Public Art – A Buyer's (Legal) Guide

Authors: Gene Brockland and Lynn Goessling

Gene Brockland

Lynn Goessling

Imagine your company has purchased an existing building to use as its headquarters. As it happens, the building has a large, modern sculpture located in its courtyard. As it also happens, unbeknownst to you the CEO hates modern sculpture and orders the facilities group to "haul that trash to the dump" immediately. You happen to notice a crane pull up one day to begin to lift the sculpture onto a flat-bed truck headed for a landfill. Do you just watch that happen out your window, or do you run down and put a stop to it? The correct answer is that you ought to put a stop to it, at least until you have determined whether or not your company has any potential exposure to the sculptor for disposing of the sculpture.

Public art has become increasingly prevalent at corporate headquarters and commercial properties. Some companies use it to beautify individual buildings or campuses that they own. Many commercial real estate developers have installed it because they believe it enhances the value of their properties, making them more attractive to tenants. In some localities, art installations are required as part of new projects. If your company is considering buying a piece of public art, or if your company is buying a property that already has public art installed on it, you should know that the artist may have rights that impact what you can and cannot do with their work.

The Visual Artists' Rights Act of 1990, codified at 17 U.S.C. § 106A (VARA), an amendment to the copyright laws, controls what can and cannot be done with existing public art installations. While the Copyright Act generally protects certain economic rights, VARA protects so-called moral rights, which are of a spiritual, non-economic and personal nature. These rights protect the artists in two basic areas: attribution and integrity. The right of attribution protects the artist's right to be recognized as the author of the work. The right of integrity, the most litigated right under VARA, grants the artist the power to protect the artist's work from intentional mutilation, distortion, modification and destruction. 17 U.S.C §106A (a). These moral rights exist for the life of the artist.

VARA covers both finished and unfinished works of visual art, such as paintings, sculptures, drawings, prints and still photographs. In the corporate and commercial real estate context, it is frequently applied to cover a piece of sculpture installed outside a building or in a building's lobby. Murals that are incorporated into a building have also been the frequent subject of litigation under VARA.

On its face, VARA appears to imply that an owner of public art must maintain it inviolate, and not cause or permit any changes to it whatsoever. That is not entirely true. A modification of the work that occurs naturally by passage of time is not a violation. For example, copper that takes on a patina due to weathering need not be continually restored to its original state. Likewise, a modification of the public presentation, such as by placement or lighting, is not a violation. 17 U.S.C §106A(c).

VARA provides for two possibilities to building owners when a work of visual art has been integrated into a building. First, if a work is not removable without destroying, mutilating, modifying or otherwise altering it, an artist's right of integrity attaches and he may sue to prevent destruction unless the right is waived in writing signed by the artist and the building owner.[i] Second, if a work is removable without destroying, mutilating, distorting or otherwise altering it, the building owner must give 90 days' written notice to the artist, notifying the artist of the building owner's intended action to affect the visual art. [ii]

Violation of VARA by a building owner can expose the owner to a suit for an injunction and damages. Statutory damages range from a $750 minimum to a $30,000 maximum, increasing to $150,000 for willful infringement and decreasing to $200 for innocent infringement.

In a number of cases, VARA has been applied to protect murals painted on the side of a building. For example, artist Kent Twitchell created a six-story mural that was painted on the side of a building owned by the federal government in Los Angeles. When it was painted over without his consent, Twitchell brought an action under VARA for violation of his right of integrity and a similar California state statute. He sued the Federal Government and fourteen other defendants, including contractors and managers who maintained the building and were involved in the destruction of his work. Defendants argued that the size of the mural and the fact it was painted on the wall of the building made it unremovable under VARA. The District Court held that there was sufficient evidence on record that the mural could have been removed and restored. Hence, a valid claim was raised under VARA. Twitchell reportedly settled for in excess of $1M. [iii]

More recently, in 2018 a real estate developer was ordered by a New York federal court to pay aerosol artists $6.75 million for whitewashing their work.[iv] In that case, the defendants permitted plaintiffs, a group of renowned visual artists, to create and display their work on the exterior and interior of *5points*, a derelict property owned by the defendant in Queens, NY. The spectacular artistic creations blossomed into an international tourist attraction and transformed the neighborhood. Without giving the plaintiffs a fair opportunity to remove and preserve their work, the defendants destroyed the plaintiffs' work. The plaintiffs sued for unlawful destruction of their works of art in violation of VARA. 17 U.S.C. § 106A. The defendant argued that VARA did not apply to temporary works because the plaintiffs knew that a day would come when the buildings would be torn down. The court held that VARA draws no distinction between temporary and non-temporary works.

