.¹⁸⁵ The district court determined that Loopnet was not liable for direct infringement; Costar appealed.¹⁸⁶

On appeal, the Fourth Circuit affirmed.¹⁸⁷ It held that the data images of the works on Loopnet's servers were not copies because they were not fixed.¹⁸⁸ The Fourth Circuit pointed out that fixation requires the presence of a data image that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of *more than transitory duration*."¹⁸⁹ The court went on to explain that, because an ISP is entirely indifferent to the material that it posts, it does not ultimately consume the information and is merely a conduit.¹⁹⁰ The court held that this uploading falls within the scope of a transitory duration because the words "transitory duration" describe not just a quantitative time limit, but also a qualitative status.¹⁹¹ In part, the words describe the status of transition.¹⁹² Thus, a person who downloads a picture into his RAM may be an infringer because he is the ultimate consumer, but an ISP is not because the information is merely in *transit* to the ultimate consumer.¹⁹³

184. See *Costar Grp.*, 373 F.3d at 547 (requiring an employee to engage in a two step process to determine if the photo is of real estate and a potential copyright issue exists).

185. See *id.* at 547 (reciting the facts of the case).

186. See *id.* at 547-48 (providing the procedural history of the case). As opposed to whether they were liable for secondary liability, which for reasons unknown, was dismissed by stipulation in the district court. See *id.* at 547.

187. See *id.* at 557 (holding that LoopNet did not engage in direct infringement).

188. See *id.* at 550-51 (comparing the owner of a copy machine that is used to make illegal copies to the Internet service provider who allows its users to post content).

189. *Costar Grp.*, 373 F.3d at 550-51 (quoting 17 U.S.C. § 101 ("fixed") (2006)) (emphasis in original).

190. See *id.* (distinguishing an ISP from an individual user).

191. See *id.* at 551 (applying the term "transitory duration" to the defendant's conduct).

192. See *id.*

193. See *id.* at 551 (qualifying the holding's application to "conduits of information", such as ISPs). It is in this way that the court distinguishes the decision in *MAI Sys. Corp. Id.*

The court also addressed whether the Digital Millennium Copyright Act ("DMCA") changed the liability of ISPs.¹⁹⁴ The court found that while Section 512 did limit liability, it did not provide the only defense against ISP infringement because the DMCA explicitly stated that other defenses in judicial decisions, such as the reasoning that the court followed in its decision, were still good law.¹⁹⁵

More importantly, a recent decision from the Second Circuit has cast some doubt upon the once general applicability of *MAI Systems*.¹⁹⁶ This case is exciting because it limits *MAI Systems* to its very sparse reasoning.¹⁹⁷ In *Cartoon Network v. CSC Holdings*, the Second Circuit was confronted with a Remote Storage Digital Video Recorder system ("RS-DVR") that, unlike standard Digital Video Recorders ("DVRs"), allowed cable customers to record television programs in hard drives at a central location rather than on a hard drive stored at their homes.¹⁹⁸ Before the programs could be written onto the hard disks, they were passed through three different "buffer" devices that held the information for less than two seconds.¹⁹⁹ As such, the buffers were in all relevant aspects identical to the process of RAM.²⁰⁰

One of the relevant questions was whether the television programs, as embodied in the buffers were "copies" within the meaning of the Copyright Act.²⁰¹ The court, rather than applying

194. See *Costar Grp.*, 373 F.3d at 552 (addressing CoStar's alternative argument for liability).

195. See *id.* (clarifying how the DMCA affects the defenses available to ISPs in copyright infringement cases).

196. See *Cartoon Network*, 536 F.3d at 128 (construing *MAI Sys. Corp.* and its progeny as holding that loading a program into a computer's RAM *can* result in copying that program, but does not necessitate such a finding).

197. See *id.* at 128 (observing that *MAI Sys. Corp.* did not address the duration requirement when considering fixation through RAM).

198. *Id.* at 124-25 (detailing the operation of RS-DVR systems).

199. See *id.* (elaborating on the complex system that is the RS-DVR).

200. Compare *Cartoon Network*, 536 F.3d at 127 (describing the process data is transferred through RS-DVR), with *MAI Sys. Corp.*, 991 F.2d at 519 (defining RAM).

201. See *Cartoon Network*, 536 F.3d at 127 (formulating the issue). The more obvious, but less relevant issue in the case was whether the copies on the hard disks were infringements. See *id.* at 130-33. The court applied the standard in

MAI Systems, distinguished it: *MAI Systems* did not hold that loading something into RAM *always* results in copying because “such a holding would read the ‘transitory duration’ language out of the definition.”²⁰² The *Cartoon Network* court noted that the user in *MAI Systems* loaded the software onto RAM for minutes at a time, and that neither the court nor the parties analyzed the “transitory duration” language of the statute.²⁰³ The Second Circuit determined that *MAI Systems* merely held that the embodiment requirement was satisfied when the data image is loaded into RAM.²⁰⁴ Ultimately the court concluded that brief storages, such as the 1.2 second storage in the case before it, were not stored for more than a transitory duration, and thus were not “copies” within the meaning of the statute.²⁰⁵

It remains to be seen what effect the *Cartoon Network* decision will have on *MAI System’s* broad application.²⁰⁶ It seems likely that many district courts, finally given a circuit decision to distinguish the poor reasoning in *MAI Systems*, will follow *Cartoon Network*.²⁰⁷ *Costar* and *Cartoon Network* may represent a long-awaited cutback on the RAM copy doctrine, which would imply that many of the electronic data images produced by a work in Second Life are not copies within the meaning of the Copyright Act.²⁰⁸ Unfortunately, early results are not strong. A case from the Fourth Circuit, the very Circuit that handed down

Costar Grp., (discussed below) and found that they did not. *See id.*

202. *Id.* at 128 (distinguishing how *MAI Sys. Corp.* is applied from the *Cartoon Network* infringement action).

203. *See id.* at 128 (analyzing the facts and reasoning of *MAI Sys. Corp.*).

204. *See id.* at 128 (limiting the application of the *MAI Sys. Corp.*’s holding by specifying the duration requirement).

205. *Cartoon Network*, 536 F.3d at 129-30 (holding Cablevision’s limited storage was transitory in duration and therefore not fixed).

206. *See id.* at 128 (inserting a temporal element into *MAI Sys. Corp.*’s interpretation of the RAM doctrine).

