

Art Versus Commerce

A Look at the Visual Artists Rights Act

By Richard A. Herman

Metropolitan areas have derived economic and cultural benefits from the surge in creative expression displayed on buildings and in parks and other public spaces. Such expressions have also created disputes between artists and property owners when individual works are threatened to be or are actually destroyed by real estate renovation and development. Contested matters involving the rights of artists and property owners are becoming more common around the country, including in Detroit and Grand Rapids.

In *Coben v G&M Realty LP*, a New York property owner was ordered to pay nearly \$7 million in statutory damages to 21 graffiti artists who plied their trade on his 5Pointz warehouse complex in Queens—with his blessing—and saw their art whitewashed to make way for luxury condos. In this case, the court found that real estate developer Gerald Wolkoff violated the Visual Artists Rights Act (VARA) by destroying work of “recognized stature.”¹

Another case involving destruction of art—*Kent Twitchell v West Coast General Corp*—ended in a \$1.1 million settlement in favor of Twitchell, a street artist of renown. His 70-foot mural depicting pop artist Ed Ruscha was painted over in 2006 in alleged violation of VARA protections, among them failure to provide 90 days’ notice of intention to cover over the mural.²

Before VARA’s enactment in January 1991 and incorporation in Section 106A of the United States Copyright Act,³ visual artists had few rights to claim and disavow authorship in and prevent distortion or destruction of their works. This legislation accorded “moral rights” (*droit morale*) to authors of works of visual art—namely, rights of attribution and integrity.

These rights have long been recognized in other countries and are codified in an international treatise, the Berne Convention for the Protection of Literary and Artistic Works.⁴ Preserving authors’ relationships with their literary, artistic, or scientific works is one of the missions shared by members of that treatise. The grant of moral rights codified in the treatise allows authors in member countries to claim authorship of their work and the right to challenge any kind of modification to the work that would prejudice their authorial reputation.⁵



VARA generally covers paintings, drawings, prints, photographs that are exhibited, and sculpture existing in a single copy or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.⁶

Conversely, VARA does not protect mass-produced content such as posters, maps, globes, charts, technical drawings, diagrams, books, magazines, newspapers, periodicals, databases, motion pictures, audiovisual work, electronic publications, models, or applied art (defined as being employed in the decoration, design, or execution of useful objects).⁷

Unprotected work also includes:

- Work installed before 1990 unless the author still holds title.⁸
- Any merchandising item or advertising, promotion, descriptive covering or packaging material, or container; a commissioned work to promote a political candidate may fall within this category.⁹
- Any work made for hire (one prepared by an employee within the scope of his or her employment or one specially ordered or commissioned for use if it is one of the enumerated works in the statute capable of being “made for hire” and the parties expressly agree in a written instrument signed by them that the work shall be considered a work “made for hire”).¹⁰
- Any work not subject to copyright protection.¹¹

Like the Berne Convention, the essence of VARA is the recognition of the author’s moral rights of attribution and integrity:

- **The right of attribution** enables artists to claim authorship of their work. It also enables artists to prevent the use of their name on any work they did not create and the use of their name on works that have been distorted, mutilated, or modified and would be prejudicial to their honor or reputation.¹² The statute does not define prejudice to reputation. Harm to reputation often involves expert testimony to focus on good name, public esteem, or reputation in the artistic community.
- **The right of integrity** provides artists the right to prevent intentional distortion, mutilation, or modification of their work in a manner that would be prejudicial to their reputation or honor, or to prevent any intentional or grossly negligent destruction of a work of recognized stature.¹³ Integrity may not be actionable under VARA, however, if damage was accidental and moving the artwork was accomplished without negligence and in good faith to preserve it.¹⁴

The right of integrity protects the condition of the artwork itself but does not necessarily extend to the impairment of the work’s visibility. In *Phillips v Pembroke Real Estate Inc*, for example, the court concluded that a property owner was

AT A GLANCE

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allowed to remove and relocate statues placed in a park because VARA does not apply to site-specific art and a relocation does not rise to a violation of the act, even though the artist’s claim was that the artwork’s placement was integral to the art and its relocation constituted a mutilation.¹⁵

