

When Art Meets Building: A Primer On the Visual Artists Rights Act

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The federal Visual Artists Rights Act of 1990 (VARA) protects visual artists' "moral rights" by prohibiting the destruction of "visual art," including paintings, drawings, sculptures or photographs, of "recognized stature."¹

Art of "recognized stature" is art that "art experts, the art community, or society in general views as possessing stature."² The creator of such qualifying art will have the right to sue to prevent its destruction or, if the damage has already occurred, the creator may be entitled to actual or statutory damages ranging from \$200 for innocent infringements to more than \$150,000 for willful infringements.³ VARA rights are non-transferrable, and are exercisable only by the artist.⁴ As such, it lasts only for the duration of the artist's life, or if it is a joint work, until the end of the last surviving artist's life.⁵

The key part for landlords is that VARA recognizes and protects works of visual art that have been "incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work."⁶ Examples of such art include murals, frescoes and sculptures that have been affixed or embedded into a building's floors, walls or ceilings. For example, in *Carter v. Helmsley-Spear*,⁷ the art consisted of sculptures, glass mosaics and other permanent installations that were affixed to the building's walls, ceilings and floors, and in *Board of Managers of Soho International Arts Condominium v. City of New York*,⁸ the work consisted of aluminum bars attached to the steel reinforcement braces of the outer walls of a building.

Given the legal implications for property owners, it behooves landlord and tenant alike to understand the workings and implications of VARA as related to real property. There are three ways for landlords to protect against VARA liability for art that has been "incorporated in

or made a part of a building."

Explicit Waiver

For artwork that *cannot* be safely removed from the property, a building owner's removal of the art will violate the artist's VARA right unless the artist either (a) consented to the installation of the work into the building before VARA's effective date (June 1, 1991), or (b) the right has been waived through the execution of a written instrument signed by both the artist and the building owner which:

- specifically identifies the work and uses of that work to which the waiver applies; and
- specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.⁹

For joint works prepared by two or more artists, a waiver made by one will waive the rights of all others.¹⁰

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Landlords and tenants should routinely require that any commission of visual art that will be incorporated into or made a part of its building include a written waiver of the artist's VARA rights. VARA rights and waivers survive the sale of the property.

De Facto Waiver

For artwork of "recognized stature" that has been incorporated into a building, but that *can* be safely removed, VARA only requires that building owners make a "diligent, good faith" attempt to notify the artist of its intention to remove the



5Pointz at 45-46 Davis St. in Long Island City in Queens.

work.¹¹ There is a presumption of such attempt if the building owner sends notice by registered mail to the artist at his most recent address as recorded by the Register of Copyrights.¹² No VARA claim shall lie if such attempt at contacting the artist was unsuccessful, or if the owner provides notice, but the artist fails to remove the work or to pay for its removal within 90 days after receiving notice.¹³

As an alternative to obtaining a waiver, therefore, a building owner may require that the installation of the art that is to be incorporated into its building be crafted in such a way to allow for its safe dismantling and removal.

Work for Hire

VARA rights also do not apply to works "made for hire," which means either:

- a work prepared within the scope of an employee's employment; or
- a work commissioned as part of a collective work ... [or] a compilation, that has been agreed in writing, signed by both parties, to be work made for hire.¹⁴

A determination of "employee" status will depend on a multi-factor "balancing test" that would include the following factors, relevant in nearly all cases:

- The right to control the manner and means

of production;

- Requisite skill;
- Provision of employee benefits;
- Tax treatment of the hired party; and
- Whether the hired party may be assigned additional projects.¹⁵

As such, courts will consider many factors in its determination of whether an artwork is a “work for hire,” and the mere use of the words “work for hire,” “employee” or “employment,” without the presence of any of the factors named above, will be insufficient to designate it as such.¹⁶

What about installations that were originally not thought to be art but, over time, reach a certain stature so as to be “recognized” under VARA?

Landlord and tenants should also consider the following cases, which illustrate that VARA may protect work that is not obviously art when first installed.

‘Surprise’ Art

Examples of installations that could turn into recognized art under VARA include graffiti art. Graffiti has recently attracted wide attention with the VARA case surrounding the graffiti mecca in Long Island City known as 5Pointz, where the owner once actively encouraged graffiti in the mid-1990s.¹⁷ When the owner decided to raze the old buildings to develop two residential towers, 17 graffiti artists filed a VARA lawsuit to enjoin the developers from razing the factory that housed their works.¹⁸ Though the judge ultimately refused to grant the injunction, his holding was not based on a determination that graffiti art was outside the purview of VARA but instead on his finding that the artists had failed to demonstrate that they would suffer irreparable harm without an injunction.¹⁹ The court held that “VARA protects even temporary art from destruction” and posited that the defendants may be “exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiff’s works were of ‘recognized stature.’”²⁰ It should be noted though, that the graffiti at 5Pointz was consented to by the owner and VARA protects only art that has been legally placed on property with the owner’s consent.²¹

Another example is the modern interest in preserving commercial signage, both free standing and those painted on the side of buildings. Though advertising and promotional material is expressly excluded from VARA protection,²² a Second Circuit judge has also said (albeit only in a concurring opinion) that “there is nothing that suggests that a work originally created for the purpose of promoting an event, product or cause could never, over time, achieve the status of a work of recognized stature and thus be deserving of protection under VARA.”²³ Copyright law currently protects art used in advertising, and this may well be the new frontier in VARA litigation.²⁴