207. *See id.* (noting the absence of a discussion of “transitory duration” in *MAI Sys. Corp.*).

208. *See, e.g., Cartoon Network*, 536 F.3d at 128 (2d Cir. 2008) (stating *MAI Sys. Corp.* does not assert that storing data in RAM as a matter of law constitutes copying); *Costar Grp.*, 373 F.3d at 551 (asserting that *MAI Sys. Corp.* allows but does not require a finding of copying when information is stored in a system’s RAM); *Second Life Terms of Service Agreement*, *supra* note 4 (outlining the intellectual property rights held by users of Second Life to information stored on Second Life’s servers).

Costar, gave short shrift to *Cartoon Network* before following *MAI Systems*.²⁰⁹

B. Second Life Works—How Many Copies?

In the Second Life environment, an author can duplicate his works at will and may make many copies.²¹⁰ Clearly, if he makes more than 200 copies of his work and has them uploaded permanently on the ROM of a server, his work will not be protected by VARA.²¹¹ However, Second Life allows the user to check a box in its interface to limit the number of copies made.²¹² If an artist makes a “sculpture” consisting of an electronic data image and checks the box to limit it to a single, or a few copies, signs and numbers them in the description of the object, the artist may not have more than 200 copies.²¹³

This is because several factors militate against either the numerous data images bouncing in cyberspace or the data images in the RAM of other user’s computers constituting a copy within the meaning of the Act.²¹⁴ First, Second Life’s distribution

209. See *Quantum Sys. Integrators v. Sprint Nextel*, 338 Fed. App’x. 329, 336-37 (4th Cir. 2009) (dismissing Sprint’s reliance on *Costar Grp.* or *Cartoon Network* reliance in favor of the *MAI Sys. Corp.* analysis because the RAM copies were “fixed” enough in nature to constitute as copies). This case involved copyright infringement of a few of Sprint’s computers after it switched providers for its data monitoring software. See *id.* at 331. Sprint neglected to remove the copies from all of its systems, which were then loaded into the RAM of the several computers it missed.

210. See, e.g., Mahaley, *supra* note 94, at 23 (outlining the creative infrastructure of Second Life); *Second Life Terms of Service Agreement*, *supra* note 4 (allowing users to grant or revoke licenses to copies of content created on Second Life); Vartanian, *supra* note 23 (observing the blossoming market for artistic works created on Second Life).

211. See, e.g., 17 U.S.C. § 101 (2006) (defining a “work of visual art” to include a painting, drawing, print, or sculpture, existing in fewer than 200 copies); 17 U.S.C. § 106A(a) (2006) (granting moral rights to the “author of a work of visual art”).

212. See SARAH ROBBINS & MARK BELL, *SECOND LIFE FOR DUMMIES* 148 (Wiley Publishing 2008) (providing a “how to” guide on sharing and selling Second Life items).

213. See, e.g., 17 U.S.C. § 101 (limiting “works of digital art” to those works existing in 200 or less copies); 17 U.S.C. § 106A(a) (providing copyright protection to “works of digital art”); ROBBINS & BELL, *supra* note 219, at 148 (describing how a Second Life user can limit the ability of transferees to copy granted works).

214. See, e.g., *Cartoon Network*, 536 F.3d at 128 (injecting a duration

and data images made in transit do not count against the author.²¹⁵ The case law dictates that these data images are of a “transitory duration.”²¹⁶ Second, it is not clear that the RAM copy doctrine would apply to an author’s fixations because cases involving an author’s fixation do not rely on the RAM copy doctrine and the statutory language supports this differing interpretation.²¹⁷ Third, it is clear from the statute that an author’s fixation must be “by or on the authority” of the author.²¹⁸ While Second Life’s creator Linden Labs has permission to distribute its user’s intellectual property, the end-users cannot reasonably be determined to be acting “on the authority of the author” when they created data images on their RAM.²¹⁹

Specifically, while Linden Labs has required a non-exclusive license to reproduce a user’s content for support services and for all media and marketing, users make no such promise to other end-users.²²⁰

requirement in evaluating whether fixation occurred through RAM); *Costar Grp.*, 373 F.3d at 551 (requiring both qualitative and quantitative characteristics in analyzing “transitory duration”); *but see MAI Sys. Corp.*, 991 F.2d at 519 (holding that a copy was made when data was stored and fixed on RAM).

215. *See Costar Grp.*, 373 F.3d at 551 (holding that data images transmitted through ISP are transitory in nature and therefore are neither fixed, nor considered a copy); *Second Life Terms of Service Agreement*, *supra* note 4 (providing a template for individual users to create online works).

216. *See, e.g., Cartoon Network*, 536 F.3d at 128 (holding the defendant’s copying for a 1.2 second duration on server was a transitory duration and therefore not infringement); *Costar Grp.*, 373 F.3d at 551 (holding the defendant not liable when allowing users to post pictures on site due to their storage of information being a “transitory duration”).

217. *See Midway Mfg. Co.*, 547 F. Supp. at 1007-08 (finding only requirement for fixation in establishing a copyright is the capability of being “reproduced ... with the aid of a machine or device”) (citing 17 U.S.C. § 102(a) (2006)).

218. 17 U.S.C. § 101 (2006) (requiring the authority of the author in order to fix a work in a tangible medium).

219. *See Second Life Terms of Service Agreement*, *supra* note 4 (claiming that Linden Lab retains certain licenses to use the author’s creations).

220. *See Second Life Terms of Service Agreement*, *supra* note 4, at 7.2, 7.3 (granting the right to Linden Lab to copy user creations as they see necessary and granting non-exclusive licenses to other users to access a user’s work). The user only gives rights to use as authorized by the Second Life System. *See id.* Therefore, a person only authorizes others to copy his work if he does not limit the work’s reproduction by turning off the copy ability in the Second Life interface. *See id.*

Finally, and possibly most importantly, it makes no intuitive sense to hold copies that allow viewing to the general public against the author's 200 copy limit. The author created only one work and sold only one work. This situation is most analogous to a real-life artist who sells a painting to a museum and allows them to make merchandising photos of it on trashcans, posters, and tote-bags.²²¹ When the museum sells these merchandizing items, they are not the author's work, but merely a representation of it.²²² Indeed, they are explicitly denied the VARA protection that the original is given.²²³ By denying them protection, the statute recognizes these items as separate and different from the original work.²²⁴ Because they are not the original work, the Copyright Act cannot count them against the author's copy limit.²²⁵

The data images that Second Life users view are also not the original work.²²⁶ While they are identical in every way to the original, they nonetheless exist in a different place, and are possessed by different people.²²⁷ In the same way that merchandizing photos are distinct from the original work in real life, these data images are distinct from the original work in Second Life.²²⁸ As such, they cannot be counted against the author's copy limit.

