

Public Art & Moral Rights

Art and Moral Rights:

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

By Jen Pitino, Deputy Boise City Attorney

Boise City's Art Collection

- 1% of the total cost of all eligible capital improvement projects are dedicated to fund art in public places in the City of Boise (B.C.C. 1-25-01)
- The Boise City Department of Arts & History, created in 2008, provides 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” – 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

Copyright vs. Moral Rights: connected, but different

COPYRIGHT REFRESHER

Copyright Owners have the exclusive right to do or authorize any of the following:

- (1) to reproduce (make copies of the work)
- (2) to create derivative works;
- (3) to distribute copies of the work to the public by sale or by rental, lease, or lending;
- (4) to perform the work publicly (e.g. play, music, choreography);
- (5) to display the work publicly (e.g. drawing, sculpture, etc.); and
- (6) to (transmit) perform the work publicly by means of a digital audio transmission (e.g. sound recording, etc.).



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)

Duration of Moral Rights

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

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

V.A.R.A.

(Visual Artists Rights Act)

- Enacted in June 1, 1990 – (Berne Convention)
- Passed to bridge gap between American jurisprudence and Moral Rights - 17 U.S.C. § 106A
- Limits protection to Works of Visual Art:
 - 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)

MORAL RIGHTS IN THE U.S.

- ◉ Right of Attribution

- ◉ Right of Integrity

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.

“LORD CALVERT NEGOTIATING WITH THE INDIANS”



In 1988, Smith wanted his name removed from this panel where a different artist had touched up the painting and co-signed the work. State refused. Widely cited as an important case which paved the way for V.A.R.A.

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.

Right of Integrity

Intentional distortion, mutilation or modification to a work does not include:

- 1) The modification of a work of visual art which is the result of the passage of time;
- 2) Modification resulting from the inherent nature of the materials used in the work; and
- 1) Modification resulting from conservation or public presentation of the work, including lighting and placement, unless the modification is caused by gross negligence.

“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. Photo by Ezra Stoller

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.

“Symphony #1” – Jan Martin

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

Symphony#1 image from
www.coolcopyright.com



Martin v. Indianapolis

192 F.3d 608 (7th Cir. 1999)

- 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.

“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 (7th Cir. 2011)

- 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 protection 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, either directly or with the aid of a machine or device."

Exceptions to V.A.R.A. protections 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 V.A.R.A.
- 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

Planet K Art Planters

Photo from
www.thefileroom.org



Photo from www.arron.ca



Kleinman v. San Marcos

597 F.3d 323 (5th Cir. 2010)

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;

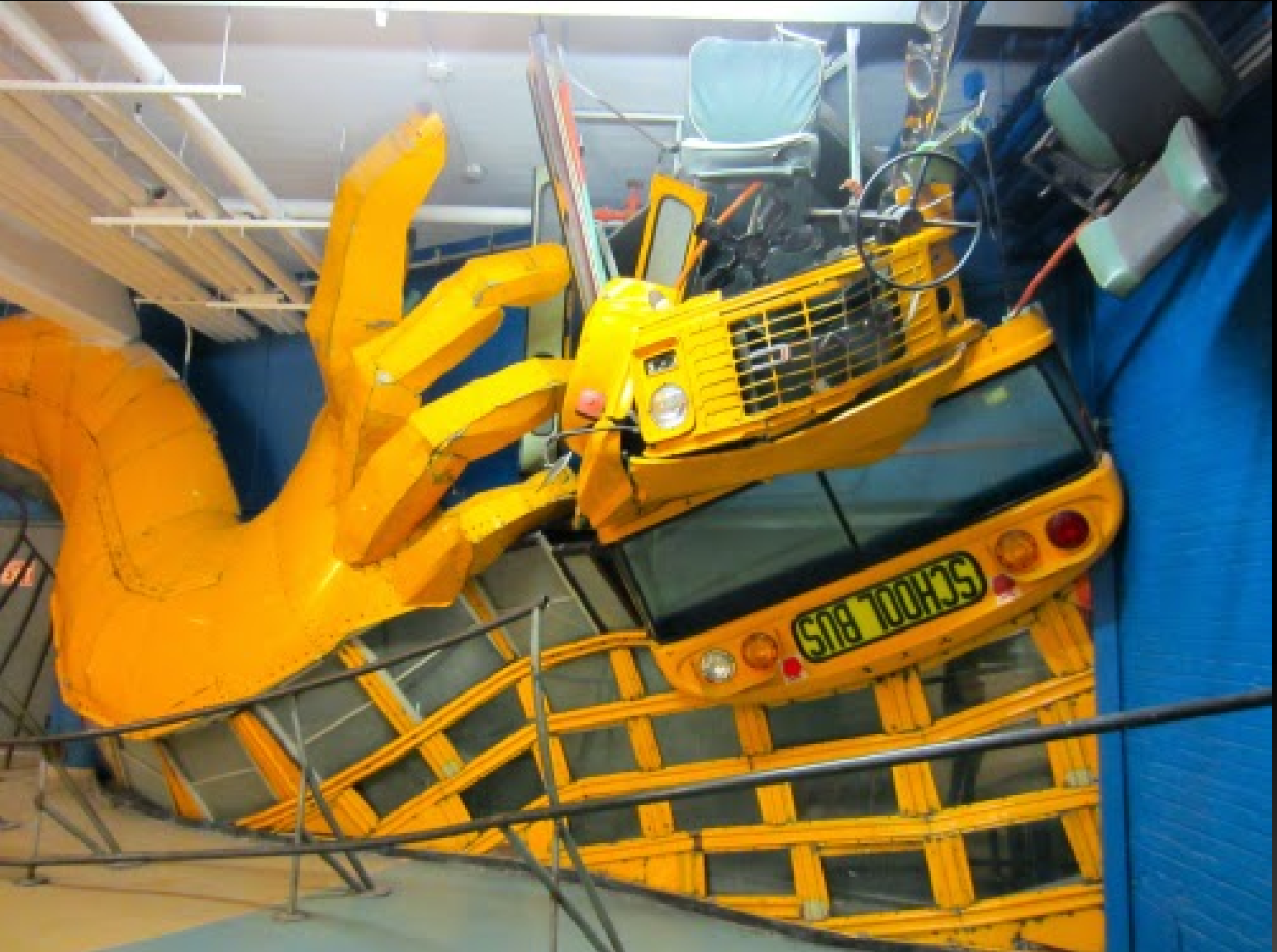
(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

