

The Visual Artists Rights Act of 1990 and Its Impact on the Real Estate Owner



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So you think you own the artwork? Think again!

DID YOU KNOW that under both federal law and some state laws, artists retain certain rights to physical works of art they created even if the artist no longer owns the art? Thus, as a building owner you may be limited in what you can do to artwork in the lobby or the outdoor sculpture that you own.

American muralist Kent Twitchell created the Ed Ruscha Monument, a six-story 70 foot tall mural on the side of a federal government-owned building in Los Angeles. In 2006, Twitchell's mural was painted over without his notification or consent, in violation of Visual Artists Rights Act of 1990 ("VARA") (17 U.S.C. § 106A) and California Art Preservation Act of 1979 ("CAPA") (Cal. Civ. Code § 987). Both laws prohibit the destruction of certain public artwork without 90 days' notice to the artist and an option for the artist to remove the work himself. Twitchell sued the U.S. government and 14 other defendants, including contractors and managers who maintained the building and were involved in destruction of the artwork. In 2008, Twitchell settled his lawsuit for a reported \$1.1 million, the largest settlement ever awarded to an artist under VARA and CAPA at the time of this writing.

In January 2011, artist Paul Jackson sued the University of Missouri alleging the University violated his moral rights under the Visual Artists Rights Act when the university failed to protect, secure, and keep the Venetian glass mosaic-tiled “Tiger Spot” from being damaged. The Tiger Spot mosaic was a circle 30 feet in diameter depicting the University’s mascot. Specifically Jackson claimed that the school failed to properly shield the mosaic from the rain just days before it was unveiled, which prevented the concrete base and tiles from properly curing. Second, he alleged that the University failed to properly protect the mosaic from vandalism. Jackson’s final claim was that the University refused to repair the damage. Instead, the University wanted to move the mosaic, which Jackson reportedly found insulting. In May 2012 the University settled the lawsuit and paid Jackson \$125,000 to relinquish his rights to the public artwork, giving the University the ability to permanently remove it. The mosaic, which originally cost around \$200,000, has been replaced with plain brick.

In January 2014 artist Kysa Johnson sued Empire State Realty Trust, Inc., the owner of the Empire State Building, for removing her paintings from the concourse level of the building. The paintings were installed in 2000 and commissioned by the building’s then-owner. According to the lawsuit filed in federal court in New York, Empire State Realty Trust told her that the paintings “could not be located, were likely destroyed and therefore could not be returned to Ms. Johnson.” The suit, which says that Ms. Johnson retained ownership of the paintings under her commissioning contract, is unusual because it is not simply a property-loss case, but is also being pursued under the Visual Artists Rights Act, which safeguards the moral rights of artists against distortion, mutilation, or destruction of their work. In her lawsuit, Ms. Johnson claims that because of the “intentional or grossly negligent destruction of the paintings” by the building’s owners, she “has suffered harm to her honor and repu-

tation as an artist.” This lawsuit was settled on June 3, 2014 for undisclosed terms.

The Visual Artists Rights Act of 1990 is now more than 24 years old. VARA gives an artist the right to:

- Claim ownership of his work;
- Prevent the use of his name as the author of any work of visual art which he did not create;
- Prevent the use of his name as the author of the work in the event of a distortion, mutilation, or modification of the work which would be prejudicial to his honor or reputation;
- Prevent any intentional distortion, mutilation, or modification of the work which would be prejudicial to his honor or reputation; and
- Prevent any destruction of a work of recognized stature and any intentional or grossly negligent destruction of that work.

The thinking behind these “moral rights” is that unapproved alterations or destruction may damage an artist’s reputation. The law establishes mechanisms by which an artist may retrieve a work of art that the owner might otherwise destroy, and also enables the artist to disclaim authorship of a piece that has been altered. The works of art covered by the statute are defined as paintings or drawings, or sculptures, graphic or photographic prints, and limited editions signed in numbers of 200 or fewer copies. VARA does not cover advertisements, promotions or packaging or any work made for hire (17 U.S.C §101).

These VARA statutory rights last for the life of the artist, regardless of who owns the work of visual art. The artist is not required to file anything with the U.S. Copyright office to keep or protect his rights. Because moral rights flow from the artist’s creative process and personality vested in the work, these rights may not be sold, transferred, or assigned. They may, however, be expressly waived by the artist in a written instrument. Remedies for violation of the right of integrity (*e.g.*, distortion,

mutilation, or modification) include injunctive relief or monetary damages, or both. Perhaps the most impacting precedent set in the 24 years since the law was enacted has been that the majority of contracts commissioning artists to create artworks contain clauses in which artists waive their VARA rights.

Eleven states (including California, Massachusetts, New York, New Jersey, and Pennsylvania) have enacted laws similar to VARA to protect the integrity of the artist's reputation, the integrity of the work of art, or both. VARA preempts these state laws to the extent those statutes provide equivalent rights to VARA. State statutes may provide protection beyond those of VARA for non-equivalent rights or for extended time limits beyond the life of the artist (17 U.S.C. §301(f)). Laws similar to VARA also exist in Europe.

To date real estate developers and building owners have been the primary defendants in VARA lawsuits. That said, VARA claims have been asserted over artwork appearing in places ranging from

college common areas and dormitories, places of worship, and building lobbies.

What are some practice tips for avoiding problems under the Visual Artists Rights Act of 1990? First, for existing artwork, make sure the artist is still alive. As the building owner, you may be forced to protect the artwork for the entire life of the artist, as will your buyer if you sell the building. Second, if you represent a landlord and your tenant has an agreement with an artist governing removal of the artwork, you need to see and approve that agreement (and any amendments). Such an agreement should allow modifications or removal without cost to the landlord. Consider requiring a direct agreement between the artists and the landlord on these issues. If possible, attach to any lease a copy of an artist's agreement if one pertains to the property. Third, if you are a building owner commissioning an original work of art, you will want the artist to expressly waive his moral rights in a written instrument, and further covenant not to assert moral rights.

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