



**Oliver & Sabec P.C.**

**VARA UPDATE 2005**

**ARTISTS' RIGHTS OF INTEGRITY & ATTRIBUTION IN MURALS & SCULPTURES  
CLE INTERNATIONAL VISUAL ARTS & THE LAW CONFERENCE**

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**I. INTRODUCTION ..... 2**

**II. VISUAL ARTISTS' RIGHTS: RIGHTS OF INTEGRITY & ATTRIBUTION ..... 2**

A. INTEGRITY RIGHTS UNDER THE VISUAL ARTISTS RIGHTS ACT - RIGHT TO PREVENT INTENTIONAL MODIFICATION OR INTENTIONAL OR GROSSLY NEGLIGENT DESTRUCTION ..... 3

1. VARA Covers Original & Limited Edition Works of Visual Art ..... 3

2. Artist Has Right to Prevent Intentional Distortion, Or Intentional or Grossly Negligent Destruction of Visual Art ..... 4

3. Damage to the Art Must Be Prejudicial to Artist's Honor or Reputation ..... 5

4. To Prevent Destruction, Art Must Be of Recognized Stature ..... 5

a) "Recognized Stature" Standard Sets a Low Threshold ..... 5

b) "Recognized Stature" is a Jury Question, Not Summary Judgment ..... 6

c) "Recognized Stature" Is Not Unconstitutionally Void For Vagueness ..... 6

5. Duration & Rights of Heirs Depend Upon When the Art Was Created ..... 7

6. Insurance Coverage Likely Not Available for VARA/CAPA Claims ..... 7

B. ATTRIBUTION RIGHTS ..... 8

C. LIMITATIONS ON INTEGRITY & ATTRIBUTION RIGHTS ..... 8

1. Originals & Limited Editions Only; Fading Does Not Count ..... 8

2. Advertising & Promotional Artwork is Not Covered and This Impacts Political Murals ..... 8

3. Location Limitations; Immobility and Jurisdiction ..... 10

a) "Site-specific Art": Unprotected by VARA Unless the Artwork is an Integrated Compilation ..... 10

b) Jurisdiction: Moral Injury Follows the Artist, Not the Work ..... 10

4. Time & Title Matter: Older Works are Covered If Title Not Transferred ..... 11

5. Artworks Affixed On Buildings: Removability and Required Notice ..... 12

a) Murals Are Usually Removable; Damage to What? ..... 12

b) Notice: First Class Mail, or For Want of a First Class Stamp ..... 13

c) VARA Is Not an Unconstitutional Taking ..... 14

d) Remodeling a Building With a Mural or Sculpture on It ..... 14

e) Hiding a Mural or Sculpture ..... 15

D. INTEGRITY RIGHTS UNDER CALIFORNIA LAW ..... 15

1. California Art Preservation Act ..... 15

2. Preemption Of State Art Preservation Laws and Federal Lanham Act Claims ..... 16

a) Limitations on Preemption: CAPA May Still Protect Old, Sold Artworks; Glass Works ..... 17

**III. ARTISTS AND CONTRACTS ..... 18**

A. MURAL & SCULPTURE COMMISSIONS ..... 18

B. CONTRACTS WITH BUILDING OWNERS; PARTIAL WAIVERS ..... 18

## I. INTRODUCTION

It is not only Michelangelo's Sistine Chapel frescos or the murals of Diego Rivera that inspire passion. On storefronts, city buildings, schools, and along alleys, murals and sculptures by some of California's greatest artists illustrate themes ranging from the sublime to the political. One San Francisco mural, on the Women's Building, covers two entire facades of a four story building with a multicultural painted tapestry of women's history, cultural contributions, and goddesses.<sup>1</sup> Another, *The Great Wall of Los Angeles*, runs for a full half a mile along the Tujunga wash in Los Angeles, depicting California history decade by decade.<sup>2</sup> Publicly displayed mural or sculptures are accessible fine art, available without the price of admission to a museum. These modern masterpieces unexpectedly reach out from neighborhood walls to touch passers by, inspiring silent prayers, connections with cultural history, laughter, anger - - and untold numbers of copyright infringements and other violations of artists' rights.

Murals and sculptures have been at the center of recent public art controversies. Images by spray can artists in Los Angeles that the City ordered covered spurred a national debate over the extent of artists' freedom to express themselves when commissioned to paint on city-owned property.<sup>3</sup> Publishers and photographers often mistakenly assume that murals and sculptures displayed on public streets are somehow in the public domain, snapping up those images for use in books and commercials. In fact, murals and sculptures are protected from such misappropriation by federal copyright law. Murals and sculptures are also becoming commercially valuable, as rights to use them in films, television, publications, software, and music videos are licensed, and as artists use increasingly sophisticated technology and production techniques to increase the number and profitability of original murals or sculptures, in conjunction with business savvy to market mural or sculpture reproductions and merchandise.<sup>4</sup>

Developers and building owners who destroy or damage murals or sculptures in violation of federal law do so at their peril. A \$200,000.00 public settlement following issuance of a mandatory injunction ordering removal of whitewash that a developer had painted over the Lilli Ann mural in San Francisco put developers, contractors, and attorneys all over the country on notice that the federal Visual Artist's Right Act has sharp teeth, and that damages can be far more than a slap on the wrist. This article will address the law of murals or sculptures, as it relates to artists, those public agencies or private parties who commission such artwork, the building owners on whose property the murals or sculptures are displayed, and conservators who may be retained to repair or conserve damaged works of art.

## II. VISUAL ARTISTS' RIGHTS: RIGHTS OF INTEGRITY & ATTRIBUTION

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<sup>1</sup> *Maestrapeace* © 1994 by Juana Alicia, Miranda Bergman, Edythe Boone, Susan Kelk Cervantes, Meera Desai, Yvonne Littleton and Irene Perez{ TA \l "*Maestrapeace* © 1994 by Juana Alicia, Miranda Bergman, Edythe Boone, Susan Kelk Cervantes, Meera Desai, Yvonne Littleton and Irene Perez" \s "*Maestrapeace* © 1994 by Juana Alicia, Miranda Bergman, Edythe Boone, Susan Kelk Cervantes, Meera Desai, Yvonne Littleton and Irene Perez" \c 3 }

<sup>2</sup> *The Great Wall of Los Angeles* © 1981 by Judith F. Baca{ TA \l "*The Great Wall of Los Angeles* © 1981 by Judith F. Baca" \s "*The Great Wall of Los Angeles* © 1981 by Judith F. Baca" \c 3 }.

<sup>3</sup> *Where Life Is Sideshow, Street Art Passes /Limit: Painting, With Police Beating, Is Covered*, New York Times, September 9, 1997{ TA \l "*Where Life Is Sideshow, Street Art Passes /Limit: Painting, With Police Beating, Is Covered*, New York Times, September 9, 1997" \s "*Where Life Is Sideshow, Street Art Passes /Limit: Painting, With Police Beating, Is Covered*, New York Times, September 9, 1997" \c 3 }. Also covered by Rush Limbaugh, September 2, 1997, and Politically Incorrect, week of September 22, 1997.

<sup>4</sup> *Cadre of Painters Cash In on Popularity*, Los Angeles Times, September 22, 1997{ TA \l "*Cadre of Painters Cash In on Popularity*, Los Angeles Times, September 22, 1997" \s "*Cadre of Painters Cash In on Popularity*, Los Angeles Times, September 22, 1997" \c 3 }.

Muralists rights to protect their original murals from alteration, mutilation, and destruction are protected under international, federal, and state laws. The federal Visual Artists' Rights Act of 1990 (17 U.S.C. §§ 106A{ TA \l "17 U.S.C. § 106A" \s "17 U.S.C. § 106A" \c 2 }, 113{ TA \l "17 U.S.C. § 113" \s "17 U.S.C. § 113" \c 2 }) is the United States' embodiment of artists' moral rights as required under the international Berne Convention treaty. The Visual Artists' Rights Act has been most often litigated in cases where a muralist's or sculptor's moral rights in their artwork conflict with a building owner's goals for the building upon which the mural is painted. Such conflict has most often arisen in the context of large publicly displayed murals and sculptures, where the rights and interests of building owners, developers, commissioning parties (like nonprofits or City governments), and artists collide.