There are nuances, however, to the issue of whether or not a mural is protected by VARA. In a recent case involving a mural at a resort in Puerto Rico, the U.S. District Court for the District of

Puerto Rico held under First Circuit law that the mural was not protected by VARA because it was site-specific. Work is considered site-specific if it is substantially integrated into the environment in which it is located.[v]

VARA has also been applied to protect sculptures, sculptural installations and paintings outside a building and in interior public spaces, such as lobbies. In 2011, the University of Missouri was sued by artist Paul Jackson, who had created a Venetian glass mosaic know as Tiger Spot, when it was damaged by the University's failure to properly shield it from rain prior to its unveiling. The defendant's main contention was that the mosaic was not a work of visual art under VARA. The court held that VARA's legislative history indicates that artists may work in a variety of media, and use a number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium of materials used. Eventually, the University paid Jackson $125,000 to relinquish his rights in the public artwork, giving the University the right to do whatever it wanted with it. The University removed it and replaced it with plain brick. [vi]

Buying and Installing Public Art

If your company is buying an existing piece from an artist directly, from a gallery, or at auction, you should assure that the artist has waived his or her moral rights. This can be easily done. If you are buying an existing piece directly from an artist or a gallery that represents the artist, you should have a written agreement signed by the artist waiving his or her moral rights. The waiver should be comprehensive and should specifically identify the work for which the moral rights are being waived.

If you are commissioning the work, you will want to make sure that it is considered a work made for hire. With a work made for hire, the employer or entity commissioning the work owns the copyright, and with it the moral rights as well.

Buying a Building with Existing Public Art

What if you have acquired a building where public art is exhibited and you are not especially fond of it or it just does not fit your plans for the property? Can you remove it or destroy it without suffering any penalty? A new building owner should not just assume that because they bought the property they can do whatever they want with the existing public art.

If the new owner wants to remove the public art from the building, they must make a diligent, good faith attempt to notify the creator of their intended action and give the creator an opportunity to remove the work or pay for its removal. Although, obviously, in the case of a mural, additional complications might arise. If the work is removed by the creator, then title to the work reverts to the creator.

So, before you buy that building that has public art on the property, do some due diligence. Ask yourself these questions:

- Is there public art that the seller plans to transfer to the buyer?
- Can I live with the public art as it exists, without altering it whatsoever?

- If I cannot live with it, is the artist still alive?
- If they are still alive, have they waived their moral rights in writing?

If the artist is still alive and they have not waived their moral rights, a new building owner may be living with that art for a long time, or subject to liability if they remove it without giving proper notice.

Gene Brockland and Lynn Goessling are partners at SmithAmundsen in St. Louis, Missouri. Gene litigates commercial litigation matters, including art-related cases. Lynn is a real-estate attorney, advising clients on an array of development-related matters. *They would like to thank Sakshi Jain, an intern with SmithAmundsen and a second-year law student at the Chicago-Kent College of Law, for her assistance with this article.*

End Notes

[i] *17 U.S.C §113(d)(1)*

[ii] *17 U.S.C §113(d)(2)*

[iii] *Kent Twitchell v. Western Coast General Corporation [Case No. CV 06-4857 FMC]*

[iv] *Jonathan Cohen v. G&M Realty L.P: 320 F. Supp.3d 421 (E.D.N.Y. 2018)*

[v] *Urban Pottier v. Hotel Plaza Lasdelicias, Inc. [2019 WL 2156457]*

[vi] *Paul Jackson v. Curators of University of Missouri [2011 WL 5838432]*