221. See *FAQ: Shopping at the Met Store*, THE METROPOLITAN MUSEUM OF ART, archived at <http://www.webcitation.org/5wZWcNjb9> [hereinafter *Shopping at the Met*] (providing visitors with the opportunity to buy reproductions of the works it owns in its permanent collection).

222. See *Shopping at the Met*, *supra* note 221 (noting that the works for sale are reproductions not the art work itself).

223. See 17 U.S.C. § 106A(c)(3) (2006) (exempting portrayals of copyrighted works from copyright protection under the Copyright Act).

224. See *id.* (contrasting the rights of the original artwork with the denial of rights to the reproductions of the work).

225. See *id.* (demonstrating that works of visual art do not lose VARA protection because of non-protected reproductions).

226. See Caroline McCaw, *Art & Second Life: Over the Hills and Far Away?*, THE FIBRECULTURE J., 11 (2008), archived at <http://www.webcitation.org/5wZZ7esfP> (illustrating that an author may put his original work on Second Life only to have copies made).

227. See McCaw, *supra* note 226 (demonstrating the author produces the work on his personal computer for others to view and perhaps copy from their own location).

228. See *Shopping at the Met*, *supra* note 221 (clarifying that a reproduction is sold in the gift shop, not the actual artwork).

On the whole, while it is far from clear that a court would follow such a line of reasoning, there is room in the current law to find that Second Life works “exist” in less than 200 copies.

IV. Evaluating the Merits of Second Life’s VARA Claim

Even if a work in Second Life could theoretically overcome the medium with which it is created and the 200 copies requirement, it probably cannot overcome them in the current legal climate. Courts are generally skeptical of VARA claims.²²⁹ In fact, currently, only one plaintiff has won an award for damages from VARA in a reported case in the nineteen years it has been enacted.²³⁰

When the case law is examined, in most cases the courts have thrown out cases for legitimate reasons.²³¹ Often VARA claims are tacked on as an afterthought in a case that primarily presents another issue.²³² However, on several occasions courts have explicitly expressed real skepticism²³³ of VARA claims and

229. See RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-up Survey about Awareness and Waiver*, 13 TEX. INTELL. PROP. L. J. 129, 141 (2005) (suggesting that VARA claims have not lived up to the potential imparted in the statute).

230. See Chang, *supra* note 229 (indicating that out of nine “VARA” lawsuit, only one plaintiff was successful). This author also conducted a LexisNexis search in March of 2009, and in April of 2011, and he scoured opinions citing VARA. Since 2005, the date of the article, no artist has won an award for damages under VARA in a reported opinion. See Search: “VARA or Visual Artists’ Rights Act and 106A”, LEXISNEXIS, April 5, 2011, archived at <http://www.webcitation.org/600LBfSDi>.

231. See, e.g., *Nogueras v. Home Depot*, 330 F. Supp. 2d 48, 51 (P.R. 2004) (denying copyright protection to clearly promotional advertising materials); *Shaw v. Rizzoli Int. Publ’ns.*, No. 96CV4259(JGK), 1999 U.S. Dist. LEXIS 3233, at *24-26 (S.D.N.Y. Mar. 19, 1999) (concluding that there is no VARA claim where there is no alleged attribution or distortion); *Tilford v. Jones*, No. H-05-2989, 2006 U.S. Dist. LEXIS 64729, at *9 (S.D. Tx. Sept. 11, 2006) (finding there is no VARA right to audio recordings); *Kettenburg v. Univ. of Louisville*, No. 3:05CV79H, 2005 U.S. Dist. LEXIS 12170, at *6 (W.D.K.Y. June 16, 2005) (holding that a work of creative writing is not protected by VARA).

232. See, e.g., *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 45 (S.D.N.Y. 1995) (reiterating the basis of the claim as primarily a Lanham Act claim but with a frivolous VARA claim tacked on); *Pecker v. Masters Collection*, 96 F. Supp. 2d 216, 218 (E.D.N.Y. 2000) (claiming primarily infringement of copyright with a VARA claim added for the posters).

233. See *Mass. Museum of Contemporary Art Found. v. Buchel*, 565 F. Supp.

have used interpretations that are far from mandated,²³⁴ and in one situation, highly questionable.²³⁵

In *Massachusetts Museum of Contemporary Art Found v. Buchel*, the district court was confronted with a VARA claim directed at an unfinished interactive political sculpture.²³⁶ The court observed, “as a broad matter, courts should be wary of attempts to invoke VARA where a violation of the explicitly recognized rights of attribution or integrity is difficult to discern.”²³⁷ The court further stated that, because of this wariness “even where a piece of work falls technically within the statute’s definition, and even where a violation of the right to attribution or integrity has been shown, a violation of VARA might nevertheless not be found....”²³⁸ While neither of these presumptions is necessarily inappropriate, they evince a fairly serious skepticism of VARA claims.²³⁹ Ultimately, the court found that because an incomplete work has not been “created” yet, there is no integrated work for the right of integrity to attach to.²⁴⁰ As a result, the court determined that incomplete works like Buchel’s have no right to integrity.²⁴¹ The court further

2d 245, 257 (D. Mass. 2008), *aff’d in part and vac’t’d in part*, 593 F.3d 38 (1st Cir. 2010); (pointing out that courts and Congress have been reluctant to accept VARA’s limited adoption of the Berne Convention); *but see* Mackenzie-Childs v. Machenzie-Childs, No. 06CV6107T, 2008 U.S. Dist. LEXIS 1717, at *17-19 (W.D.N.Y. Jan. 9, 2008) (finding that summary judgment was inappropriate for a case involving ceramic works of art).

234. *See, e.g.*, Phillips v. Pembroke Real Estate, 459 F.3d 128, 143 (1st Cir. 2006) (justifying the exclusion of site-specific art from VARA protection based on strict textual interpretation of VARA); Hunter v. Squirrel Hill Ass’n, 413 F. Supp. 2d 517, 518-21 (E.D. Pa. 2005) (basing the decision on the interpretation of the meaning of “recognized stature” under VARA).

