

Public Art & Moral Rights

If your clients own art – then this is relevant
to them!

By Jen Pitino, Deputy Boise City Attorney

Boise City and Public Art

- 1% of the total cost of all eligible capital improvement projects to fund art in public places in the City of Boise (B.C.C. 1-25-01)
- The Boise City Department of Arts & History, was in 2008 to provide leadership, advocacy, education, services, and support for arts and history in the City.
- Boise City Arts Commission, established in 1978, was a nonprofit city agency that advised and assisted the City Council in development, coordination, promotion and support of the arts.

“CONTROLLER OF THE UNIVERSE” – BY
DIEGO RIVERA



"[I]n destroying my paintings, the Rockefellers have committed an act of cultural vandalism. There ought to be, there will be yet, a justice that prevents assassination of human creation as of human character." - Diego Rivera

MORAL RIGHTS

Moral Rights have been described as:

“rights of a spiritual, non-economic and personal nature [that]...spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.”

Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2nd Cir. 1995)

V.A.R.A.

(Visual Artists Rights Act)

- ◉ Enacted in June 1, 1990
- ◉ Passed to bridge gap between American jurisprudence and Moral Rights
- ◉ Limited in types of art protect:
 - 1) Paintings,
 - 2) Drawings
 - 3) Prints
 - 4) Sculptures
 - 5) Photographs (created for exhibition and limited to limited edition printing of 200 copies or less – signed and consecutively numbered)

V.A.R.A.

○ RIGHT OF ATTRIBUTION

- 1) claim authorship of that work [also called the right of paternity], and
- 2) to prevent the use of his/her name as the author of any work of visual art which he/she did not create [also called the right of disavowal]; and
- 3) right to prevent the use of his/her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to the artist's honor or reputation.

MARYLAND HOUSE MURAL – BY
WILLIAM SMITH 1966



The center panel of William Smith's nine panel mural was changed without his knowledge or permission. He asked to have his name removed from the work and was denied.

V.A.R.A.

◎ RIGHT OF INTEGRITY –

- 1) to prevent any intentional distortion, mutilation or other modification to the work that would be prejudicial to the author's honor or reputation; and
- 2) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

“SHINTO” – ISAMU NOGUCHI 1974



Shinto, was an enormous, stainless steel, rhomboid- weighing 1,600-pound and 17 feet long. The giant monolith hung from the ceiling of the lobby in the Manhattan branch of the Bank of Tokyo. It is said that the installation frightened customers and employees.

V.A.R.A.

To demonstrate “recognized stature” there is a two part test:

- 1) The artwork has stature – i.e. it is viewed meritorious;
- 2) The artwork is recognized – i.e. the merit of the work is recognized by art experts, other members of the artistic community or by some cross-section of society.

Martin v. Indianapolis

Bulldozer image from
<http://rhmplanthire.co.uk>

Symphony#1 image from
www.coolcopyright.com



Martin v. Indianapolis

192 F.3d 608

- ◉ VARA provides that an artist shall have the right to prevent destruction of a work of “recognized stature” – which is not clearly defined and left open to argument.
- ◉ Martin was allowed to use newspaper/magazine articles, various letters – including one from an art gallery director, and a letter to the editor of the local newspaper regarding his sculpture to prove that the piece was of “recognized stature” to prevent destruction under VARA.
- ◉ City objected and was overruled on the hearsay issues. City also argued that Martin had the burden of proving willful infringement and that he failed to prove that defendant willfully violated plaintiff’s rights under copyright law.
- ◉ District Court granted summary judgment to Martin with an awarded \$20,000 and attorney’s fees. The Court refused to award plaintiff enhanced damages available under VARA because the City of Indianapolis was not aware of this statute and did not recklessly disregard plaintiff’s contractual and ownership rights.
- ◉ On appeal, Seventh Circuit affirmed the district court’s ruling and resulting judgment in all respects.