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

17 U.S.C. §101

SCHOOL BUS SCULPTURE – BY JX3



Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303 (S.D.N.Y.1994).

Carter v. Helmsley-Spear

861 F.Supp. 303 (S.D.N.Y.1994)

Supreme Court has relied on agency principals in setting forth 13 factors to consider when determining whether a work is made for hire:

- 1) the hiring party's right to control manner and means by which the product is accomplished;
- 2) the skill required;
- 3) the source of the instrumentalities/tool;
- 4) the duration of the relationship between the parties;
- 5) whether the hiring party has the right to assign additional projects to the hired party;
- 6) the extent of the hired party's discretion over when and how long to work;
- 7) the method of payment;
- 8) the hired party's role in hiring and paying assistants;
- 9) whether the work is part of the regular business of the hiring party;
- 10) whether the hiring party is in business;
- 11) the provision of employee benefits;
- 12) the location of the work; and
- 13) the tax treatment of the hired party.

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)

Removing Art Affixed to Building

- 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

- ◉ 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”

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.

Phillips v. Pembroke

443 Mass. 110(2004)

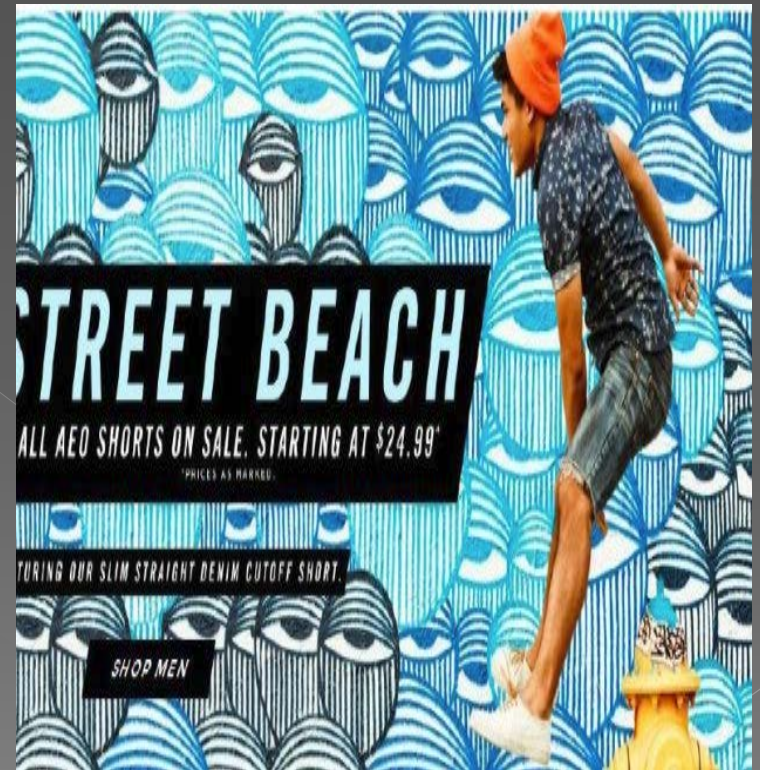
- Park with multiple sculptures and pathways with united theme specific to the site
- Massachusetts Supreme Court found V.A.R.A. does not create site specific interest for visual art

What about Graffiti Art?

Photo by Giulo Sciorio



American Eagle Outfitters' Ad



Graffiti Art Infringement- Movies

Photo from The Zero Theorem, courtesy of Voltage Pictures



Graffiti Art & Moral Rights

Photo by Forsaken Fotos



Cohen v. G&M Realty

988 F.Supp.2d 212 (E.D.N.Y. 2013)

- ◉ Graffiti artists had building owner's permission
- ◉ 5 Pointz became world-famous – conducted regular tours
- ◉ Injunction to prevent demolition denied
- ◉ Judge suggested in decision that artists may be due V.A.R.A. damages – pending lawsuit on that issue

MORAL RIGHTS WAIVERS

- ◉ 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.
- ◉ NOTE: 1) waiver must be very specific (i.e. specifically identify the work, and uses of that work, to which the waiver applies); and
2) waiver by one creator binds all of the co-creators

17 U.S.C. §106A(e)(1)

- ◉ Do moral rights actually help artists if buyers demand waivers?

“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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