235. *See* Kelley v. Chi. Park Dist., 2008 U.S. Dist. LEXIS 75791 (N.D. Ill. Sept. 29, 2008), *aff’d on other grounds*, 635 F.3d 290, 300-07 (7th Cir. Feb. 15, 2011) (holding that the plaintiff’s work was site-specific and therefore was not covered under VARA).

236. *See* *Mass. Museum of Contemporary Art Found.*, 565 F. Supp. 2d at 258 (suggesting an unfinished work could still qualify for VARA protection).

237. *Id.*

238. *Id.* at 258.

239. *See id.* at 258 (cautioning courts to not apply VARA broadly based on Congress’ intent).

240. *See id.* at 259-60 (finding that no violation of VARA due to no completed work existing to be distorted, mutilated or modified).

241. *See id.* at 260 (refusing to find that display of an abandoned or incomplete work constitutes a violation of a right of integrity).

found that the right to attribution was not violated because the museum did not intend to display the work or attribute it.²⁴²

This conclusion was by no means required.²⁴³ The work was not entirely complete to Buchel's specifications,²⁴⁴ but the work was complete enough and impressive enough that the museum originally wished to remove its coverings and show the partially finished installation.²⁴⁵ If it was complete enough to present, certainly the court could have reasonably held that it had been "created."²⁴⁶ However, the court showed its skepticism and held against Buchel.²⁴⁷ In February of 2010, the First Circuit reversed that finding and demonstrated less skepticism of the claim. The First Circuit found that because VARA's definitions of completion are the same as those of the Copyright statute in general and that all fixed but unfinished works are protected.²⁴⁸ After reading a prejudice component into relief for damages on the right to integrity, the First Circuit also found that there was a material fact as to whether the museum violated Buchel's right of integrity when it did not carry out his instructions.²⁴⁹

242. See *Mass. Museum of Contemporary Art Found.*, 565 F. Supp. 2d at 259-60 (finding that even if VARA applied there would be no violation due to Mass MoCA not intending to claim the work as its own or as someone else's).

243. See *id.* at 259-60 (refusing to find that the work is capable of VARA protection, or alternatively that VARA would be violated by Mass MoCA's conduct).

244. See *id.* at 247 (summarizing the dispute between the artist and museum leading to the work being left unfinished). The work was more than eighty-percent complete to specifications at the time of the relationships termination. See *id.*

245. See *id.* (stating Mass MoCA intent in filing the action for declaratory judgment).

246. See *id.* at 247, 260 (noting that Mass MoCA desired to display the unfinished work, but ultimately declining to allow VARA protection due to it being incomplete).

247. See *Mass. Museum of Contemporary Art Found.*, 565 F. Supp. 2d at 258, 260 (outlining several indicators narrowing VARA protection and finding that no Buchel does not have rights under VARA).

248. *Buchel*, 593 F.3d at 50-52.

249. *Id.* at 57-61. The court also found that Buschel had no right to withhold the unfinished work from display because such a right was far too similar to the right to disclosure, which is recognized by other countries, but omitted from VARA. *Id.* at 62. This interpretation has strong support in the history of VARA.

However, similar skepticism has been evidenced in a number of cases.²⁵⁰ In *Phillips v. Pembroke Real Estate*, the court found that site-specific art was not protected by VARA because VARA would not protect it and then undermine that protection by allowing its relocation under Section 106A(c)(2).²⁵¹ No doubt this interpretation is legitimate, but again it is far from mandated, as evidenced by the district court's contrary decision.²⁵² Additionally, in *Hunter v. Squirrel Hill Associates*, the court found that VARA was barred based on the statute of limitations, but had to go further and reject the theory of a continuing infringement, which many courts accept in the copyright context.²⁵³

As discussed above in Part II. A, the court in *Pollara* found that the banner in question was promotional because it was being used to "promote" a particular political advocacy group's lobbying effort despite the fact that it was not commercial in nature.²⁵⁴ This is an unnecessarily harsh rule. While undoubtedly Congress intended a narrow definition of a work of visual art, and intended to exclude advertising and promotional material, the court's interpretation so narrows the possibilities for works of visual art that it should be reconsidered.²⁵⁵ Much, if not all of our most meaningful art has some sort of message, sometimes it is political, sometimes otherwise.²⁵⁶ VARA cannot

250. See *Phillips*, 459 F.3d at 143; but see *Kelley*, 635 F.3d at 306-07, (7th Cir. Feb. 11, 2011) (providing dicta mapping the reasons that site-specific art may not be categorically excluded from VARA protection).

251. See *Phillips*, 459 F.3d at 142-43 (rejecting the district court's dual regime in which "site-specific work" are protected but relocation is exempted under the "Public-Presentation Exemption").

252. See *id.* at 139 (summarizing the district court's finding that "site-specific work" is protected by VARA but its protection was limited by the "Public-Presentation Exemption").

253. See *Hunter*, 413 F. Supp. 2d at 519-21 (finding that the plaintiff sufficiently asserted a VARA claim but declined to grant remedy due to statute of limitations expiring).

254. See *Pollara*, 344 F.3d at 269-70 (holding that the plaintiff's banner is not allowed protection due to its intent being promotional).

255. See, e.g., 17 U.S.C. § 101 (2006) (stating a "work of visual art does not include . . . any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container"); *Pollara*, 344 F.3d at 269-70 (holding that protection on VARA will depend on the artist's purpose and objective).

256. See David Dalton, *Andy Warhol*, N.Y. TIMES, Feb. 23, 2011, archived at <http://www.webcitation.org/5wicUG52> (analyzing the work of Andy Warhol).

be read to eliminate from its scope works that have messages because a work's message is often what makes it quality art.²⁵⁷ As such, like these other courts, the *Pollara* court showed substantial skepticism towards VARA claims that was in many ways unwarranted.²⁵⁸

Undoubtedly, the most questionable analysis is contained in *Kelley v. Chicago Park District*.²⁵⁹ While the *Kelley* court quite generously found that an artist's wildflower arrangements could be a sculpture or a painting within the meaning of VARA, the court nonetheless found that they lacked originality, and as a result were not copyrightable and thus not works of visual art.²⁶⁰ This reasoning is inexcusable.²⁶¹ The standard of copyright originality is extremely low and requires only a modicum of originality.²⁶² Instead of applying this simple standard, the court

as being a rebellion against previous concepts of art); Kathryn Calley Galitz, *The Legacy of Jacques-Louis David (1748-1825)*, THE METROPOLITAN MUSEUM OF ART, archived at <http://www.webcitation.org/5wicXBS9T> (discussing the use of David's work as propaganda for Napoleon); James Voorhies, *Francisco de Goya (1746-1828) and the Spanish Enlightenment*, THE METROPOLITAN MUSEUM OF ART, archived <http://www.webcitation.org/5wibvrZKl> (chronicling the political message behind the works of Goya during the Napoleonic era).