Site-specific claims tend to be problematic for courts. In 1989, Arturo DiModica installed a large bronze bull outside of the New York Stock Exchange. Subsequently, artist Kristen Visbal installed a four-foot-tall bronze statue of a girl in the path of DiModica’s bull. DiModica claimed Visbal’s statue infringed his work inasmuch as his work was mutilated by the second installation. The matter has not yet started through the judicial system. However, should it ultimately get to that point, VARA protections for the artist based on visibility and position of the installation may not be successful based on the *Phillips* case and others.¹⁶

Furthermore, VARA may not protect an artist who trespasses or creates art in a space without permission. Courts have held that allowing such unauthorized actions would freeze development of a building.¹⁷

VARA includes exceptions from protecting an artist’s moral rights in the following situations:

- When modifications occur given the passage of time or the nature of the media used in execution of the work¹⁸
- The work is not considered to be modified if it is altered because of a conservation policy or public presentation¹⁹
- Death of the artist/producer²⁰

Remedies exist for the violation of moral rights that closely mirror those available for general copyright infringement; unlike in copyright infringement matters, however, VARA does not prescribe criminal penalties. Available remedies include injunctive relief, actual damages to the artist, disgorgement of an infringer’s profits, and statutory damages.²¹

VARA and copyright law

A distinct difference exists between owning the underlying copyright and owning the actual work itself. Copyright protection automatically vests in the author of an original work of authorship once it is placed in a fixed, tangible medium. Ownership of the copyright grants the following exclusive rights:

- Reproducing works
- Preparing derivative works
- Distributing copies
- Publicly performing works
- Publicly displaying works²²

Even though a copyright will automatically vest in the author of an original work without registration in the U.S. Copyright Office, Congress believes it advisable to register a copyright. As such, Congress has granted extra inducements available under the statute for those who register. For example, except for VARA claims and infringements in Berne Convention works outside the United States, no action for infringement of the copyright in any work will be instituted until registration of the copyright claim has been made.²³ Also, registration is a prerequisite to certain remedies for infringement.²⁴

While a copyright holder may sell, license, or transfer some or all of its rights to third parties, VARA rights are instilled in the author upon creating the artwork and belong only to the author of the work (whether or not the author holds the copyright) and cannot be transferred.²⁵

Ownership of the work without owning the actual copyright does not grant the five exclusive rights noted above and, in fact, the owner of the work is prohibited from exercising those rights without permission from the copyright holder.²⁶ An owner of the work, if not the author and without a written waiver, is also prohibited from violating an author's moral rights pursuant to VARA.²⁷ Based on the climate surrounding judicial decisions in this arena, it appears as if this prohibition can present issues between an artist and property owners when the artwork is purchased or commissioned for public display.

While VARA rights may not be transferred, they may be waived if the waiver is in writing and signed by the author.²⁸ This waiver becomes important to both property owners and artists when art and real estate merge, especially when the installation cannot be removed without distortion, mutilation, modification, or destruction.

If a property owner intends to remove artwork that is capable of being removed without distortion, mutilation, modification, or destruction, he or she must give the artist a 90-day written notice (or make a good-faith effort to give such notice) of intention. If the artist fails to remove or pay for the artwork's removal within 90 days of receiving notice, the author's rights

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to protect the work will no longer apply.²⁹ However, when the installation cannot be removed without mutilation, modification, or destruction, removal requires a written signed agreement from the author waiving those moral rights.³⁰

Sculptures attached to buildings have often been removed without causing damage to the work. Murals may be more difficult to remove if painted on concrete. However, in certain situations, they may be removed using special techniques, and some courts have taken notice. One technique, called strappo, involves chemical assistance to transfer the painted work onto canvas.³¹

Twitchell painted his Ed Ruscha Monument in 1987 on the side of a federal government building in Los Angeles that was managed by a YMCA as a job center. His lawsuit against 12 defendants, including the U.S. government, was instructive on many legal grounds concerning VARA, but it also demonstrated that the act may not be the only source of protection for the distortion, mutilation, modification, or destruction of art.

