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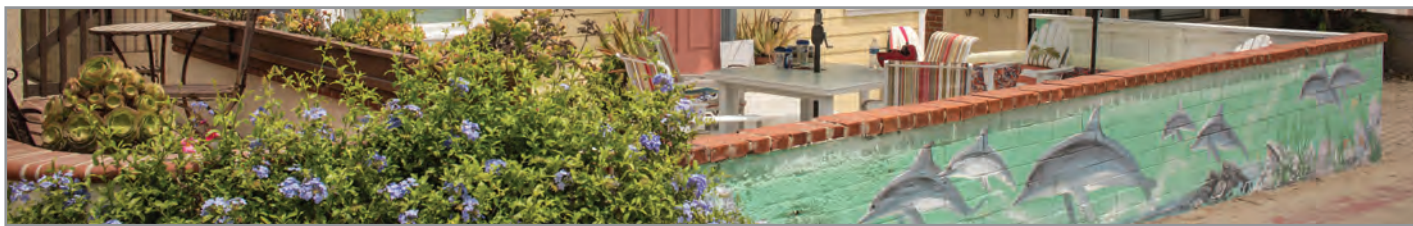


THE OFFICIAL MONTHLY NEWS MAGAZINE OF THE NATIONAL ASSOCIATION OF RESIDENTIAL PROPERTY MANAGERS



Is Original Artwork On a Property Protected from Removal or Destruction?

Just as it is simple to overlook the presence of the work, property owners, cities, and artists themselves may not have a full realization of the legal protections afforded to the creators of the work. The Visual Artists Rights Act (VARA) of 1990 grants moral rights and protections to authors of works that fall under the law and are distinct from for-hire pieces. Must you be mindful of any artwork on the properties you manage? **See page 12.**



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Culturally conscious property owners may be interested in commissioning an independent artist to beautify a building, but it is important to understand the legal effect of such a decision and the scope of rights the owner acquires and surrenders as a result.

Visual Arts and Property Owners **Be VARA Careful**

Traveling the same roads and visiting the same buildings, it is easy to miss the amount of art that surrounds us. Paintings, murals, sculptures, photography and practically any form of visual arts are ubiquitous within and outside buildings and infrastructure. Just as it is simple to overlook the presence of the work, property owners, cities, and artists themselves may not have a full realization of the legal protections afforded to the creators of the work.

The Visual Artists Rights Act (VARA) of 1990 grants moral rights and protections to authors of works that fall under the law and are distinct from for-hire pieces. Frequently, VARA comes into play in cases related to the destruction or removal of works by property owners or municipalities (unintentional or not), such as during a redevelopment project or renovation.

In 2018, for example, a federal judge cited VARA in awarding \$6.7 million to 21 graffiti artists whose works were destroyed by a developer who tore down the building where the work was displayed to build condos. A decade earlier, muralist Kent Twitchell was awarded \$1.1 million in a settlement that included the federal government after his work was painted over.

With the potential for such large settlements, all parties should have an understanding of VARA, including its unique elements and the respective rights, remedies and obligations.

VARA & ARTISTS

VARA is the first federal copyright legislation to grant protection to “moral rights,” which are those afforded to the creators of copyrighted works, generally recognized in civil law jurisdictions and some common law jurisdictions. Moral rights only apply to artistic, literary, and dramatic works, as well as films (in which case, directors enjoy the benefit of moral rights). VARA provides that works meeting certain requirements afford the authors additional rights to the work, notwithstanding subsequent physical ownership or holding of the copyright.

Regarding the types of works typically most affected in disputes involving commercial or residential properties, VARA protection is granted only to paintings, drawings, sculptures, prints, and still photographic images produced strictly for exhibition and existing

in single copies or in limited editions of 200 or fewer copies, signed and numbered by the artist. Requirements for protection do not implicate aesthetic taste or value.

VARA grants the following exclusive rights to authors of qualifying works:

- Right to claim ownership
- Right to prevent use of one’s name on any works that have been distorted, mutilated or modified in a way that would be prejudicial to the author’s honor or reputation
- Right to prevent the use of one’s name on any works the author did not create
- Right to prevent distortion, mutilation or modification that would prejudice the author’s honor or reputation

VARA also allows authors to waive their rights, something generally not permitted in many European countries, whose laws were the originators of the “moral rights” concept. Otherwise, VARA rights are granted to an author for life, or the last surviving author, if it is a joint work.

Importantly — and somewhat vaguely — authors of works of so-called “recognized stature” may prohibit intentional, grossly negligent destruction of the work or the removal of the work without written consent. Under traditional property law principles, artists have less ability to prevent the destruction of work not deemed of “recognized stature” than they do to prevent its distortion or mutilation. This demonstrates the true influence of “moral rights,” which acknowledge that the reputation and honor of an artist could be injured more by an altered work than if it were destroyed.