Artists' "moral rights" of integrity and attribution are embodied in both federal and many states' laws. The right of attribution refers to the artist's rights to be credited as the author of the work, or to disclaim authorship under certain conditions. 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(a)(1); { TA \l "Cal. Civ. Code § 987" \s "Cal. Civ. Code § 987" \c 2 }Cal. Civ. Code § 987(d). The right of integrity refers to the integrity of the artwork itself as a whole, integrated, complete piece of visual art.

However, if a mural or sculpture has been created as a Work Made For Hire, under federal law, or for commercial purposes under California law, these rights of integrity and attribution do not apply. 17 U.S.C. §§ 101{ TA \l "17 U.S.C. § 101" \s "17 U.S.C. § 101" \c 2 }, 106A(a); Cal. Civ. Code § 987{ TA \s "Cal. Civ. Code § 987" }(b)(2, 7).

## **A. INTEGRITY RIGHTS UNDER THE VISUAL ARTISTS RIGHTS ACT - RIGHT TO PREVENT INTENTIONAL MODIFICATION OR INTENTIONAL OR GROSSLY NEGLIGENT DESTRUCTION**

### **1. VARA Covers Original & Limited Edition Works of Visual Art**

Murals are works of visual art covered by the federal Visual Artists Rights Act. Carter v. Helmsley-Spear, 71 F.3d 77, 84 (2d Cir. 1995){ TA \l "Carter v. Helmsley-Spear, 71 F.3d 77 (2d Cir. 1995) (Carter III)" \s "Carter v. Helmsley-Spear, 71 F.3d 77 (2d Cir. 1995) (Carter III)" \c 1 } (*citing* HR Rep. No. 514, 101<sup>st</sup> Congress, 2d Sess. at 11 (1990)) (hereafter Carter III) (*cert. denied Carter v. Helmsley-Spear, Inc.*, 517 U.S. 1208 (1996)). A "work of visual art" is defined as 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. 17 U.S.C. § 101.{ TA \s "17 U.S.C. § 101" } 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 is also a "work of visual art."<sup>5</sup>

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<sup>5</sup> Under 17 U.S.C. § 101{ TA \s "17 U.S.C. § 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 that title.

A maquette, a porcelain or clay statue sculpted in preparation for creating a bronze statue, is a "work of visual art" protected by VARA. Flack v. Friends of Queen Catherine, 139 F. Supp. 2d 526, 533-534 (S.D.N.Y. 2001). In a recent Pennsylvania district case, seemingly at odds with the holding in Flack, the court held that technical drawings and illustrations created as a foundation for a protected sculptural work are not within the scope of VARA protection. National Assoc. for Stock Car Auto Racing, Inc. v. Scharle, 356 F. Supp. 2d 515 (E.D. Pa. 2005). The facts of NASCAR are distinguishable from Flack. The art in NASCAR – technical illustrations done in preparation for a trophy design – fell within the ambit of explicit copyright preclusions for models and technical drawings. *Id.* at 529. The illustrations were additionally found to fall short of the limited edition requirement explicitly stated in the VARA statute. Because multiple revised versions of the drawings were emailed, the court held that the works could not have existed in a single copy. *Id.* Although the NASCAR court stated that foundational works are not protectable, the court may have so stated as a reaction to works that clearly fell short of VARA protection on numerous grounds. The physical and contextual differences between computer generated sketches, which do not exist in a single copy, and physical sculptures or maquettes, which do, may serve to reconcile what might otherwise be seen as conflicting rulings. Nevertheless, artists should be warned that illustrations and mock-ups for murals, paintings, or sculptures may not be protected by VARA. This holding flies in the face of the value that preparatory drawings by artists such as Picasso hold, and so is likely limited to its narrow facts.

## 2. **Artist Has Right to Prevent Intentional Distortion, Or Intentional or Grossly Negligent Destruction of Visual Art**

Under VARA, the author of a work of visual art has the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to her honor or reputation. 17 U.S.C. § 106A(a)(3)(A). The artist may also prevent the destruction of a mural or sculpture of recognized stature. Any intentional or grossly negligent destruction of that mural or sculpture is a violation of the artists' rights. 17 U.S.C. § 106A(a)(3)(B). For works created after the effective date of VARA, the artist has these rights even if she has sold or otherwise transferred her copyrights. 17 U.S.C. § 106A(b).

Section 106A(c)(2) provides that "[t]he modification of a work of visual art which is the result of conservation ... is not a destruction, distortion, mutilation, or other modification described in section (a)(3) *unless the modification is caused by gross negligence.*" 17 U.S.C. § 106A(c)(2) (emphasis added). Conservators and others hiring a person other than the artist to repair or restore a work of visual art should exercise due care in performing such conservation work. In a New York case where the artist's cheaper assistant was hired, over the artists' objections, to do restoration work on the head of clay statue that had been damaged by exposure to the elements, the District Court held that the artist stated a claim that her right to preserve the integrity of her artistic work under VARA was violated, by alleging that the successor sculptor had performed conservation work in a grossly negligent manner. Flack v. Friends of Queen Catherine, 139 F. Supp. 2d 526, 534-535 (S.D.N.Y. 2001). Her claim survived a motion to dismiss. It would be prudent to retain only qualified conservators who adhere to national art conservation standards to perform such conservation work, and not to retain unqualified artists or

assistants to perform such work. In addition, the artist's consent to such conservation should be obtained before starting, and a waiver of artists' claims in the event of harm to the work should be considered.

### **3. Damage to the Art Must Be Prejudicial to Artist's Honor or Reputation**

The damage under a VARA claim is not purely damage to the work of visual art. Rather, the damage contemplated is the harm done to the artist's honor and reputation as a result of alteration or destruction of the artwork. In determining what would be "prejudicial to the artist's honor or reputation," courts will consider whether such alteration would cause injury or damage to the artist's good name, public esteem, or reputation in the artistic community. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) (hereafter Carter II)<sup>1</sup> (rev'd on other grounds, 71 F.3d 77 (2d Cir. 1995)). The standard for proof and the measurement of honor and reputation damages has not been clearly established. Such damages are normally proved through expert testimony about what the artist's honor and reputation in the art world and community at large, the place the damaged mural or sculpture has in establishing or maintaining the artist's reputation, the fair market value of the artists' work as established by similar commissions, art sales, and licensing history, the potential lost licensing, lost commissions, or other lost revenues or financial harm caused to the artist by the loss of the artwork, and other situation-specific evidence. Artists are entitled to statutory damages and attorneys fees under VARA. Martin v. City of Indianapolis, 192 F.3d 608, 612 (7<sup>th</sup> Cir. 1999)<sup>2</sup>.

### **4. To Prevent Destruction, Art Must Be of Recognized Stature**

#### ***a) "Recognized Stature" Standard Sets a Low Threshold***

In proving that a destroyed work is of "recognized stature," the artist need not show the work to be on par with works created by artists such as Chagall or Picasso. Carter II, 861 F. Supp. at 325.<sup>3</sup> Rather, the court may rely on the testimony of experts, artists, and art critics, about whether the mural or sculpture is of recognized stature. Id.<sup>4</sup> The court may decide to measure stature by two factors: 1) that the work is viewed as meritorious and 2) art experts, the artistic community or some other cross-section of society recognize that the work has stature. Martin v. City of Indianapolis, 192 F.3d 608, 612 (7<sup>th</sup> Cir. 1999)<sup>5</sup> (citing Carter I, 861 F. Supp. at 325). Letters and articles written by non-expert members of the artistic community, expressing their own opinions as to the worth of the artwork may be adequate evidence of stature. Martin, 192 F.3d 608 (7<sup>th</sup> Cir. 1999)<sup>6</sup>, 192 F.3d at 613. This is important because not needing to retain experts can significantly lower the costs of suit for an artist. In California, expert testimony is required, but expert witness fees are recoverable. Cal. Civ. Code § 987.<sup>7</sup>

In a New York district case, the court limited the scope of the "recognized stature" standard to the artwork that is readily accessible to the general public, and is the subject of the litigation, stating that "it is not enough that works of art authored by the plaintiff, other than the work sought to be protected, have achieved such stature." Scott v. Dixon, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004)<sup>8</sup> (citing Martin v. City of Indianapolis, 982 F. Supp. 625, 631 (S.D. Ind. 1997)). However, the court stated that it could "imagine a set of circumstances where an artist's work is of such recognized stature that any work by that artist would be subject to VARA's protection," using the example of a newly

discovered Picasso that would clearly protected. Scott{ TA \s "Scott v. Dixon, 309 F. Supp. 2d 395 (E.D.N.Y. 2004)" }, 309 F. Supp. 2d at 400.