Models and Unfinished Works

Consistent with copyright law, unfinished works are also subject to VARA protection. In *Flack v. Friends of Queen Catherine*, Audrey Flack,

a famous sculptor, had been hired to create a monument in Queens, N.Y.²⁵ After three of four phases of the project had been completed, the project was temporarily suspended, and though the sculpture was never completed, the court held that the Flack’s work was not excluded from VARA coverage since the “‘preliminary’ work of painters—drawing and sketches—[were] covered by VARA.”²⁶

Practical Considerations

Finally, here are a few practical suggestions for landlords and tenants:

- Landlords, tenants and their managing agents should consider artists’ waivers when installing into or onto their building any work which is, or may one day be considered, art, and where its future removal may result in its modification or destruction.

- Since it may not be clear as to whether a work is “incorporated” into a building, consider obtaining waivers for all art which is not simply affixed by a nail in a wall.

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- Landlords should also consider including the following provision in their leases:

Prior to the installation of any work which might be considered art in the Building, including, without limitation, any sculptures, murals, wall art, frescos, mosaics, and/or paintings that have been affixed to, embedded in or attached to the Building other than by a simple nail or similar art mounting hardware, Tenant shall first obtain the prior written consent of Landlord in each instance (such consent to be granted or withheld in Landlord’s sole discretion). Such consent may be conditioned upon Tenant obtaining a written waiver between Tenant and at least one of the artists if there is more than one, which includes the following language:

This Visual Artists Rights Act Waiver (“Waiver”), dated __ is entered into by and between [Tenant] and [Artist] (the “Artist”). The parties agree that the work which is the subject of this Waiver is a work of visual art. [Agreement must identify the work and the use of the work.] The Artist is aware and acknowledges that the installation or removal of the work may subject the work to destruction, distortion, mutilation, or other modification by reason of its installation or removal (accidental or otherwise). The Artist hereby grants his/her consent to such installation and removal, regardless of whether such installation or removal may cause damage or destruction to the artwork, and hereby waives any rights under the Visual Artists Rights Act. This Waiver shall also benefit the current and future owners, superior lessees

and mortgagees of the Building.

Furthermore, Tenant shall indemnify and save harmless Landlord and its agents against and from any and all claims, suits, damages, costs and expenses suffered by Landlord or its agents arising out of or in connection with the creation, installation or removal of such art described above that is installed into, onto or made a part of the Building (including, without limitation, any claims by the Artist).

- For works that may be safely removed, keep good records of the creator’s name and address to permit the easy creation of a de facto waiver.

- Educate building personnel to be sensitive to the issues involving art attached to buildings.

- For works made for hire made within the scope of an employer-employee relationship, be sure to properly document the relationship in the contract to include such provisions as the employer’s right to control the manner and means of production, the employer’s right to assign additional projects and an express reference to all creations being works for hire.

- Finally, purchasers of real property should consider adding an analysis of VARA rights to their checklist of diligence items and brokers should instruct sellers to be prepared to answer questions on art which has been incorporated into the building.

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1. 17 U.S.C. 106A(a)(3)(B).
2. *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994).

3. 17 U.S.C. 504(b) and (c).
4. 17 U.S.C. 106A(e)(1).

5. *Id.*
6. 17 U.S.C. §113 (d)(1)(A); see generally *Cohen v. G & M Realty L.P.*, 13-CV-5612 (FB JMA), 2013 WL 6127232 (E.D.N.Y. Nov. 20, 2013).

7. 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994).
8. No. 01 Civ.1226 (DAB), 2003 WL 2140333 (S.D.N.Y. June 17, 2003).

9. See 17 U.S.C. §113(d)(1)(B).
10. 17 U.S.C. §106(A)(e).

11. 17 U.S.C. §113(d)(2).
12. *Id.*
13. *Id.*

14. See 17 U.S.C. §101.
15. See *Carter*, 71 F.3d at 85 (citations omitted).

16. *Carter*, 71 F.3d at 87 (“use of these terms does not transform them into “magic words” imbued with legally controlling significance”).

17. *Cohen*, 2013 WL 6127232, at *5.
18. *Id.* at *1.
19. *Id.* at *12-13.
20. *Id.* at *13.

21. *Id.* at *5; see also *English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999) (holding that VARA was inapplicable to plaintiffs’ sculptures and murals that had been placed on the defendant’s property illegally).

22. See 17 U.S.C. §101A(ii).
23. *Pollara v. Seymour*, 344 F.3d 265, 271-72 (2d Cir. 2003).

24. *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 251 (1903) (“a picture is none the less a picture, and none the less a subject of copyright, that is used for an advertisement”).

25. 139 F. Supp. 2d 526, 532-34 (S.D.N.Y. 2001).
26. *Flack*, 139 F. Supp. at 553; see also *Massachusetts Museum of Contemporary Art Foundation v. Buchel*, 593 F.3d 38, 50-52 (1st Cir. 2010), but see *National Ass’n for Stock Car Auto Racing v. Scharle*, 356 F. Supp. 2d 515 (E.D. Pa. 2005) (holding that VARA’s definition did not extend to the drafts of the artist’s “designs created to lay a foundation for the eventual manufacturing of the trophy”).