257. See, e.g., *Pollara*, 344 F.3d at 269-70 (declining to extend protection to those works motivated by political message); Dalton, *supra* note 256 (noting David's works were used to politically support Napoleon); Voorhies, *supra* note 256 (stating that purpose of Goya's most famous work *The Third of May 1808* was fueled by atrocities committed against Spanish citizens).

258. See also *Kleinman v. City of San Marcos*, 597 F.3d 323, 329-30 (5th Cir. 2010) (finding, in a case where the promotional aspect was far more clear – the work was used to draw attention to “Planet K” stores – that the VARA claim was barred).

259. See *Kelley*, No. 04C07715, 2008 U.S. Dist. LEXIS 75791 at *19 (finding that Wildflower Works is neither copyrightable nor protectable under VARA because it is a “site-specific work”).

260. See *Id.* at *16-18 (concluding that the plaintiff's flower arrangement is not copyrightable).

261. Compare *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (stating that the originality requirement for copyright protection is “extremely low”), with *Kelley*, 2008 U.S. Dist. LEXIS 75791 at *16-18 (finding that designing a floral pattern in an ellipse-shape is not sufficiently original to merit copyright protection).

262. See *Feist*, 499 U.S. at 345 (declaring that “[o]riginal” as the term is used in copyright, means only that a work was created by the author . . . and that it possess at least some minimal degree of creativity”); H.R. REP. NO. 94-1476 at 51-52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (stipulating that “[originality] does not include requirements of novelty ingenuity or [a]esthetic merit”).

seems to have required novelty.²⁶³ In short, the court confused copyrights and patents.²⁶⁴ The court did buttress itself by holding that the work was also site-specific art and not protected under VARA, but this does not excuse its error.²⁶⁵ In a very recent decision before the Seventh Circuit, the court corrected this error but provided another blow to Second Life works of visual art.²⁶⁶ The court found that the work was not sufficiently “fixed” to qualify as a copyrightable work²⁶⁷ and, more damagingly, found that works must be real pictures or sculptures, “not metaphorically or by analogy.”²⁶⁸

Given these and other cases, it appears that much of the case law is somewhat hostile to VARA claims.²⁶⁹ If artistic works in the real world have difficulty succeeding with VARA claims, certainly electronic works will have difficulty.²⁷⁰ The argument

263. See 35 U.S.C. § 102 (2006) (placing a restriction on the patentability of inventions which were previously known).

264. See 35 U.S.C. §102 (2006) (requiring novelty for patentability); 17 U.S.C. § 102(a) (2006) (requiring only that the work be an “original work of authorship”); *Feist*, 499 U.S. at 345 (establishing a low threshold for satisfaction of originality requirement); *Kelley*, 2008 U.S. Dist. LEXIS 75791 at *16-18 (declining to extend copyright protection on the grounds that the court was unsure whether it was the arrangement’s size, shape, or use of plants that made it original).

265. See *Kelley*, No. 04C07715, 2008 U.S. Dist. LEXIS 75791 at *18-21 (following *Phillips* in finding that the work is a “site-specific work” and therefore not protectable under VARA).

266. *Kelley*, 635 F.3d at 300-07.

267. This, interestingly enough, may peripherally assist the Second Life work in overcoming challenges to its 200 copies requirement. However, because it is addressed primarily to the ever-changing nature of a flower bed, it is not sufficiently relevant to the calculus to be included above.

268. *Id.* at 300.

269. See, e.g., *Phillips*, 459 F.3d at 143 (holding VARA does not protect “site-specific works”); *Pollara*, 344 F.3d at 269-70 (holding that VARA claims do not extend to works which are intended for promotional or political purpose); *Kelley*, 2008 U.S. Dist. LEXIS 75791 at *20 (limiting VARA protection to not encompass “site specific works”); *Hunter*, 413 F. Supp. 2d at 519 (finding that the statute of limitations barred Hunter’s claim for violation of VARA).

270. Compare *Costar Grp.*, 373 F.3d at 551 (rejecting argument that digital work was fixed when transmitted through ISP server), and *Cartoon Network*, 536 F.3d at 128 (requiring that the fixation be more than a transitory duration for digital works in an infringement suit), with *Phillips*, 459 F.3d at 143 (declining to extend VARA protection to “site-specific works”), and *Pollara*, 344 F.3d at 269-70 (holding banners promoting political messages are not protectable under VARA), and *Kelley*, 2008 U.S. Dist. LEXIS 75791 at *20 (following *Phillips*’ holding that VARA does not protect “site specific works”), and *Hunter*, 413 F. Supp. 2d at *3 (dismissing VARA claim due to statute of

that an electronic work can be a work of visual art is not simple, and is not the only way, or even the most obvious way to interpret the statute and the case law.²⁷¹ In many ways, the argument must run the table. Thus the courts and case law will need to be far more forgiving to VARA claims before a court is willing to accept such an argument.²⁷²

However, nonetheless, there is some hope. First, part of the reason that the case law is hostile is that so few legitimate VARA claims are brought.²⁷³ As Chang suggests, this is partly due to a lack of education about VARA rights among the artistic community.²⁷⁴ More good VARA claims will lead to more positive case law, and possibly more flexible case law.²⁷⁵ Second, the future can bring many things. If a Second Life like environment becomes a primary medium for creating and distributing artwork, courts will need to adjust, both to be realistic and to follow the “standards of the artistic community” as mandated in the House Report.²⁷⁶ Third, judges may become less skeptical of the three-dimensional electronic experience as they become more familiar with it.²⁷⁷ There is hope on this front, for example,

limitations).