Notably, another New York case clarified limits on the scope of the “recognized stature” standard, stating that “VARA actually does not require that a work be of ‘recognized stature’ for its protection to inure in the artwork.” Bd. of Manager of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221, 46 (S.D.N.Y. 2003) (Soho I){ TA \l "Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" \s "Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" \c 1 }. Rather, recognized stature is required in order for an artist to prevent destruction of an artwork, but not to prevent intentional modification or distortion of it. { TA \s "Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" }Id.

**b) “Recognized Stature” is a Jury Question, Not Summary Judgment**

In an important New York District Court order, it was held that the issue of recognized stature is a jury question not subject to summary judgment, and that recognized stature is a matter of fact for determination at trial. Pollara v. Seymour & Casey, 150 F. Supp. 2d 393 (N.D.N.Y. 2001) { TA \l "Pollara v. Seymour & Casey, 150 F. Supp. 2d 393 (N.D.N.Y. 2001)" \s "Pollara v. Seymour & Casey, 150 F. Supp. 2d 393 (N.D.N.Y. 2001)" \c 1 } (holding limited to the question of whether or not the fact that Pollara's painting had never been publicly displayed precludes it from being a work of “recognized stature” within the meaning of Section 106A). Later at trial, it was held that the Pollara mural was not a work of recognized stature within the meaning of VARA because the mural was to have been used solely to publicize one event sponsored by a public interest group, and there was never any intent by the artist to preserve her work for future display. Pollara v. Seymour, 206 F. Supp. 2d 333, 337 (N.D.N.Y. 2002){ TA \l "Pollara v. Seymour, 206 F. Supp. 2d 333 (N.D.N.Y. 2002)" \s "Pollara v. Seymour, 206 F. Supp. 2d 333 (N.D.N.Y. 2002)" \c 1 }. Unfortunately, the Second Circuit Court of Appeal in Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003){ TA \l "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)" \s "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)" \c 1 }, agreed that the destruction of Ms. Pollara’s mural did not violate her rights, although they could not agree about why.<sup>6</sup> This decision is troubling for any artist who does art with a political message, and is discussed in more detail below.

**c) “Recognized Stature” Is Not Unconstitutionally Void For Vagueness**

The Department of Justice, in a brief filed by the Attorney General in a Florida case, has opined that the term “recognized stature” is not unconstitutionally void for vagueness. Leviton v. Hollywood Art & Culture, Case No. 97-7175-Civ-Jordan/Seltzer{ TA \l "Leviton v. Hollywood Art & Culture, Case No. 97-7175 Civ. (S.D. Fla. 2000)" \s "Leviton v. Hollywood Art & Culture, Case No. 97-7175 Civ. (S.D. Fla. 2000)" \c 1 } (settled before Court reached constitutional issue). The Attorney General argued that, following Carter II{ TA \s "Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) (Carter II)" } and Martin{ TA \s "Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999)" }, the statutory language can be reasonably interpreted using the common-sense meanings of these words. Memorandum of Law of the United States in Support of the Constitutionality of the Visual Artists Rights Act of 1990 and in Response to Defendant’s Motion for Final Summary Judgment, p.5-8 (hereafter “Attorney General MOL”) (available at [www.artemama.com](http://www.artemama.com) in the Artist’s Rights section). The Attorney General cited Carter’s interpretation of Grayned v. City of Rockford, 408 U.S. 104, 110 (1972){ TA \l "Grayned v. City of Rockford, 408 U.S. 104 (1972)" \s "Grayned" \c 1 }, which examined a statute similar to VARA, for the proposition that VARA is marked by its “flexibility and reasonable breadth, rather than meticulous specificity.” Attorney General MOL at 6. Although “recognized stature” may describe a broad range of artwork, and may be shown through a variety of sources, the standard is not

<sup>6</sup> Excellent case note can be found in *Entertainment Law Reporter*, Vol. 25, No. 8, January 2004.

unconstitutionally vague, nor is it unduly difficult to apply.

## **5. Duration & Rights of Heirs Depend Upon When the Art Was Created**

For both joint works and works created on or **after** June 1, 1991, these rights of integrity and attribution last for the life of the author (or the life of the last surviving author, if it was a joint work). 17 U.S.C. § 106A(d). For works created **before** June 1, 1991, and which the artist still owns, the rights expire at the same time as the artist's copyright expiration. 17 U.S.C. § 106A(d)(2). In the "Lilli Ann" case, both the mural's designer and painter acquired rights under VARA as joint authors. 17 U.S.C. § 106A(b). Campusano's VARA rights survived Campusano's death on two grounds: 1) because the mural was created before VARA's effective date (17 U.S.C. § 106A(d)(2), 17 U.S.C. § 302), and 2) because Rocha survived Campusano, perpetuating Campusano's rights as a joint author. (17 U.S.C. § 106A(d)(3)). Campusano's heirs were thus permitted to assert Campusano's VARA rights in federal court, bringing about the issuance of a preliminary and a subsequent mandatory injunction.

The artist may choose to waive these rights by signing a written contract waiver. 17 U.S.C. § 106A(e). Artists are increasingly being asked to sign such waivers in exchange for the right to paint murals or display sculptures, especially on public buildings. See discussion below on waiver provision alternatives.

## **6. Insurance Coverage Likely Not Available for VARA/CAPA Claims**

After the Lilli Ann mural case was settled, the developers who destroyed the mural sought to recover their defense fees and other costs from their general commercial liability insurer. Given that the damages under VARA are honor and reputation damages, the developers argued that their VARA and CAPA claims should be covered under the personal injury sections of the policy. The Ninth Circuit recognized the artists' VARA claim, but found that the insurer had no duty to defend the developers. The Ninth Circuit held that the artists' claims under VARA and CAPA (1) did not constitute claims of libel, trade disparagement or invasion of privacy within the scope of personal injury coverage, and (2) claims did not involve advertising injury within coverage of the policy. Cort v. St. Paul Fire & Marine Ins. Companies, Inc., 311 F.3d 979 (9<sup>th</sup> Cir. 2002). Cort v. St. Paul Fire & Marine Ins. Companies, Inc., 311 F.3d 979 (9<sup>th</sup> Cir. 2002).

## B. ATTRIBUTION RIGHTS

Attribution rights refer to the artist's right to be credited as the author of the work, or to disclaim authorship under certain conditions. 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(a)(1); Cal. Civ. Code § { TA \s "Cal. Civ. Code § 987" }987(d). The artist's right of attribution ensures that "artists are correctly identified with the works that they create." Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221, 22 (S.D.N.Y. 2003) (Soho I){ TA \s "Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" }, (*citing* H.R. Rep. No. 101-514 at 1 (1990), reprinted in 1990 U.S.C.C.A.N. 6915). This right to be credited or to disclaim credit was recently affirmed by the United States Supreme Court.<sup>7</sup> Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003){ TA \l "Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)" \s "Dastar" \c 1 }.

A co-author may sue for lack of attribution under VARA, but only when another co-author has already received credit. However, the court stated that "Congress plainly meant for any one of two or more coauthors to bind the others by waiving attribution rights," essentially meaning that one co-author may waive rights of attribution on behalf of the entire authorship. Grauer v. Deutsch, 2002 U.S. Dist. LEXIS 19233 (S.D.N.Y. 2002){ TA \l "Grauer v. Deutsch, 2002 U.S. Dist. LEXIS 19233 (S.D.N.Y. 2002)" \s "Grauer" \c 1 } (*citing* 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(e)(1)) (*motion for reconsideration denied* 2002 U.S. Dist. LEXIS 22209 (S.D.N.Y. 2002)).

