**ANALYZING THE RAMIFICATIONS OF THE REMOVAL, RELOCATION, AND/OR DESTRUCTION OF PUBLIC ART**

When an real estate owner (“Owner”) seeks to alter, remove, relocate, deaccession, or destroy a work of public art, what laws apply?

There are three main areas of consideration:

1. Visual Artists Rights Act (VARA). What is it? Does it apply? And can it be waived?
2. California Art Preservation Act (CAPA) What is it? Does it apply? And can it be waived?
3. Contract Law. Is there a contract between the Artist and Owner and if so, what does it say?

**ANALYSIS:**

**Q: What is VARA and does it apply?**

**A:** The Visual Artists Rights Act (VARA) is a Federal law found in § 106(a) of the Copyright Law, and provides moral rights protection to the author of *recognized works of visual art*. Under VARA, an Artist of a "work of visual art" has the right to prevent any intentional distortion, mutilation, or other modification of a work of art (as long as it meets VARA's criteria), which would be prejudicial to the artist’s honor or reputation. This right endures for the life of the Artist rather than the entire term of copyright protection (currently, life plus 70 years).

A "work of visual art" is narrowly defined to include irreplaceable artwork such as paintings, drawings, prints, or sculptures existing in a single copy or in a limited edition of less than 200. The artwork must additionally be a "work of recognized stature.” The “recognized stature” requirement can pose some challenges as there is not a lot of case law defining this term.

Assuming that the artwork meets the bar for being a “work of recognized stature,” the first question to consider is *whether the work can be removed from the installation site without causing damage*. If the work is established to be removable with little or no damage, the law clearly gives the Owner the ability to remove the work with the proper notice. Avoiding liability even with providing notice prior to removal is less clear in the case where artwork is not removable without it being destroyed.

If it is determined that the work *can* in fact be removed with minimal or no damage, §113(d)(2) of the Copyright Law provides that Owner can satisfy the terms of VARA by making a diligent, good faith attempt to notify the artist in writing of the intended action affecting the artwork. This means sending a notice via registered mail to the Artist at the Artist’s most recent address on record with the Owner and/or with the Register of Copyrights.

Upon receiving the notice, the Artist has up to 90 days (longer only if mutually agreed) to arrange and pay for the removal of the artwork. Title to the artwork then transfers back to the artist. Should the artist fail to respond or elect not to take the work back within 90 days after receiving such notice, Owner can proceed to remove, relocate and/or destroy the artwork.

If it is determined that the artwork *cannot* be removed without causing damage or destruction, then it is more difficult for the Owner to do anything to the artwork without the Artist’s permission. VARA may in fact provide the basis for an Artist to block any action that will cause the destruction or mutilation of the artwork. However, if the artist consented to the installation of the artwork in the building either before the effective date of VARA, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the artist and that specifies that installation of the artwork may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then VARA shall not apply

Damages for a VARA violation can range from $750 to $30,000 per work destroyed. If it is determined that the destruction is willful, damages can include a punitive multiplier of up to $150,000 per work destroyed.

With technology today, most artwork, including even a mural affixed to a wall, is likely removable. However, artists may assert that artwork is “site-specific” and that *any* removal and relocation, even if it preserves the artwork, constitutes destruction as the site is integral to the artwork. While that may be a legitimate argument artistically and conceptually, it is unlikely that the courts’ current interpretations of VARA will provide protection for such site-specific works. The issue is therefore one certainly of academic interest, but much less likely to result in Owner liability.

**NOTE:** One reason driving artists to be particularly aggressive in their assertion of VARA rights is the recent 5Pointz case where the artists were awarded more than $6 million in damages. There is a common misunderstanding among artists that this case vindicates artists and justifies the award of damages whenever an artwork, and murals in particular, are destroyed. This is simply not true, although the case did provide some additional guidance on establishing the “recognized stature” criteria. More clearly what the 5Pointz case did was to emphasize the need for property owners to follow the notice requirements under VARA so as to avoid any legitimate claims by artists for damages.

**Q; What is CAPA and does it apply?**

**A:** California Art Preservation Act (CAPA), found in California Civil Code Ch. 3 § 987-989, is a state law that preceded VARA, and while similar, provides some slightly different protections and remedies to Artists. Key differences between the two laws are:

1. CAPA remains in effect for the life of the artist plus 50 years, as opposed to VARA rights which expire upon the death of the Artist.
2. If the artwork in question is *not* removable without sustaining damage or destruction, then the protections of CAPA do *not* apply and the Owner can remove or destroy the artwork without notice to the artist. This is different from VARA which may arguably provide more protection for artwork that is not removable.
3. If the artwork in question *is* removable, then there is a 90-day notice requirement similar to that required by VARA (though the 90-day period begins on the day the artist *receives* the notice). However there is an additional requirement that in the event the Artist or Artist’s representative fails to remove the artwork following the 90-day notice, the Owner must further provide a 30-day notice of the intended action affecting the artwork in order to allow someone other than the Artist to step in to remove the artwork. This notice must be published in a newspaper of general circulation in the area where the artwork is located and may run concurrently with the 90-day notice. If an organization agrees to remove the work of fine art and pay the cost of removal, then action to remove the work must occur within 90 days of the first day of the 30-day notice. And as with VARA, if the work is removed at the expense of the Artist or another party, title to the artwork will also transfer.

A notable inconsistency arises under CAPA, given that the 90-day notice to the Artist and the 30-day notice in the newspaper to organizations can run concurrently. If the notices run concurrently and begin on the same day, and if the Artist takes the entire 90-day period to decide *not* to recover the artwork, this would leave an organization no time to remove the artwork as the 90-days for removal that applies to all parties will have expired. There is also no consideration for what might happen if more than one organization elects to recover the artwork simultaneously. Presumably an Owner will use best efforts to accommodate a fair resolution within reason under any of these scenarios, but the fact remains that the law fails to provide a clear path to resolution in the event of confusion or dispute resulting from this inconsistency.

**Q: Is there a contract between the Artist and Owner and if so, what does it say? Does it include any language waiving VARA/CAPA?**

**A:** If there is a commission agreement or other contract between the Artist and Owner, the answer to what happens upon removal, relocation, deaccession, or destruction of a public artwork may be specifically addressed. Thus, the first step is to read the contract and determine what, if any, language applies.

Under both VARA and CAPA, it is possible for the Artist to contractually waive all VARA and/or CAPA rights. If the Artist has contractually granted a complete waiver, the Owner is likely free to remove, relocate, or destroy the artwork without adhering to the requirements of VARA and/or CAPA.

Even if waiver language exists in the commission agreement or subsequent agreements, the Owner should carefully examine all agreement language to determine if there is replacement or substitute language providing protection similar to VARA or CAPA.

If there is no contractual waiver, the default position is that VARA and CAPA apply.

**Q: Are there any other considerations to keep in mind?**

**A:** In addition to the legal considerations detailed above, there are some business considerations to keep in mind. While an Owner may have done all that is required by law to properly notify the Artist and other interested parties about intended actions or decisions affecting an artwork, there is the emotional component too that should not be ignored. Artists are understandably emotionally attached to their artwork and changes the artwork are often taken very personally. For this reason, it is always advisable to take the most conservative approach, provide the most notice and always behave in a manner that is respectful to the artwork and the Artist. It is amazing how a few words of acknowledgement can turn an otherwise cold, bureaucratic notice letter into one that conveys respect and appreciation for the services of the Artist. This can make all the difference in smoothing the process of removing, relocating or deaccessioning artwork. Remaining open in communications and empathetic to the love and care that went in to creating the artwork is often the best investment an Owner can make when dealing with the removal of artwork.