Duration of Moral Rights

Because moral rights are personal to the artist, moral rights:

- 1) cannot be transferred to another
- 2) last the lifetime of the artist
- 3) if a joint work, last through the lifetime of the last surviving co-creator

Exceptions to VARA protection of Moral Rights:

Moral Rights do not apply to:

- 1) Works made-for-hire
- 2) Anything that is not defined as a “work of visual art” under 17 U.S.C. 101
- 3) Works created and transferred before ratification of VARA
- 4) Modifications to the work which are the result of the passage of time or inherent nature of the materials
- 5) Works of visual art which are incorporated into or made part of a building in such a way that removing the work from the building will cause destruction, distortion, mutilation or other modification to the work
- 6) Works that are made for advertising and promotion

17 U.S.C. 101, 17 U.S.C. 106A and 17 U.S.C. 113

Kleinman v. San Marcos

Photo from www.aron.ca



Photo from
www.thefileroom.org



Kleinman v. San Marcos

597 F.3d 323

Under V.A.R.A. a protected “work of visual art” does not include—

(A)

(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

Removing Art from Buildings

- If a building owner wishes to remove a piece of “visual art” which is a part of such building and which can be removed without the destruction, distortion, mutilation or other modification of the work – a creator’s “right to integrity” of the piece shall apply UNLESS:
 - 1) The owner has made a diligent, good-faith attempt without success to notify the artist of his intention to remove the work; or
 - 2) The owner did provide such notice in writing and the artist failed to remove the work (or pay to have it removed) from the building within 90 days of the notice

V.A.R.A.

- ◉ Remedies for moral rights violations are the same as civil (but not criminal) remedies for copyright infringement:
 1. injunction,
 2. impounding,
 3. damages (actual or statutory), and
 4. fees and costs
- ◉ Damages are governed under the copyright statute which has two types of damages – actual and statutory:
 - > Actual Damages – (tough to prove for V.A.R.A. violations)
 - > Statutory Damages – (copyright registration for V.A.R.A. claim not required!)
 - Statutory requires showing of “willful” violation – more than just “intentional”

COPYRIGHT INFRINGEMENT DAMAGES

○ Actual Damages:

- > Require proof of actual losses and any profits earned by infringers based solely on the infringement
- > Registration of the Copyright prior to the infringement not required

○ Statutory Damages:

- > Requires that copyright was registered prior to the infringement
- > Maximum Recovery = \$30,000 + Attorney's fees + costs (per infringement)
- > Minimum Recovery = no less than \$750 + Attorney's fees + costs
- > Further reduction to Recovery = If the infringer can prove not aware and had no reason to believe that his acts constituted an infringement of copyright, court may reduce the statutory damages not less than \$200.00.
- > Willful violation can greatly enhance the statutory damages available
- > Maximum Recovery for willful violation = \$150,000 + Attorney's fees + costs (per infringement)

17 U.S.C. §504(a)(1)and (2) and also §504(c)(1)and (2).

EASTPORT PARK SCULPTURES – DAVID PHILLIPS



Phillips v. Pembroke Real Estate, Inc., 288 F.Supp.2d 89 (D.Mass. 1999). Injunctive relief stopped developers from moving sculptures pieces to new locations within the park.

Waiver of Moral Rights

- ◉ Moral Rights can be waived under written contract, signed by artist and specifically identify the work and uses of that work to which the waiver applies. 17 U.S.C. 106A(e)(1)
- ◉ NOTE: 1) waiver must be very specific; and
2) waiver by one creator binds all of the co-creators
- ◉ Do moral rights actually help artists if buyers demand waivers?

“WILDFLOWER WORKS” - BY CHAPMAN KELLY



Living art “sculpture” located in Chicago, IL.
Photo taken from The Art Newspaper, April 21, 2011 article, www.theartnewspaper.com

Kelley v. Chicago

635 F.3d 290

- 1984 – installation of Wildflower Works – north end of Grant Park
- Promoted as “living art”
- Deteriorated by 2004 – and City had new plans for the park
- City reconfigures Wildflower Works from two giant ovals to two smaller rectangles and changes planting materials
- Kelley sues for “right of integrity” violation under V.A.R.A.

Kelley v. Chicago

Chapman Kelley - Photo by Jon Randolph

Wildflower Works - Photo By Chapman Kelley



Kelley v. Chicago

Copyright Act of 1976 – Copyright subsists in “original works of authorship fixed in a tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”

* In order to get moral rights protection under VARA– the work must first satisfy basic copyright standards

“PUPPY” – BY JEFF KOONS



Puppy is part of the permanent collection at the Guggenheim Museum, Bilbao, Spain and was part of a Basque terrorist plot in 1997.

“THROUGH THE COTTONWOODS” – BY
DANA BOUSSARD



Formerly located at the back of Boise City Council Chambers

“A RIVER RUNS THROUGH IT” – BY
ALISON SKY 1999



Located on the side of the Grove Hotel in Boise.

The End

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