## C. LIMITATIONS ON INTEGRITY & ATTRIBUTION RIGHTS

### 1. Originals & Limited Editions Only; Fading Does Not Count

There are several limitations to an artist's rights of integrity and attribution. First, these rights apply only to original pieces of art, or to limited editions of 200 or fewer that are signed and consecutively numbered by the artist, not to reproductions. 17 U.S.C. §§ 101{ TA \s "17 U.S.C. § 101" }, 106A{ TA \s "17 U.S.C. § 106A" } (c)(3). Second, an artist's right to prevent distortion or modification does not apply where the modification results from the passage of time, as with fading from the sun; or is the result of the inherent nature of the materials (17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(c)(1)), although this second exception does not extend to the destruction of a work of recognized stature. 17 U.S.C. § 106A(a)(3)(B). If the distortion, modification, or even destruction of a work is a result either of conservation efforts or of public presentation of the work, like damage from lighting and placement for instance, there is no violation of the artist's rights unless the modification was caused by gross negligence. 17 U.S.C. § { TA \s "17 U.S.C. § 106A" }106A(c)(2).

### 2. Advertising & Promotional Artwork is Not Covered and This Impacts Political Murals

VARA does not protect advertising, promotional, or utilitarian works, and does not protect works for hire, regardless of their artistic merit, their medium, or their value to the artist or the market. *See* 17 U.S.C. § 101{ TA \s "17 U.S.C. § 101" }, *see also* § 106A(c)(3). VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it

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<sup>7</sup> VARA provides that the author of an artistic work "shall have the right . . . to claim authorship of that work." 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(a)(1)(A). That express right of attribution is carefully limited and focused: It attaches only to specified "works of visual art," § 101, is personal to the artist, §§ 106A(b) and (e), and endures only for "the life of the author," at § { TA \s "17 U.S.C. § 106A" }106A(d)(1). Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003){ TA \l "Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)" \s "Dastar" \c 1 }.



could arguably be called a sculpture. See *Id.* Drawings and paintings are protected, but only if they do not advertise or promote. *Id.* Only limited edition still photographs are protected. Congress explicitly limited VARA's protection to works "intended for exhibition use only," as opposed to works intended for use in a publication or the photographer's photo album. *Id.*, see also Pollara v. Seymour{ TA \1 "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)" \s "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003){ TA \s "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)" }}, 344 F.3d 265, 269-270 (2d Cir. 2003).

It makes sense to distinguish between fine art and art created for commercial advertising and promotion, granting fine art a level of protection unavailable to advertisements. However, the Second Circuit's application of this exception to Joanne Pollara's political banner mural raised serious concerns about the breadth of the court's definition of "promotional." In the aftermath of this decision, any mural that promotes a political point of view may not have the benefit of federal VARA protection.

Muralist Pollara, an experienced and widely renowned fine artist, was commissioned by a nonprofit to create a banner for Lobbying Day that would be displayed next to an information table at Empire State Plaza. Pollara and several helpers erected the banner in Empire State Plaza on March 15, 1999, the evening before Lobbying Day was scheduled to begin. The completed banner, in three or four colors, depicts a tableau of two dozen stylized people, with few salient features, standing in line, set against a background of shut doors labeled "PUBLIC DEFENDER," "LEGAL AID," and "PRISONERS LEGAL SERVICES." They patiently await entry, at left, of an open door marked "LAWYER," inside which sits a person, wearing a jacket and tie. The person sits behind a brown desk, beside which is a trash can. The likenesses of the people in line are suggestive of varied ethnicities, conceivable immigrant statuses, are both young and old, and of both sexes -- one person carries an infant and two have children in tow; the rest are in silhouette. Many are holding rectangles of paper, evidently summonses, correspondence, and the like. Large lettering across the top and left read: "EXECUTIVE BUDGET THREATENS RIGHT TO COUNSEL" and "PRESERVE THE RIGHT TO COUNSEL -- NOW MORE THAN EVER!"

The banner was taped to two ten-foot-high steel supporting poles that were connected by a steel cross-bar and anchored with twelve-inch square bases held down by sandbags. After the installation, the banner was left unattended in the plaza. Through no fault of Pollara's and without her knowledge, the advocacy group that commissioned the temporary mural had failed to obtain a valid permit for Pollara to erect the banner or leave it there overnight. The manager of Empire State Plaza ordered the banner be removed. During removal, it was torn vertically into three pieces. Pollara learned the following morning that the banner had been removed. She went to the plaza, saw that the banner was gone, and later saw it lying torn and crumpled in a corner of the plaza manager's office. Pollara v. Seymour{ TA \s "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)" }, 344 F.3d 265, 266-267 (2d Cir. 2003).

Pollara's mural was found to be "promotional and advertising" because the banner was created for the purpose of drawing attention to the information desk as part of a lobbying effort, and the banner overtly promoted in word and picture a lobbying message. Congress chose to exclude from the scope of VARA all advertising and promotional materials, regardless of whether the thing being promoted or advertised was a commercial product or (as here) a particular advocacy group's lobbying efforts, and regardless of whether the work being used to promote or advertise might otherwise be called a painting, drawing, or sculpture. The court held that it was not a "work of visual art" subject to protection under VARA. Pollara v. Seymour{ TA \s "Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)" }, 344 F.3d 265, 270 (2d Cir. 2003). Another judge opined that the mural was "not a work of recognized stature" because it had never been exhibited before it was destroyed. *Id.* Many of the world's finest works of art depict images in ways that promote political messages. By extension, one is left to wonder how the Second

Circuit might decide a case involving the destruction of *Guernica* if created in current times by Picasso because of its blatantly anti-war message.

In a Puerto Rico case, an artist's work was appropriated for use on promotional material without the artist's knowledge, consent, or compensation, but the court found that the use, however improper, was beyond the scope of VARA rights of attribution and integrity because the artwork was reproduced in a promotional brochure. Nogueras v. Home Depot, 300 F. Supp. 2d 48, 51 (D. P.R. 2004) (citing Pollara v. Seymour, 344 F.3d 265) { TA \l "Nogueras v. Home Depot, 300 F. Supp. 2d 48 (D. P.R. 2004)" \s "Nogueras v. Home Depot, 300 F. Supp. 2d 48 (D. P.R. 2004)" \c 1 }. VARA protection does not extend to mass-produced copies of a work even when the original may merit protection. Silberman v. Innovation Luggage, Inc., 2003 U.S. Dist. LEXIS 5420, 14 (S.D.N.Y. 2003) { TA \l "Silberman v. Innovation Luggage, Inc., 2003 U.S. Dist. LEXIS 5420 (S.D.N.Y. 2003)" \s "Silberman v. Innovation Luggage, Inc., 2003 U.S. Dist. LEXIS 5420 (S.D.N.Y. 2003)" \c 1 }. Although the Nogueras and Silberman courts focused on the use of the artwork on a promotional brochure as the grounds for ruling that VARA does not apply, the cases would more properly have been decided had the court simply recognized that VARA protects against modification or destruction of original and limited edition artworks, and does not apply to infringements of an artist's Section 106 reproduction rights.

### **3. Location Limitations; Immobility and Jurisdiction**

#### ***a) "Site-specific Art": Unprotected by VARA Unless the Artwork is an Integrated Compilation***

"[A]n artist has no right to the placement or public presentation of his sculpture under the exception in § 106A(c)(2)." Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 100 (D. Mass. 2003) { TA \l "Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89 (D. Mass. 2003)" \s "Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89 (D. Mass. 2003)" \c 1 }, *see also* Id. at 92, 98 (stating that "federal law provides no protection for the placement of site-specific sculpture," even though such works may share a common theme with adjacent pieces). Although VARA does not explicitly extend protection to the location of a given artwork, some works have been found to be so "visually integrated" into surrounding works that the sum of the works, taken as a whole, constitutes a single "work of visual art." Phillips { TA \s "Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89 (D. Mass. 2003)" \l }, 288 F. Supp. 2d at 98 (holding that VARA may protect compounded works where the visual effects of alterations along a given line-of-sight serve to substantially change the artist's intended visual effect). "The very point of the statute" is not "to preserve a work where it is, but rather to preserve the work as it is." Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221, 34 (S.D.N.Y. 2003) (hereafter Soho I) { TA \s "Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" \l } (motion for reconsideration denied, Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. 2003) (hereafter Soho II)).

#### ***b) Jurisdiction: Moral Injury Follows the Artist, Not the Work***

An artist may bring a VARA claim, even if damage to the artwork occurred overseas, if the artist is a resident of the United States and the perpetrator of the damage is accountable in the United States. Leonardo v. United States, 55 Fed. Cl. 344, 353-4 (U.S. Fed. Cl. Ct. 2003) { TA \l "Leonardo v. United States, 55 Fed. Cl. 344 (U.S. Fed. Cl. Ct. 2003)" \s "Leonardo v. United States, 55 Fed. Cl. 344 (U.S. Fed. Cl. Ct. 2003)" \c 1 } (upholding the contention that because the artist is deprived of the right to prevent the destruction of her works, moral rights therefore reside in the artist's person, not in her artwork).

