KRIEG DEVAULT

Insights

Patronizing Has Its Consequences

October 1, 2025

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Imagine you own a building and its surrounding grounds. Consider that you might want to enhance the visual appeal of the grounds or of public spaces inside the building with something more than sprucing up the landscaping or implementing architectural features. Your designer might suggest installing a statue or sculpture, or hanging artwork that compliments the look you are striving to achieve. Then the 'a-ha' moment – why not commission something by a local artist that not only achieves the visual appeal you seek but also signals your desire to be noted in the community as a patron of visual arts? Brilliant! So you decide to commission the creation of a lovely abstract sculpture for the grounds by an up-and-coming sculptor, and in the building's lobby you commission the creation of a mural by a well-known impressionist painter.

Fast forward 15 years, and you've decided the aesthetic of each is too dated and you want to get rid of the sculpture and the mural. Unable to sell the sculpture for a price to your liking, you hire a crew to tear it down. And due to the hassle and expense of carving out a huge section of the wall in your lobby, you take the more efficient action of simply painting over the mural. Then, a week later, you are served with a legal complaint – the artists are suing you for the destruction of these works of visual art. Something about violating their "moral" rights. So you call up your friendly neighborhood intellectual property attorney and ask, "Can they sue me for that? I own those works, so can't I do whatever I want with them?" And the answer you are given is, as usual, "It depends."

In 1990, Congress passed the Visual Artists Rights Act (VARA)[1] in order to comply with the Berne Convention, an international treaty primarily relating to copyrights, which the U.S. entered into in 1988. VARA implements a feature of historically European protections for artists known as 'moral rights,' which are a supplement to the standard bundle of rights of authors under copyright law, but pertain only to "works of visual art" – defined as single copy (i.e. one-off) works or limited edition prints or casts in a run of no more than 200 copies.

Moral rights generally pertain to certain rights of attribution of the author and protections for the integrity of the work. These include the right to claim authorship of the work and to prevent use of the author's name in connection with a work the author did not create; the right to prevent use of the author's name on his/her work when it has been distorted, mutilated or modified, if naming the author would be prejudicial to the author's honor or reputation; the right to prevent an intentional distortion, mutilation or modification that would be prejudicial to the honor or reputation of the author; and the right to prevent destruction of the work if the work is of a 'recognized stature.'

Moral rights are only held by the author of the work and cannot be transferred or assigned like copyrights may be. And of course there are some specific exceptions in the law to what constitutes distortion, mutilation, or modification.

So, what about the sculpture and the mural you once commissioned? Those are, most likely, works of visual art. An under VARA, those artists may have certain rights and a cause of action because you destroyed them. However, when you commissioned these works, certainly you engaged a good attorney to draft the contracts with the artists. Right? Well, let's hope so, because if you did, those contracts most likely included provisions that protected your ability to control what happens to the sculpture and the mural.

First and foremost, title to each work itself should be conveyed by the author to you (or your business), just like any other purchased asset. Similarly, the standard copyrights – which are separate from the title to the work as an asset – should be conveyed by the author, giving you the right to prevent the authors from making copies of their works for others, which they otherwise would be allowed to do. Having the copyrights assigned to you also allows you to commercially exploit the works if you wanted to, such as by creating and selling prints of the mural or replicas of the sculpture.

In the context of the moral rights, VARA allows these rights to be waived by authors, so long as the waiver is agreed to expressly in writing and signed by the author, specifying the work itself and the uses of the work to which the waiver applies. For you, this means you want the contract with the artist to include a provision in which the artist expressly waives his/her moral rights under VARA to the work being created, including waiver of the right to prevent distortion, mutilation, modification or destruction of the work for any reason in your sole discretion.

Now, assuming you had that in your contracts with these artists, you should have a strong case allowing you to tell them to go pound sand after you receive that complaint. If you did not, you may still be okay if certain other facts bear out. For example, the author's right to prevent destruction is contingent on the work being of a "recognized stature." Unfortunately, that term is not defined in the statute, but enough cases have been decided to help courts make that very fact-specific determination, although that does not require the work to be 'good'; rather, it could be enough that the work or the author is somewhat notorious in a very relative sense.

A somewhat recent case played out in Queens, New York, which illustrates how courts will determine if a work of visual art is of recognized stature.[2] In 2020, a federal appeals court affirmed a district court holding that 'aerosol artists' whose works of graffiti donned the side of a building, which happened to be famous for such displays and indeed had been, in a sense, curated in a loose cooperation between a local artist and the owner of the building, were owed $6.75 million in statutory damages after the building owner whitewashed the graffiti before its sale to a third party for a new development. Even though the various works of graffiti were inherently temporary (because new artists would be approved to add their new work overtop previous work), overall facts of the cases and various experts' opinions supported the court's finding them to be of recognized stature.

Even here in Indiana, a case was decided in 1997 granting summary judgment to a sculptor in his suit against the City of Indianapolis after it destroyed rather than removed the sculptor's work sitting on property the City acquired by eminent domain.[3] The sculptor was not famous broadly, but was known at least in local art circles and the work itself had been the subject of positive reviews published for the art community.

Reflecting again on your case, you might be able to point to the sculpture or the mural as not being of recognized stature. As seen in these earlier cases, that will be very fact specific, and not necessarily something you want to have to rely on in order to avoid having to pay damages. But because you were proactive in having a contract prepared for the commissioning of the work, even though it didn't include a waiver of the moral rights you should have been informed that you could avoid trouble from the artists if you took care of a few things before the destruction of the works.

For the mural, which by its nature is "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," you could approach the artist and request his/her consent to the removal or waiver of the right to prevent destruction. While it would be better for this to be included in the contract commissioning the mural, a

subsequent written agreement to allow for this is another way to get there. For the sculpture, which could be removed without destruction, you would not even need to get written permission or waiver, so long as you provide 90 day notice to the sculptor (or make a diligent, good faith attempt to do so) that you intend to destroy the sculpture, unless the sculptor elects to remove it or have it removed before the 90 days is up.

So, the next time you decide to be a patron of the arts, remember that moral rights of the author are real and meaningful topics that should be addressed in advance and in appropriate contractual provisions whenever works of art are commissioned. For help with such matters, or any other IP protection or enforcement concern, please contact Justin L. Sage, Daniel Tychonievich, or a member of our Business, Acquisitions and Securities Practice.

1 17 U.S.C. §§106A, 113(d)
2 Castillo et al. v. G&M Realty L.P., 950 F.3d 155 (2d.Cir. 2020)
3 Martin v. City of Indianapolis, 982 F.Supp. 625 (S.D. Ind. 1997)

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