Ten states have moral rights protections under state law. The *Twitchell* case pled not only violations of VARA, but contained counts based on the California Art Preservation Act (state moral rights), conversion, negligence, and state unfair competition.³² Under certain circumstances, further protections may also exist under state and federal law surrounding contract, copyright, and trademark under the Lanham Act.

VARA—Reputation

In the case of the 5Pointz artists noted in *Coben*, the court awarded \$6.75 million to the 21 graffiti artists based on their works' "recognized stature." The court applied statutory damages because the plaintiffs failed to establish actual damages based on market value for their works.

The *Coben* court emphasized that a work *not* of recognized stature may still gain VARA protection from intentional distortion, mutilation, or other modification if the actions are prejudicial to the artist's honor or reputation.³³ However, that

court did not find prejudice existed to the honor or reputations of those specific works it determined were *not* of recognized stature.

As noted previously, proving and quantifying damages to an artist's reputation may be difficult. VARA does not clearly define prejudice to reputation, which, in and of itself, may have to be proved with expert testimony to focus on good name, public esteem, or reputation in the artistic community.³⁴

VARA—Conclusions

It's clear that VARA offers certain protections to artists in the areas of attribution and integrity. In the cases of *Cohen* and *Twitchell*, building owners faced remedies for altering works of import—a scrim of graffiti along the 5Pointz warehouses and a 70-foot “giant” of the Los Angeles art scene—and failing to provide the required 90-days' notice in the latter case.

Other cases did not fare as well and reflected weaknesses in the statute's ability to protect artists based on issues related to exclusions from the applicability of VARA, ambiguous and nonexistence of statutory language, and the unavailability of judicial interpretation. For instance, lack of VARA protection existed in the movement of more than 20 sculptures from a Boston park that led to *Phillips*. According to the court, moving the sculptures did not constitute alteration or mutilation of an artwork. Again, that court based its decision on the lack of protection in the VARA statute for site-specific works of art.

Property owners also face uncertainty when it comes to ownership of art, especially when integrated into real estate. They may be concerned about the lack of control over their investment and fear litigation arising from the potential future removal of installations. Their concerns may inhibit them from purchasing art, thus affecting artists by limiting their market for sales as well as limiting the public's cultural enjoyment.

It can be argued that general copyright laws and VARA protections encourage authors to create. To continue to foster creativity, it is important for those involved to understand the legal rights and restrictions they both enjoy to facilitate the ability of authors and other stakeholders to work together. ■



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ENDNOTES

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4. Library of Congress, Copyright Office, *Waiver of Moral Rights in Visual Artworks* (October 1996) <<https://www.copyright.gov/reports/exsum.html>> and WIPO, *Berne Convention for the Protection of Literary and Artistic Works* <<http://www.wipo.int/wipolex/en/details.jsp?id=12214>>.
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7. *Cheffins v Stewart*, 825 F3d 588, 594 (CA 9, 2016); 17 USC 106A.
8. 17 USC 106A(d)(2).
9. *Pollara v Seymour*, 344 F3d 265, 270 (CA 2, 2003).
10. *Community for Creative Non-Violence v Reed*, 490 US 730, 750; 109 S Ct 2166; 104 L Ed 2d 811 (1989) and 17 USC 101.
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12. 17 USC 106A(a).
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24. 17 USC 412.
25. 17 USC 106A(e).
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27. 17 USC 106A(e)(2).
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29. 17 USC 113(d)(2).
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32. *Id.*
33. *Cohen v G&M Realty, LP at 320 F Supp 3d 441 and Massachusetts Museum of Contemporary Art Fdn, Inc v Buchel*, 593 F3d 38, 54–55 (CA 1, 2010).
34. *A Guide to the Visual Artists Rights Act and Carter v Helmsley-Spear, Inc*, 71 F3d 77; 138 ALR Fed 711 (CA 2, 1995).

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