#### 4. Time & Title Matter: Older Works are Covered If Title Not Transferred

Works that are subject to VARA are set forth in Section 106A{ TA \s "17 U.S.C. § 106A" }(d) of the Act. Section 106A(d)(2) addresses works covered by VARA that were created prior to enactment of the Act in 1991. It states:

“With respect to works of visual art created before the effective date...[of VARA in 1991], but *title to which has not*, as of such effective date, been transferred from the author and, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by Section 106.” [emphasis added].

“Ownership,” not “title” is the term of art used throughout the Copyright Act when referring to ownership of copyright. The statutory language in Section 106{ TA \s "17 U.S.C. § 106A" }(a)(d)(2) refers to title to tangible property, i.e., the installed mural or sculpture. The legislative history makes clear that “title” refers to the particular copy. Both the legislative history and rationale are explained in PATRY, COPYRIGHT LAW AND PRACTICE, Vol. II at 1061 (Bureau of National Affairs 1994){ TA \l "PATRY, COPYRIGHT LAW AND PRACTICE, Vol. II at 1061 (Bureau of National Affairs 1994)" \s "Patry, Copyright Law and Practice, Vol. II at 1061 (Bureau of National Affairs 1994)" \c 5 }, “The Visual Artists’ Rights Act of 1990.” He explains:

“The House agreed to limit VARA to copies (including the original) of “works of visual art” created before the effective date (June 1, 1991), the title to which had not, as of that date, been transferred by the author. The term “title” refers to title to the physical copy of the work of visual art at issue, and not to title to any intellectual property rights. *Id.* at 1061. [emphasis added]

The applicable footnote also explains:

“By focusing on the title to particular copies, VARA permits retroactive application where a work created before the date of enactment may be protected as embodied in some copies, but not others. Where title to a particular copy was not transferred before June 1, 1991, the copy is protected; where title to a particular copy was transferred before that date, that particular copy is not protected. *Id.* at 1061. [emphasis added].

VARA protects pre-VARA murals or sculptures for which title has not been transferred from the artist to someone else. 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(d)(2). If title was never transferred away from the artist, VARA applies even to these older murals or sculptures. Under California law, an artist owns anything that he creates until he relinquishes possession. Cal. Civ. Code § 980{ TA \l "Cal. Civ. Code § 980" \s "Cal. Civ. Code § 980" \c 2 }. Upon creation, the artist has title to that paint layer which is the mural. If that paint layer can be severed from the building, the artist can and may take it away with them. Under Cal. Civ. Code § 3440{ TA \l "Cal. Civ. Code § 3440" \s "Cal. Civ. Code § 3440" \c 2 }, a conveyance is void if it is not accompanied by an immediate transfer in possession. So, in California, an artist must deliver the artwork itself, or some indicia of ownership, to another party, who must then accept the transfer, in order for title to change hands. In the Lilli Ann mural case, the District Court found that title had not been effectively transferred, even when the mural commission contract said title transferred to the City of San Francisco, because the City did not accept it into its collection. The City provided a declaration to that effect which was introduced into evidence.

Conversely, a recent New York district court decision found that ownership of an abstract mural sculpture, for which ownership was not clearly resolved in the evidence provided by either party, was attributed to a non-profit arts organization which was the grantee of necessary city permits. Bd. of Managers of Int’l Arts Cond. V. New York, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005) (hereafter Soho III){ TA \l "Bd. of Managers of Int’l Arts Cond. v. New York, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005) (Soho III)" \s "Bd. of Managers of Int’l Arts Cond. v. New York, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005) (Soho III)" \c 1 }.

Notably, the artist who actually created the work, although he never explicitly transferred his rights to the work, was not accorded title to the work. Title was instead given to an intermediary organization, who had facilitated the acquisition of both the property owner's and the city's permission. The artist's claims of lien and adverse possession failed. *Id.* In response to the Soho III decision, artists are well advised to secure in writing, in advance of creating the artwork, express title of ownership to artwork for which they may later seek protection.

**When VARA Applies to Older Works of Art: Title to the Artwork Matters**

If Title in Work Created Before June 1, 1991	VARA	CAPA
Has Not Been Transferred from the Artist to Another Person	VARA applies (§ 106A (d)(2))	Probably is preempted
Has Been Transferred (An Old, Sold Artwork)	VARA does not apply (§ 106A(d)(2))	May or may not be preempted <sup>8</sup>

**5. Artworks Affixed On Buildings: Removability and Required Notice**

When a mural or sculpture is installed in or on a building, a complicated set of exceptions applies which uneasily balance the respective rights of building owners and artists. 17 U.S.C. § 113{ TA \s "17 U.S.C. § 113" } (d). If the mural or sculpture is installed in such a way that its removal would damage the artist's honor or reputation, the age of the artwork also becomes important because different rules apply to artworks, depending on whether the works were created before or after the effective date of the legislation: June 1, 1991. Building owners have broader latitude with regard to pre-VARA artwork because Congress, in passing VARA, did not want to upset "valid understandings of the law as it existed" before VARA became effective. Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994){ TA \l "Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994) (Carter I)" \s "Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994) (Carter I)" \c 1 } (*rev'd.* on other grounds, 71 F.3d 77 (2d Cir. 1995) (Carter I)).

**a) *Murals Are Usually Removable; Damage to What?***

Though seemingly counterintuitive, murals are often removable with minimal damage. Technology exists which will allow a mural's removal from a wall without causing excessive damage to the mural. A noted art conservator, Nathan Zakheim, has done so numerous times, and has provided expert testimony that murals generally are removable. It is also conceivable that a particular mural may not be removable without damage due to the condition of, or architectural detail of the wall. No court has ruled on whether or not murals are removable as a matter of law, but a New York district court has noted that the touchstone of this inquiry is not merely whether a work is removable, but also the actual consequences of removal, i.e. the damage that would result from such removal. Soho I{ TA \s "Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" }, 2003 U.S. Dist. LEXIS 10221 at 34, *see also* Botello v. Shell Oil Co., 229 Cal. App. 3d 1130, 1138; 280 Cal. Rptr. 535 (1991){ TA \l "Botello v. Shell Oil Co., 229 Cal. App. 3d 1130 (1991)" \s "Botello v. Shell Oil Co., 229 Cal. App. 3d 1130 (1991)" \c 1 }. Such a determination is deemed factual, based on the particular mural and the surface on which it is painted. In the Lilli Ann mural case, several different paints, including blends, had been applied to a wall with at least three different surfaces: stucco, cement brick, as well as an unidentified patching material. Art conservator Nathan Zakheim was able to remove sections of the mural intact from each of the surfaces, and was then able to reaffix them without damage to wood panels. Based on that demonstration and a voluminous conservator's report, Federal District Court Judge Martin J. Jenkins issued a preliminary injunction, finding that the Lilli Ann mural, which had covered a forty-six foot by forty-six foot wall, was more likely than not removable.

<sup>8</sup> See detailed preemption discussion below. Authorities now conflict on this question after Soho I.

The question of “how much damage is too much” is an interesting one. Crucial to such an analysis is the question of “damage to what?” A mural or sculpture is not “legally removable” merely because it can be removed without any damage or harm being done to the artwork itself. The statute reads that VARA does not apply when “removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3).” 17 U.S.C. § 113{ TA \s "17 U.S.C. § 113" }(d)(1)(A). The genre of damage discussed in section 106A(a)(3) is damage to the artist’s honor and reputation, not actual physical damage to the mural or sculpture. It could be that the statute intends that art may be removable even if the mural or sculpture is harmed to some degree, so long as the act of removing it does less harm to the artist’s honor and reputation than destroying the art would do. In the case of more notable murals or sculptures, it may prove less damaging to the artist’s honor and reputation to remove the artwork, even if as much as 5% or 10% of the mural or sculpture is destroyed in the course of removal. In that event, the mural or sculpture may still be legally removable, thus triggering VARA and the building owner’s notice obligations.