271. See, e.g., 17 U.S.C. § 101 (defining “work of visual art” as having under 200 copies); *Midway Mfg. Co.*, 547 F. Supp. at 1007-08 (holding that fixation is satisfied and protection granted when work can be reproduced utilizing computer technology); but see *Costar Grp.*, 373 F.3d at 551 (holding work transferred through RAM not fixed due to its transient nature); *Cartoon Network*, 536 F.3d at 128 (declining to hold that fixation was satisfied due to copying in RAM being a “transitory duration”).

272. *Contra Phillips*, 459 F.3d at 143 (limiting VARA protection to exclude “site-specific” works); *Pollara*, 344 F.3d 265 at 269-70 (holding VARA does not protect promotional works); *Kelley*, 2008 U.S. Dist. LEXIS 75791 at *20 (following *Phillips*’ limited protection); *Hunter*, 413 F. Supp. 2d at *3 (barring the VARA claim on statute of limitations grounds).

273. See Chang, *supra* note 229, at 141 (chronicling artists failures to assert successful VARA claims).

274. See Chang, *supra* note 229, at 150 (cautioning practitioners to consider VARA when counseling artists).

275. See Chang, *supra* note 229, at 141, 150 (advocating for greater utilization of VARA despite potentially constraining case law).

276. See H.R. REP. NO. 101-514, at 11 (providing for a flexible framework from which courts can extend VARA protection).

277. See Wagner James Au, *The Second Life of Richard A. Posner*, NEW WORLD NOTES, archived at <http://www.webcitation.org/5wk65PpsK> (providing Judge Posner’s view that increased exposure to certain technologies may lead to a corresponding tolerance for technology related claims).

Judge Posner has a Second Life account.²⁷⁸ As a result, while VARA claims in Second Life seem highly unlikely today, they may become more feasible as time passes and more people become users of three-dimensional online experiences.²⁷⁹ A feasible VARA claim can be a dangerous beast.

V. Implications of Success and Defensive Measures

In this Part, this article will examine the implications and possible defensive measures to VARA claims in Second Life. It will also examine Linden Lab's current attempt to avoid such claims. It starts with a general observation—while making a VARA claim is extremely difficult in a three-dimensional electronic world, so is protecting oneself against one.²⁸⁰

The implications of successful VARA claims in Second Life are fairly severe.²⁸¹ As discussed earlier, the right to integrity for works of recognized stature creates liability for the destruction of a work that is intentional or grossly negligent.²⁸² Unlike many other provisions of the Copyright Act, these require some culpability.²⁸³ However, it is not impossible to see how a server error or meltdown could be grossly negligent, or considering the state of the art, that protections of the server from hackers could also be negligent.²⁸⁴

As scary as such liability may be, the rub is in the previous clause.²⁸⁵ It allows the artist to *prevent* any destruction of a work

278. See Au, *supra* note 277 (interviewing Judge Posner in the Second Life "creative commons" area).

279. See H.R. REP. NO. 101-514, at 11 (contemplating a fluid standard for VARA protection based on current artistic standards).

280. See Chang, *supra* note 229, at 141 (highlighting the difficulty artists have faced winning VARA claims).

281. See 17 U.S.C. § 106A (2006) (giving authors of works of visual art certain moral rights over covered works or art).

282. See *id.* § 106A(a)(3)(B) (preserving a work of recognized structure in the artist's original form).

283. See *id.* § 106A(a)(3)(B) (requiring intent or gross negligence to be held liable for infringement).

284. See *General Terms and Conditions*, MECH HERO, archived at <http://www.webcitation.org/5wk9ZtjUX> (claiming responsibility for server destruction only in the case of gross negligence).

285. See 17 U.S.C. § 106A(a)(3)(B).

of recognized stature.²⁸⁶ This suggests an injunction that would operate against any destruction of the work.²⁸⁷ This would create serious problems for Second Life. First, if Second Life went out of business, it would be unable to keep things running.²⁸⁸ A person who wanted to keep her works might potentially be able to enjoin them from shutting down the server.²⁸⁹ Second, if someone cancelled her account, but wanted her works to continue to be displayed, she could enjoin Second Life from taking down her works.²⁹⁰

Whether destruction of a work creates liability hinges on whether it is a work of “recognized stature.”²⁹¹ The case law is generous to authors in this regard. For a work to be one of recognized stature, the current precedent requires:

- (1) that the visual art in question has “stature,” i.e. it is viewed as meritorious, and
- (2) that this stature is “recognized” by art experts, other members of the artistic community, *or by some cross section of society*. In making this showing plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.²⁹²

286. See *id.* § 106A(a)(3)(B) (providing the author with preventative rights to protect their works).

287. See Cynthia Esworthy, *A Guide to the Visual Artists Rights Act*, NEA OFFICE OF THE GENERAL COUNSEL (1997), archived at <http://www.webcitation.org/5wkC7mAGv> (indicating that VARA remedies are the same as the civil remedies for copyright infringement, which includes injunctive relief).

288. See *Second Life Terms of Service Agreement*, *supra* note 4, at 11.5 (disclaiming that Linden Lab may “suspend or terminate” user accounts upon a general suspension or discontinuation of the service).

289. See Esworthy, *supra* note 287 (listing the numerous remedies available to artists under VARA).

290. See, e.g., Esworthy, *supra* note 287; 17 U.S.C. § 106A(a)(3)(B) (2006). A visual work of art is protected from destruction under VARA, so an artist on Second Life might be able to get an injunction to protect her visual art from being destroyed on the website. See, e.g., Esworthy *supra* note 287; 17 U.S.C. § 106A(a)(3)(B).

291. See 17 U.S.C. § 106A(a)(3)(B) (2006) (limiting moral right to certain works enumerated in VARA).

292. *Martin v. Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999).

In fact, while the *Martin v. Indianapolis* court used the above test, it suggested that the actual test contemplated by Congress might be even less stringent.²⁹³

A work in an electronic world could certainly fit this definition.²⁹⁴ In fact, even a work in the current incarnation of Second Life might satisfy these requirements.²⁹⁵ Taking the second requirement first, Second Life has over 21.3 million members in its community that could constitute “some cross section of society.”²⁹⁶ A majority of these users would constitute a cross section that could recognize the stature of the work by revering it, talking about it, and coming to its location to view it.²⁹⁷

Now turning to the first requirement, if the work itself has merit, or is viewed as meritorious by the majority of the users in Second Life then it has satisfied the first requirement.²⁹⁸ Certainly in our hypothesized future where more and more artwork is made in an environment like Second Life, large communities and large cross sections could recognize the merit of an electronic piece of art.²⁹⁹ In fact, in the not so distant future, electronic work could be the primary medium where people

293. See *id.* (contemplating that this test may be more stringent than Congress intended).

294. See *id.* (stating the test used by the court when determining whether a work of visual art is one of “recognized stature”); see also Vartanian, *supra* note 23 (observing the growth in sales of art sold via Second Life).