Frustratingly, “recognized stature” does not have a precise definition, although 1994’s *Carter vs. Helmsley-Spear*, which included VARA claims for destruction and modification of artists’ “walk-through sculpture” ceiling installation, has become a leading case on the issue. In *Carter*, the work was installed by a tenant in the lobby of a building. The VARA suit was filed after the tenant went bankrupt and the building owner sought to remove the installation.

The U.S. District Court for the Southern District of

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New York held that to establish recognized stature, the work had to be “meritorious,” with its merit being determined by art experts, members of the artistic community or some cross-section of society. The district court found the work to have recognized stature, but the ruling was reversed by the Second Circuit Court after it found the work to be “made for hire,” depriving the artists of any claim to copyright ownership.

A work of visual art which is made for hire is not protected by VARA. Generally, a work is deemed made for hire if it is created by an authorized employee, which is determined based on the substance of the relationship, considering a number of factors (degree of control, scope, duration of the relationship, level of skill required, availability of employee benefits, written agreements, etc.). If an artist is an independent contractor, however, the work is likely to be protected by VARA.

Carter, ultimately, demonstrates how important it is for building owners to include lease provisions that prohibit making works of visual art part of the building without prior written consent. However, that is just one of many considerations for owners when it comes to VARA.

VARA & PROPERTY OWNERS

Culturally conscious property owners may be interested in commissioning an independent artist to beautify a building, but it is important to understand the legal effect of such a decision and the scope of rights the owner acquires and surrenders as a result.

It may come as a surprise to the owner that commissioning and paying for the work does not necessarily mean the owner may use the artwork without restriction. For example, even if an owner

holds the title to the physical work, in most instances, they may not reproduce it for clothing, sell photographs of the image or use it in the backdrop of a film, television or music video production. Furthermore, depending on the facts, the owner may be prevented from distorting the work or removing it.

In the context of a mural, for instance, the owner’s ability to remodel a property or demolish the wall where the work is located may be limited by the obligation to preserve the artistic integrity of the mural and/or the honor and reputation of the artist. This is a very big deal, as the decisions to hire an artist to paint a property may very well limit the owner’s ability to control the same property after the fact.

The law is not as one-sided as it sounds. VARA achieves a delicate, albeit imperfect, balance between the property rights of owners and the moral rights of artists, and there are various procedural options available to an owner faced with the need for maintenance or demolition.

Assuming the work is removable (as in Carter), for instance, VARA provides that the artist should have an opportunity to salvage the work before it can be destroyed. If the artist fails to so act within a prescribed time period, that failure is deemed a waiver by the artist and the owner is free to destroy the work. VARA also sanctions the use of explicitly written waivers that may override preclusive effect of the law.

When it comes to something unremovable, such as graffiti, there are multiple points to keep in mind. Graffiti Tracker founder Timothy Kephart, whose web platform helps identify and prosecute graffiti vandals, told *REALTOR® Magazine* that even illegal graffiti can be protected by VARA and be considered to have “recognized stature.” An artist may also have had an agreement with a previous owner that gave them certain permissions.


In sum, not all graffiti is automatically subject to VARA as having “recognized stature” — and property owners are not prohibited from remediating “tagging.” However, where certain building artwork may be long-standing and/or have been created by a recognized artist, the application of VARA should be considered and discussed with legal counsel. Any potential new art, meanwhile, should come with written agreements waiving the artist’s VARA rights or setting parameters regarding treatment of the work.

VARA & MUNICIPALITIES

Municipalities and government entities frequently commission and showcase public art, and they are subject to the same restrictions as parties in the private sector. Nonprofit group Americans for the Arts (AFTA), which leads a network of organizations and individuals in supporting the arts in the U.S., has produced some brief guidance on VARA in an online FAQ document and an open letter to public art administrators.

In a recommendation, the letter says clients should notify artists when a work is to be altered, relocated or removed, encouraging cooperation to find a solution that preserves the work and the artists’ integrity. The AFTA’s Public Art Network Advisory Council also produced a set of best practices in 2016 that include measures to support VARA.

These documents can help direct conversations between parties and inform the drafting of contracts, but they are not to be construed as legal advice. An attorney well-versed in intellectual property law should be consulted if there are any concerns or questions when commissioning a work.

Expertise, certainly, is key when it comes to dealing with VARA. As we see, there are many nuances to the law. The consequences of failing to understand it fully could mean the loss of a of substantial amount of money and integrity — and that goes for any party involved. 



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