In a recent New York district case, the court found that although an artwork work could perhaps be reconstructed at a later time, the mere fact that it would require such reconstruction is sufficient evidence that it has already been destroyed according to VARA standards. Bd. of Managers of Int’l Arts Cond. v. New York, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005) (Soho III){ TA \s "Bd. of Managers of Int’l Arts Cond. v. New York, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005) (Soho III)" }. This holding is troubling in that the court should have evaluated whether the artwork could have been removed without damage, if removal had been done by proper methods. No expert testimony concerning this was introduced, other than the artist’s declaration that it was possible. However, looking to the result of the defendant’s removal efforts to define whether or not the work could have been removed seems to encourage destruction. Under that reasoning, a defendant could destroy a work by whatever means, and then simply shrug his shoulders and say “see, it wasn’t removeable.” The court in the Lilli Ann case reached a different conclusion, in large part because the plaintiff introduced expert testimony and evidence showing the work could have been removed using proper conservation techniques. In that case, the court issued a mandatory injunction ordering restoration.

Upon a request for reconsideration of the New York court’s dismissal of summary judgment in Soho I, the artist sought to establish that removeability of the work could only be determined by the artist. The court found this contention unconvincing because the only evidence submitted was the artist’s “conclusory” declaration and because the opposing party had submitted evidence of non-removeability. Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. 2003) (Soho II){ TA \l "Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. 2003) (Soho II)" \s "Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. 2003) (Soho II)" \c 1 }. This again underlines the critical nature of submitting expert testimony or declarations on the question of removeability, which is a fact-specific inquiry. This expense can be daunting for generally underfunded artist defendants.

**b) Notice: First Class Mail, or For Want of a First Class Stamp...**

Under VARA, if a mural or sculpture is removable, and a building owner wishes to remove it, the owner may not do so unless she either: 1) makes a diligent, good faith effort to notify the artist, by registered mail, even if it does not reach her (17 U.S.C. § 113{ TA \s "17 U.S.C. § 113" }(d)(2)(A)); OR 2) actually gives the artist written notice and the artist fails to remove the mural or sculpture, at the artist’s own expense, within 90 days after receipt of such notice. 17 U.S.C. § 113(d)(2)(B). After either occurrence, the owner may remove the mural or sculpture with impunity.

If the mural or sculpture is not removable without damage to the artist’s honor and reputation, and it was painted before June 1, 1991, a building owner may destroy the artwork without notice to the artist. 17

U.S.C. § 113{ TA \s "17 U.S.C. § 113" }(d)(1). However, failing to give notice is not advisable, given that most murals and sculptures are removable, and issuance of notice is such a relatively minor burden.

If a post-VARA mural or sculpture (created after June 1, 1991) is not removable, the building owner may not remove it unless the artist has signed a written waiver acknowledging that it may not be possible to remove the art without damage to it, but consenting to its installation nonetheless. 17 U.S.C. § 113{ TA \s "17 U.S.C. § 113" }(d)(1)(B).

### **c) VARA Is Not an Unconstitutional Taking**

VARA has been found not to be an unconstitutional “taking.” Carter II{ TA \s "Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) (Carter II)" }, 861 F. Supp. 303, 327 (*rev'd.* on other grounds, 71 F.3d 77 (2d Cir. 1995)), *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)). Building owners have argued that VARA imposes a perpetual lien and an obligation to store the artist’s completed artwork for the rest of his life. Attorney General’s Memorandum of Law of the United States in Support of the Constitutionality of the Visual Artists Rights Act of 1990 and in Response to Defendant’s Motion for Final Summary Judgment, page 8, in Leviton v. Hollywood Art & Culture, Case No. 97-7175 Civ. (S.D. Fla. 2000){ TA \s "Leviton v. Hollywood Art & Culture, Case No. 97-7175 Civ. (S.D. Fla. 2000)" } (available at [www.artemama.com](http://www.artemama.com) in the Artist’s Rights section). “Not every law which affects a property owner’s right to control his property is a taking because the ‘[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. Carter I{ TA \s "Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) (Carter I)" }, 861 F. Supp. at 327 (*quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)). The Attorney General memorandum of law reasons that VARA does not disproportionately burden building owners because the rights it bestows apply only to a limited period, and because it allows an owner to seek a waiver of VARA protections. Leviton v. Hollywood Art & Culture{ TA \s "Leviton v. Hollywood Art & Culture, Case No. 97-7175 Civ. (S.D. Fla. 2000)" } Attorney General Memo of Law at 9-10. Since an owner remains able to sell or donate the property under VARA, the property value is undiminished. VARA also yields reciprocal benefits since artists benefit from having their work preserved and the public benefits from the preservation of cultural resources. Id. at 9.

The Attorney General Memo of Law erred in arguing that VARA does not apply to works created prior to its effective date. 17 U.S.C. § 113{ TA \s "17 U.S.C. § 113" }(d)(2). Correctly assessed, VARA does not apply to older murals or sculptures that have either been sold or are not removable without damage. 17 U.S.C. § 113(d)(1). However, if an older mural or sculpture can be removed, there is still no unfair burden to the property owner because the artist may, at his own expense, remove it, so long as he is given proper notice of the building owner’s need for him to do so.

### **d) Remodeling a Building With a Mural or Sculpture on It**

VARA has several significant exceptions. For example, what happens when an *older* mural or sculpture is *not removable*, and the building owner wants to remove only a part of the mural or sculpture, say for a remodeling project, but does not wish to remove the entire artwork? If the mural or sculpture *can* be removed without causing damage to it, such a modification would be a violation of the artist’s integrity right. However, if it cannot be removed without damage, the statute as drafted would allow a building owner to mutilate the work in a manner prejudicial to the artist’s reputation, meanwhile keeping it on public display; it seems unlikely that Congress intended such a result. NIMMER ON COPYRIGHT, §8D.06[C]{ TA \l "NIMMER ON COPYRIGHT, §8D.06[C]" \s "Nimmer On Copyright, §8D.06[C]" \c 5 } at 8D-81. The artist may disavow authorship of the piece under VARA’s attribution right. 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(a)(1). Furthermore, if the artist objects to displaying the mural or sculpture in this damaged condition, the building

owner could easily remove the entire piece. In some cases, the artist may prefer removal, but in others, loss of the entire mural or sculpture could be tragic. In many cases, the best approach in this situation has been to negotiate an arrangement with the building owner to hire the artist, at a reasonable fee, to restore the older mural or sculpture after the owner completes work on the building.

*e) Hiding a Mural or Sculpture*

VARA does not prevent a building owner from covering a mural or sculpture (e.g. with cloth, placing another wall in front of it) or sections of it, as long as nothing is done to harm the artwork itself. Such actions probably fall under the presentation exception. 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(c)(2). The legislative history explained that the exception extended to “a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time.” H.R. Rep. No. 101-514, 101<sup>st</sup> Cong., 2d Sess. at 17 (1990){ TA \l "H.R. Rep. No. 101-514, 101<sup>st</sup> Cong., 2d Sess. at 17 (1990)" \s "H.R. Rep. No. 101-514, 101st Cong., 2d Sess. (1990)" \c 3 } (1990 U.S.C.C.A.N. 6915, WL 258818 (Leg. Hist.)). It is unclear whether Congress intended to allow a building owner to entirely cover a work of art that the owner. The City of Los Angeles Recreation and Parks Commission used this omission to justify placing a tarp over a mural whose content – a caricature of a pig in blue uniform hitting a graffiti artist – offended some members of the community, although both the artist and other community members found it expressive of their values and political concerns. Los Angeles later settled a Constitutional rights lawsuit with the artist, who was represented by the American Civil Liberties Union with the support of the Social and Public Art Resource Center (SPARC).

**D. INTEGRITY RIGHTS UNDER CALIFORNIA LAW**

**1. California Art Preservation Act**

The California Art Preservation Act (CAPA) protects artists’ rights of integrity. Cal. Civ. Code § { TA \s "Cal. Civ. Code § 987" }987. CAPA protects “fine art,” which is defined as “an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.” Cal. Civ. Code § { TA \s "Cal. Civ. Code § 987" }987(b)(2). CAPA protects works in glass that are exempted from VARA. CAPA does not protect photographs or limited edition multiples, whereas VARA does provide such protection for signed, numbered multiples in editions of 200 or fewer. 17 U.S.C. § 101{ TA \s "17 U.S.C. § 101" }.