295. See, e.g., *Martin*, 192 F.3d at 612 (affirming the test used to determine what qualified as art of a “recognized stature”); see also Vartanian, *supra* note 23 (highlighting the growing community of artists in Second Life).

296. See, e.g., *Martin*, 192 F.3d at 612 (holding that if “some cross section of society” recognizes the stature of a work of art, then it may be deserving of VARA protection); WIKIPEDIA, *supra* note 1 (observing that Second Life has 23.1 million registered accounts).

297. See *Martin*, 192 F.3d at 613 (holding *Martin*’s work to be a work of “recognized stature” when respected members of the art community and members of the public at large found his work to be socially valuable, with artistic merit, and that it was newsworthy).

298. See *Martin*, 192 F.3d at 612 (stating the first element of being a work of “recognized stature” is for the “visual art in question” to have “‘stature,’ i.e. is viewed as meritorious”).

299. See Vartanian, *supra* note 23 (explaining that there are over 200 art galleries in Second Life and a number of works exhibited are also critiqued in an online journal about art in Second Life).

assess artistic merit.³⁰⁰ As a result, it is plausible and even likely that an electronic work, like one in Second Life, could fulfill the medium requirements of VARA and the recognized stature requirement.³⁰¹

There are several ways that Second Life might try to avoid these claims. First, it could try to get a waiver of the works of visual art.³⁰² Simple waivers have been the bread and butter of corporate intellectual property for years. However, this will be extremely difficult.³⁰³ Section 106A(e)(1) requires that any waiver shall specify the work and the uses of that work that are no longer subject to moral rights claims.³⁰⁴ Any such waiver will apply *only* to the work identified.³⁰⁵ As such, a general waiver in a terms and services agreement will not be effective to works created in the world because it cannot specifically identify the works that the user will create before the user even logs on for the first time.³⁰⁶ Second Life could add a click-through waiver every time a person begins or finishes making an object in the world; however, this would be so annoying to users that any three-dimensional experience would lose a significant market

300. See, e.g., Eshi Otawara, *Portfolio Review – Layachi Ihnen*, OPEN ART CRITIQUE (Dec. 15, 2007), archived at <http://www.webcitation.org/5x0kjCVzX> (critiquing art work from Second Life).

301. See, e.g., 17 U.S.C. § 101 (2006) (defining a “work of visual art”); 17 U.S.C. § 106A (2006) (granting certain moral rights to authors of works of visual art); *Martin*, 192 F.3d at 612 (deciding when a work of visual art has “recognized stature” thus giving it the protections of VARA). The type of evidence that could be brought to bear on this question could be chat logs of Second Life artists who laud the work, the number of people who visit the location of the work compared to similar locations without the work, testimony of experts in the Second Life community and outside of the Second Life community, whether the work is the only one of its kind, and whether it sold for a hefty price. See Otawara, *supra* note 306 (reviewing the artwork of a Second Life user).

302. See 17 U.S.C. § 106A(e)(1) (articulating that VARA rights can be waived).

303. See *id.* (expressing when and how moral rights may be waived by authors of “works of visual arts”).

304. See *id.* (stating when an author of a “work of visual art” may waive the moral rights established under VARA).

305. See *id.* (restricting any waiver of moral rights granted under VARA to a specific work identified in the waiver).

306. See, e.g., *id.*; H.R. Rep. No. 101-514, at 17 (1990), reprinted at 1990 U.S.C.C.A.N. 6915, 6928 (reflecting that “[t]he bill does not permit blanket waivers.”).

share to other three-dimensional experiences that did not require it.³⁰⁷

However, the *Phillips* holding provides an interesting and easy defense for companies like Second Life. While users may have an absolute right to integrity, they have no right to have that integrity in *Second Life* because Second Life is merely the “site” where the work is located and “site specific” works are not protected under the statute.³⁰⁸ Second Life could simply email the data of the work to the complaining user and eliminate liability.³⁰⁹ To be even more proactive, Second Life could simply automatically email the user a copy of his work before he complains, when he clicks the “no copies” checkbox to limit the number of works made.³¹⁰ That way there would be no destruction of the work.³¹¹

In light of these potential measures, it may be useful to see how Second Life has attempted to insulate itself from liability. While it seems clear that the Second Life Terms of Service Agreement could not act as a waiver for a particular work, it does take several steps that may be effective, at least in the currently legal climate.³¹² First, Second Life requires users to acknowledge

307. See, e.g., 17 U.S.C. § 106A(e)(1) (mandating a waiver of rights for each individual work the waiver shall apply to); see also Steven M. Edwards, Hairong Li, & Joo-Hyun Lee, *Forced Exposure and Psychological Reactance: Antecedents and Consequences of the Perceived Intrusiveness of Pop-Up Ads*, 31 J. of ADVERTISING, No. 3, 83, 83 (2002) (studying the adverse reactions of intrusive pop-up advertisements on website patrons); Mahaley *supra* note 94, at 2 (listing several virtual worlds besides Second Life).

308. Compare 17 U.S.C. § 106A (2006) (giving authors of “works of visual art” rights of attribution and integrity), with *Phillips*, 459 F.3d at 143 (holding “that the plan language of VARA does not protect site specific art”).

309. See *Phillips*, 459 F.3d at 129 (holding that VARA does not protect site specific work and that Pembroke was permitted to remove Phillips’ work from the park without violating VARA).

310. See, e.g., *id.*; see also ROBBINS & BELL, *supra* note 212 at 148 (describing how users can choose to share their works created in Second Life).

