



Oliver & Sabec P.C.

PUBLIC MEMORANDUM

To: **Judy Baca** cc: **Debra Padilla**

From: **Brooke Oliver**

Re: **SPARC MURAL ORDINANCE DISCUSSIONS**

Date: **Friday, November 18, 2011**

Dear Judy:

Thank you for the honor of participating in last night's inspiring muralists' meeting. I thought it might be helpful for you to have the materials and research I used as references in making my remarks. You are very much on the right track in referencing VARA and CAPA in your suggested revised ordinance.

One significant legal difference, though, is that while registration of the copyrights in a mural protected by VARA is preferable, it is not automatic nor is it required.¹ So, you could leave the "registration" references in or take them out. If you'd like, I could make suggested edits in that regard.

I. VARA DISTINGUISHES FINE ART FROM COMMERCIAL ART AND PROTECTS FINE ARTIST'S MORAL RIGHTS

Here is the text of VARA, 17 U.S.C. §106A:

17 U.S.C. § 106A. Rights of certain authors to attribution and integrity

(a) Rights of attribution and integrity. Subject to section 107 [17 USCS § 107] and independent of the exclusive rights provided in section 106 [17 USCS § 106], **the author of a work of visual art**--

(1) **shall have the right**--

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he

¹ It is however much better than copyrights in murals be registered. Muralists should indeed register the copyrights in each of their murals as they are completed, and for large public commissions, at the preliminary drawing stage as well. In a recent case concerning the Korean War Veterans' Memorial in Washington, D.C., the court found it to be significant in holding that the artist, and not the government, was the copyright holder that the artist had filed copyright registrations in his name at several stages during the preparatory process, in addition to a copyright registration in his name for the final sculptures.



or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d) [17 USCS § 113(d)], shall have the right--

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) 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.

(b) Scope and exercise of rights. *Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner.* The authors of a joint work of visual art are co-owners of the rights conferred by subsection (a) in that work.

The text in italics above means that a corporation that hires an artist to create a work of art for it is not protected by VARA... only the artist is.

Where a work is affixed on a wall, like a mural, there are other important restrictions set out in VARA's section 17 USCS § 113, including that if the mural is removable from the wall, the building owner has to give the artist written notice of their intent to remove or destroy the mural by first class mail, and allow the artist 90 days to remove it at the artist's expense.

Please see my longer article on VARA and CAPA, 2005 VARA Update for more detail.

A. PURPOSE:

Purpose of 17 USC § 106A is to protect moral rights of certain visual artists; § 106A is analogous to Article 6 of Berne Convention for Protection of Literary and Artistic Works, but § 106A's coverage is more limited. *Quality King Distribs. v L'anza Research Int'l* (1998) 523 US 135, 140 L Ed 2d 254, 118 S Ct 1125.

B. WHAT IS A "WORK OF VISUAL ART" UNDER VARA

"A 'work of visual art' is--

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; 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." **17 USCS § 101**

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);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title." **17 USCS § 101**

C. SELECTED CASE SUMMARIES RE VARA NOT PROTECTING ADVERTISING:

Congress chose to exclude from scope of Visual Artists Rights Act of 1990, 17 USCS §§ 101 et seq., all advertising and promotional materials, regardless of whether thing being promoted or advertised was commercial product or whether work being used to promote or advertise might otherwise be called painting, drawing, or sculpture. *Berrios Nogueras v Home Depot (2004, DC Puerto Rico) 330 F Supp 2d 48.*

Artist's banner was not entitled to protection under Visual Artists Rights Act (VARA), 17 USCS §§ 101 et seq., where banner was commissioned and paid for by non-profit group, was created for purpose of drawing attention to information desk, as part of lobbying effort, and overtly promoted in word and picture lobbying message; non-profit group's directions evidenced promotional and advertising purpose that brought banner outside scope of VARA. *Pollara v Seymour (2003, CA2 NY) 344 F3d 265, 68 USPQ2d 1145.*

Where city ticketed store under junked-vehicle ordinance for displaying planter made from smashed car, artists' claims under Visual Artists Right Act (VARA) failed because car-planters were "promotional" material and thus outside of VARA's protection. *Kleinman v City of San Marcos (2010, CA5 Tex) 597 F3d 323, cert den (2010, US) 2010 US LEXIS 5847.*

II. HOW DO SAN FRANCISCO ORDINANCES DISTINGUISH MURALS FROM SIGNS & GRAFFITI:

Express reference to VARA and CAPA in SF City Ordinances concerning signs and graffiti allows the City of San Francisco to rely on the body of federal case law that already defines what a mural is and how it can be distinguished from graffiti and advertising. San Francisco ordinances use two methods: a "carve out" for murals and an express incorporation of VARA and CAPA.



A. CARVE OUT FROM SIGN ORDINANCE - MURALS ARE EXPRESSLY EXEMPTED:

SF Planning Code, Article 6, Signs: Murals are exempted from the definition of a sign, i.e. these things are not signs so are not regulated as signs: "Nonilluminated art murals within the South of Market Mixed Use District and Eastern Neighborhoods Mixed Use Districts, with the exception of the UMU District, if they project no more than 18 inches from the pre-existing surface of a structure;" Section 603(l)

B. ORDINANCES AFFIRMATELY BRING VARA AND CAPA INTO THEM: -

This is done in the Graffiti Abatement regulations, where the ordinances expressly say that murals or paintings that are protected under VARA or CAPA are by definition not graffiti and so may not be destroyed under the graffiti abatement ordinances.

SF Public Works Code, Article 23, Section 1302(c) "Graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of this Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

III. MURALISTS ORGANIZE:

A. A LABOR UNION

501(c)(5) under federal law. IRS page:

<http://www.irs.gov/charities/nonprofits/article/0,,id=96169,00.html>

Under California law, this would be an unincorporated labor organization or unincorporated association.

B. A MUTUAL BENEFITS / TRADE ASSOCIATION:

501(c)(6) under federal law. IRS page:

<http://www.irs.gov/charities/nonprofits/article/0,,id=96107,00.html>

Under California law, this would be a mutual benefits corporation