Murals are paintings that are protected by CAPA. *See Botello v. Shell Oil Co.*{ TA \s "Botello v. Shell Oil Co., 229 Cal. App. 3d 1130 (1991)" } 229 Cal. App. 3d 1130; 280 Cal. Rptr. 535 (1991). CAPA was enacted before the federal Visual Artists Rights Act, and many federal removal exceptions mirror the California law. The table below compares federal and state removal provisions.

The California code is somewhat broader than the federal act in some ways, in that an artist is not required to prove that a modification is prejudicial to her honor and reputation in order to enforce her rights of integrity. Cal. Civ. Code § { TA \s "Cal. Civ. Code § 987" }987(a). However, under CAPA, the building owner has more rights -- if a mural or sculpture cannot be removed without damaging it, the building owner may remove it no matter whether the artwork is new or old unless the building owner has signed a waiver of that right, and the written waiver has been recorded. Cal. Civ. Code § { TA \s "Cal. Civ. Code § 987" }987(h)(1). Under VARA, if a new mural or sculpture is not removable without damage to the mural or sculpture, and the artist has not waived her rights in writing, the building owner may not remove it. A comparison of the removal provisions of VARA and CAPA is in the following Table:

IF ART IS	VISUAL ARTISTS RIGHTS ACT		CALIFORNIA ART PRESERVATION ACT
<b>REMOVABLE</b>	<b>Owner MAY NOT REMOVE without</b>		<b>Owner MAY NOT REMOVE without</b>
113(d)(2)(A)	good faith effort to notify	987(h)(2)	good faith effort to notify
113d(2)(B)	<b>OR</b> actual notice, 90 days, & artist does not remove @ own expense	987(h)(2)	<b>OR</b> actual notice, 90 days, & artist does not remove @ own expense
<b>NOT REMOVABLE</b>	<b>Owner MAY REMOVE IF</b>		<b>Owner MAY REMOVE</b>
113(d)(1)(B)	created before June 1991	987(h)(1)	no matter whether art is new or old
113(d)(1)(B)	<b>OR</b> artist waived (if a new art is not removable and no waiver from artist, owner must keep the art.)	987(h)(1)	<b>OR</b> building owner waived right to remove in writing and that is recorded.

## 2. Preemption Of State Art Preservation Laws and Federal Lanham Act Claims

In 2003, a New York district court issued an express decision holding that VARA preempts state art preservation law.

“VARA is the sole remedy for artists seeking to protect the moral rights of attribution and integrity under state or federal law.” Soho I{ TA \s "Bd. of Manager of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" } 2003 U.S. Dist. LEXIS 10221, 56 (S.D.N.Y. 2003). In the New York district case of Soho I, the court, finding that VARA preempts both Federal Lanham Act claims and the New York state statute. The VARA “statute preempts state law if two conditions are met: 1) if the work to which the rights under the state statute falls within the ‘subject matter’ of copyright as specified in 17 U.S.C. §§ 102{ TA \l "17 U.S.C. § 102" \s "102" \c 2 } and 103{ TA \l "17 U.S.C. §103" \s "103" \c 2 }; and 2) if the right is the same or ‘equivalent’ to those granted by VARA.” Id{ TA \s "Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" } 2003 U.S. Dist. LEXIS 10221, at 41-2, *citing* H.R. Rep. 101-514 at 21 (1990). As to the first prong, the court noted that since § 103 addresses derivative works, only § 102 works (works of authorship fixed in a tangible medium) are applicable to VARA inquiry. Soho I{ TA \s "Bd. of Manager of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" } 2003 U.S. Dist. LEXIS at 42. The court then stated that even where state laws “are more protective in scope than the federal statute,” VARA preempts the state law. Id{ TA \s "Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" } 2003 U.S. Dist. LEXIS 10221, at 43. The court clarified ‘equivalence,’ stating that “any statute” which protects “attribution or integrity” rights is preempted by VARA, further stating that “Congress intended VARA to preempt not only state statutes and common law which seek to protect visual artists’ moral rights, but all other remedies as well.” Id{ TA \s "Bd. of Managers of Int'l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" } 2003 U.S. Dist. LEXIS 10221, at 44, 56. Soho I also ruled that Federal Lanham Act claims are preempted by VARA. Id. at 58, *see also Dastar*, 539 U.S. at 32 (limiting Lanham Act applicability to goods for sale, explicitly excluding authors otherwise covered under copyright law).

### a) *Limitations on Preemption: CAPA May Still Protect Old, Sold Artworks; Glass Works*

Soho I limited its preemption ruling, noting that VARA explicitly exempts from preemption state



statutes which, though otherwise ‘equivalent,’ “grant rights beyond the life of the author,” although such statutes would be preempted during the life of the author. Soho I{ TA \s "Bd. of Manager of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. 2003) (Soho I)" }, 2003 U.S. Dist. LEXIS at 47, *see also* Soho I at 47-8 (stating that works “created before VARA’s effective date” are granted “a term of protection commensurate to those of general copyright protection”). This case is the sole authority which directly addresses the issue of VARA preemptions.<sup>9</sup>

Moreover, the same legislative history cited in Soho I indicated other state provisions that would not be preempted. The legislative history expressly notes that VARA’s preemptive power would not apply to those works that are not protected by Section 106A, but are protected by state laws. A House report issued before the bill had been amended to its final form stated that VARA would “not preempt State causes of action relating to works that are not covered by the law, such as... works in which the copyright has been transferred before the effective date.” H.R.Rep. No. 101-514, 101<sup>st</sup> Cong., 2d Sess. 21{ TA \s "H.R. Rep. No. 101-514, 101st Cong., 2d Sess. (1990)" }, reprinted in 1990 U.S. Code Cong. & Admin. News 6915, 6931.

VARA does not protect older works of art that the artist has sold. 17 U.S.C. § 106A{ TA \s "17 U.S.C. § 106A" }(d)(2). Although Section 106A does not protect the class of old sold murals or sculptures, CAPA does protect old, sold works. Under legislative history relied on in Soho I, it would still seem to be the case that California law is not preempted as to old, sold artwork, despite Soho I’s global pronouncement.

CAPA may also not be preempted with respect to works in glass, which VARA does not protect. These issues must be considered carefully when choosing whether to litigate in state or federal court. A state court action seems increasingly risky.

Violations of VARA and CAPA can frequently be resolved without having to resort to a lawsuit. If the mural or sculpture has already been destroyed, a demand letter directed toward the company or companies which destroyed it have brought excellent results. In some instances, the parties responsible for the damage or destruction have paid the artist to restore or repair the art, or to paint a new mural or sculpture to replace one destroyed.

### III. ARTISTS AND CONTRACTS

As public funding for the arts decreases, artists are beginning to use entrepreneurial methods to increase their income and fund new murals or sculptures. Public demand for vibrant artwork is rising, and more commercial publishers and producers want to reproduce mural and sculpture images. These trends have prompted artists to take a more discerning look at their rights, and how their murals or sculptures can be produced and licensed profitably. As a result, fee-generating license and distribution agreements are becoming more commonplace.

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<sup>9</sup> In a case dealing with insurance coverage for VARA claims, the Ninth Circuit recently stated in a footnote that VARA may preempt CAPA. Cort v. St. Paul Fire & Marine Ins. Companies, Inc., 311 F.3d 979 (9<sup>th</sup> Cir. 2002){ TA \l "Cort v. St. Paul Fire & Marine Ins. Companies, Inc., 311 F.3d 979 (9<sup>th</sup> Cir. 2002)" \s "Cort v. St. Paul Fire & Marine Ins. Companies, Inc., 311 F.3d 979 (9<sup>th</sup> Cir. 2002)" \c 1 }. Also, in Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (1996){ TA \l "Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (1996)" \s "Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (1996)" \c 1 }, the Court noted in dicta that VARA may preempt CAPA. It did not reach the issue of preemption, holding instead that plaintiffs’ artwork, which had been accidentally destroyed by a city trash truck, could not be compensated in an action for simple negligence. Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24, 29 (1996).