311. See *Costar Grp.*, 373 F.3d at 551 (explaining how data is transferred between computers and servers).

312. See 17 U.S.C. § 106A(e)(1) (2006) (requiring a waiver of rights for each individual work created, as opposed to allowing a single waiver for all subsequent works); *Second Life Terms of Service Agreement*, *supra* note 4 (outlining the terms of service users must agree to in order to use Second Life).

that Linden Lab has the right to delete any of its user's data, without reason or notice, and without liability, "notwithstanding any intellectual property rights you may have in your content."³¹³ It also disclaims any guarantee to the value represented by the data.³¹⁴ VARA is the *only* aspect of the Copyright Act that protects against destruction.³¹⁵ As such, it appears that Linden Labs has anticipated moral rights claims.³¹⁶ This seems odd, because, as suggested earlier, VARA claims probably would fail in our current legal climate.³¹⁷ The explanation lies in Europe, even though the agreement specifies California law as the law governing disputes.³¹⁸ The prominence of the language reflects a concern of the much more robust moral rights in European countries.³¹⁹

In such countries, a larger number of moral rights are recognized, such as the right to first publication and broader rights of integrity, and a broader selection of works are protected.³²⁰ Specifically, in France, Germany, and Italy civil codes protect the "rights of disclosure, attribution, integrity, and withdrawal."³²¹ In addition to the rights of attribution and integrity contained in VARA, these countries also grant the author the right to determine when and in what form the work is presented to the public, as well as when to withdraw the work from the public.³²² These rights also apply more broadly,

313. See *Second Life Terms of Service Agreement*, *supra* note 4, at 4.3, 10.2 (stipulating that Linden Lab reserves the right to delete content from Second Life without notice or liability).

314. See *Second Life Terms of Service Agreement*, *supra* note 4, at 4.3, 10.2 (warning that business transaction are conducted at the risk of the user).

315. See 17 U.S.C. § 106A (2006) (codifying the Berne Convention to protect the moral rights of visual artists in America).

316. See *Second Life Terms of Service Agreement*, *supra* note 4, at 4.3 (disclaiming liability for destruction of user works on Second Life).

317. See *supra* Part IV (concluding a discussion of the possibility of a Second Life VARA claim by finding it is highly unlikely to succeed in today's courts).

318. See, e.g., Berne Convention, *supra* note 14, at 6*bis* (granting authors the right to object to the destruction of their works); *Second Life Terms of Service Agreement*, *supra* note 4, at 12.2 (stipulating California law will be used in the case of a lawsuit).

319. See Berne Convention, *supra* note 14, at 6*bis* (broadening moral protection to all authors instead of just visual artists).

320. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 359-61 (2006) (summarizing the operation of moral rights in Europe).

321. *Id.* at 359.

322. See *id.* at 362-63 (detailing what the rights of disclosure and

covering literary and other works and without a strict copies limitation.³²³

Second, Second Life's Terms of Service Agreement states that the user's "intellectual property rights are subject to the rights of Linden Labs to change and/or eliminate any aspect(s), features or functionality of the Service as it sees fit at any time without notice, and Linden Lab makes no commitment, express or implied, to maintain or continue any aspect of the Service."³²⁴

The Terms of Service explains that regardless of intellectual property rights, the user does not own any data that Linden Labs stores on its servers and that Linden is not liable for any deletion or corruption of that data.³²⁵ While not clearly addressed to moral rights, the fact that a user has no rights to any data stored suggests that if his account was terminated, despite his legitimate VARA claim, the contract would prevent him from collecting for any loss of his work, as it is merely "data" on the server. Third, the Terms of Service Agreement provides that Linden Lab does not control and is not responsible for the legality of the conduct of any user.³²⁶ This is a clear attempt to limit its secondary liability, as it limits its control, a prerequisite to certain types of secondary liability.³²⁷

Finally, the Terms of Service creates an express limitation on liability for damages of any kind exceeding one hundred dollars.³²⁸ It also requires the user to agree that Linden Labs

withdrawal entail).

323. See *id.* at 406-07 (contrasting VARA with European moral rights protection finds that VARA applies to a more limit set of copyrightable works).

324. Terms of Service, *supra* note 313, at ¶ 4.2.

325. *Id.* at ¶ 4.5.

326. See *Second Life Terms of Service Agreement*, *supra* note 4, at 10.1 (stressing Linden Lab is not liable for its users' actions).

327. See, e.g., *Fonovisa v. Cherry Auction*, 76 F.3d 259, 264 (9th Cir. 1996) (holding that the defendant could have controlled infringing activity and was therefore potentially open to secondary liability).

328. See *Second Life Terms of Service Agreement*, *supra* note 4, at 10.3 (limiting the damages for which Linden Lab can be held liable).

cannot be liable for any punitive, incidental, special or exemplary damages, including lost profits.³²⁹ To the extent that a court enforces the provision, it would certainly limit any after-the-fact liability of Linden Labs, but does not insulate it from an injunction.

On the whole, especially given the tenuous nature of such a claim, Linden Labs has effectively protected itself from liability in the event of a lawsuit, to the extent that its contract is valid in a court of law. However, new three-dimensional environments may want to take a more explicit approach, such as the technological measures outlined above.

VI. Conclusion

There is a colorable claim for VARA protection in Second Life. An example of a colorable VARA claim emanating from Second Life would be a Second Life sculpture where (1) the author has prevented others from making copies in Second Life by enabling the “no copy” version of the interface, (2) it is signed either on the work itself or in the item description, (3) sold to another for a large amount of real world money, and (4) is lauded by the Second Life and real world artistic community. The limitation on in-world copying is necessary to comply with the 200 copies doctrine even if, as discussed, the RAM data images elsewhere do not count as copies. The definition of a work of visual art requires a signature, and identification in either the visual component of the work or its item description would be perfectly satisfactory.³³⁰ Both the money value and the recognition of the work would suggest that it has a recognized stature enough to be protected from destruction.

Despite this colorable claim, in the current legal climate an author of an online electronic work is unlikely to succeed on a VARA claim, even if there is room in the law for success.

329. See *Second Life Terms of Service Agreement*, *supra* note 4, at 10.3 (restricting the types of damages available to users who engage in lawsuits with Linden Lab).

330. See 17 U.S.C. § 101 (2006).

However, as more people begin to live significant portions of their lives online and the online experience becomes more three-dimensional, courts may become more open to the claims of online visual artists. This could result in real rights for online artists and significant difficulty for the providers who host content. The most common tool in a lawyer's chest, the waiver, will not be sufficient to protect companies, and these providers probably will have to turn to technological solutions to insulate themselves from legal liability.