Artists are coming to agreements amongst themselves about joint ownership of copyrights, division of license proceeds, contributions to costs, and some are even forming business ventures and partnerships. They are beginning to ask their assistants and students to assign any copyrights they might acquire during a project back to the artists who designed the mural or sculpture in exchange for the instruction they receive. They are beginning to require others who want to use images of their artwork to sign written license agreements, and to pay basic license fees and sometimes royalties. These entrepreneurial approaches signify a dramatic repositioning of the mural movement, and have the potential to allow artists to continue to paint controversial images and spiritual visions without fear of censorship.

#### **A. MURAL & SCULPTURE COMMISSIONS**

Written contracts with the individuals and organizations, including cities, state, and federal governments that commission murals and sculptures, are also becoming more common. Informed artists normally insist on retaining copyrights, and then license certain uses to the commissioning party. Such contracts state if and how the commissioning organization may use reproductions of the art work in brochures, or on merchandise, and often provide that a share of the copies and profits from sales will go to the artists as royalties. The price of the art work should reflect the scope of the licensed uses that will be included. A lower price for an original mural or sculpture should be offset by a grant of fewer uses licensed to the commissioning party, or a greater royalty from sales of reproductions to the artist. A contract for a higher priced mural or sculpture might permit the commissioning party to make broader use of the image. A well-drafted agreement can help both artist and commissioning party balance their respective interests, provide for maintenance, repair, and conservation of the mural or sculpture, and provide a basis for permitting both parties to reproduce the artwork in a manner that will permit a steady stream of income.

Contracts for mural or sculpture commissions should also address who has title to the finished artwork, restrictions on alteration or modification of reproductions, quality control of reproductions, a requirement that the artists' copyright notice be put on all reproductions, and provisions for how the art work will be mounted, displayed, lighted, documented, and other provisions. Waivers proposed by the commissioning party, if any, should be carefully scrutinized and modified to preserve some of the artist's rights, as discussed further below. A good lawyer can review or draft contracts like these for artists in a clear format and simple language which will not frighten the people who want to commission a mural or sculpture. Such agreements will help ensure that our streets continue to be enlivened with vibrant, powerful artistic images.

#### **B. CONTRACTS WITH BUILDING OWNERS; PARTIAL WAIVERS**

As new murals and sculptures are commissioned, building owners, including cities like San Francisco, Oakland, and Los Angeles, are increasingly asking artists to waive all their rights under VARA in order to be selected for city grants and commissions. The waivers mean that any city worker with a paint bucket could be sent to modify a mural or sculpture at the whim of city officials. The waivers also offer cities a vehicle for censoring images that become controversial. If a controversy arises, the city in possession of a contractual waiver may simply paint over the mural, without a hearing and without regard to the artists' freedom of expression. Such waivers represent a tremendous threat to the future of diversity, not to mention aesthetics, in public art. Many artists are concerned that images that contain any hint of conflict between social groups, or that do not reflect a Norman-Rockwellian view of America, will simply be "whited" out. Blanket waivers go too far, and may be open to legal challenge from a number of angles, not the least of which is that they may be prohibited under the Berne Convention treaty. More importantly, they are not necessary to ease building owner's concerns.

There are many ways to preserve the integrity of a mural or sculpture while calming building owner's fears that allowing the mural or sculpture to be put on their premises would impinge upon their property rights.

In some cases, building owners agree to consult with the artist in advance so that the project's impact on the mural or sculpture can be minimized, and to hire the artist to restore any damage done in the course of such projects, in exchange for the artist not unreasonably withholding her consent to a remodeling project. In other cases, the owner agrees to pay for removal of the mural. In some cases, the artist will agree to waive her rights under VARA after ten or twenty years, in exchange for the building owner agreeing to preserve and maintain the mural or sculpture for that period.

Almost all building owners or commissioning parties who ask artists to waive their rights under VARA and CAPA will agree to make the waiver ineffective as to third parties. In addition, they will most often permit the artist to preserve the right to receive advance notice of the owner's intent to do something which might impact the mural or sculpture, and to allow the artist the opportunity to document the artwork and/or remove the artwork before the owner's project proceeds, and who would pay for such removal. Such owners will also usually agree to allow the artist to retain her rights to be credited as the author or to disclaim authorship of a damaged or modified piece.

Where the building owner absolutely insists that the artist waive her rights under VARA and CAPA, the artist has three options: 1) agree and know the piece could be temporary, or worse, modified by someone else; 2) find another wall on another building; or 3) use production techniques that make large artworks more easily portable, such as painting murals on panels or other materials and mounting them on outdoor walls, or making the sculpture in a way that permits disassembly and reconstruction, with detailed mapping of the pieces and their configuration. In that way, removing the mural or sculpture without damage can be relatively simple and inexpensive. In such cases, contracts should specify that the mural or sculpture will be returned to the artist in good condition if it is removed.

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 (Soho I)..... 5, 7, 9, 11, 14, 15

Bd. of Managers of Int’l Arts Cond. v. New York, 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. 2003)  
 (Soho II) ..... 12

Bd. of Managers of Int’l Arts Cond. v. New York, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. 2005)  
 (Soho III)..... 10, 11

Botello v. Shell Oil Co., 229 Cal. App. 3d 1130 (1991)..... 11, 13

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

Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994) (Carter I)..... 11

Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) (Carter II)..... 4, 5, 6, 12

Cort v. St. Paul Fire & Marine Ins. Companies, Inc., 311 F.3d 979 (9<sup>th</sup> Cir. 2002) ..... 6, 15

Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)..... 7

Flack v. Friends of Queen Catherine, 139 F. Supp. 2d 526 (S.D.N.Y. 2001)..... 3, 4

Grauer v. Deutsch, 2002 U.S. Dist. LEXIS 19233 (S.D.N.Y. 2002)..... 7

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 6

Leonardo v. United States, 55 Fed. Cl. 344 (U.S. Fed. Cl. Ct. 2003)..... 9

Leviton v. Hollywood Art & Culture, Case No. 97-7175 Civ. (S.D. Fla. 2000) ..... 6, 12

Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (1996) ..... 15

Martin v. City of Indianapolis, 192 F.3d 608 (7<sup>th</sup> Cir. 1999)..... 5, 6

National Assoc. for Stock Car Auto Racing, Inc. v. Scharle, 356 F. Supp. 2d 515 (E.D. Pa. 2005)  
 (NASCAR) ..... 3

Nogueras v. Home Depot, 300 F. Supp. 2d 48 (D. P.R. 2004)..... 8

Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89 (D. Mass. 2003)..... 9

Pollara v. Seymour & Casey, 150 F. Supp. 2d 393 (N.D.N.Y. 2001) ..... 5

Pollara v. Seymour, 206 F. Supp. 2d 333 (N.D.N.Y. 2002) ..... 5

Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)..... 5, 7, 8

<u>Scott v. Dixon</u> , 309 F. Supp. 2d 395 (E.D.N.Y. 2004) .....	5
<u>Silberman v. Innovation Luggage, Inc.</u> , 2003 U.S. Dist. LEXIS 5420 (S.D.N.Y. 2003) .....	9

Statutes

17 U.S.C. § 101 .....	3, 7, 13
17 U.S.C. § 102 .....	14
17 U.S.C. § 106A .....	2, 3, 4, 6, 7, 9, 10, 13, 15
17 U.S.C. § 113 .....	2, 10, 11, 12
17 U.S.C. § 302 .....	6
17 U.S.C. §103 .....	14
Cal. Civ Code § 3440 .....	10
Cal. Civ. Code § 980 .....	10
Cal. Civ. Code § 987 .....	3, 5, 7, 13, 14

Other Authorities

<i>Cadre of Painters Cash In on Popularity</i> , Los Angeles Times, September 22, 1997 .....	2
H.R. Rep. No. 101-514, 101 <sup>st</sup> Cong., 2d Sess. at 17 (1990) .....	13, 15
<i>Maestrapeace</i> © 1994 by Juana Alicia, Miranda Bergman, Edythe Boone, Susan Kelk Cervantes, Meera Desai, Yvonne Littleton and Irene Perez .....	2
<i>The Great Wall of Los Angeles</i> © 1981 by Judith F. Baca .....	2
<i>Where Life Is Sideshow, Street Art Passes /Limit: Painting, With Police Beating, Is Covered</i> , New York Times, September 9, 1997 .....	2

Treatises

NIMMER ON COPYRIGHT, §8D.06[C] .....	13
PATRY, COPYRIGHT LAW AND PRACTICE, Vol. II at 1061 (Bureau of National Affairs 1994) .....	9