**COPYRIGHT OWNERSHIP FOR COMMISSIONED ART**

**By Sarah Conley Odenkirk**

**A. THE CHALLENGE**

Ownership of copyrights has become a hot topic in public art commissions as the value and importance of public art collections in both public and private contexts is more widely recognized. Historically, copyright remains with the artist even after a project is installed. But, in an effort to preclude future challenges or liabilities, lawyers representing commissioning parties are more frequently drafting commission agreements to require a full assignment and transfer of copyrights as well as a blanket waiver of Visual Artist Rights Act (VARA) rights (and in California, California Arts Preservation Act (CAPA) rights as well). Not only is this recognized as a violation of best practices in the public art field, but it is not necessary in order to provide the owner of the public art with legal protection. In fact, owning the copyright may very well create unintended liabilities and ultimately damage the ability of developers and public art programs to realize the maximize potential of their public art commissioning opportunities.

**Best Practices Dictate That Artists Retain Copyright Ownership**

In 2017 the Public Art Network Council of the Americans for the Arts adopted a 29-point statement outlining the most important best practices to be followed in the field of public art. This document can provide a helpful basis for conversations and the construction of policies, procedures and contracts. One of the best practices listed is that artists should retain copyright to their artwork.[[1]](#footnote-1) Currently, the Council and other public art professionals are in the process of annotating these best practices, so look for updates in the near future.

**Tools To Bridge The Disconnect Between Art And The Law**

Having tools to assist in constructing an acceptable and functional structure for public art commissions is crucial in building impactful programs at every level. One valuable tool is that of *communication*. Open and respectful communication is crucial for all contract negotiations, and particularly helpful when all parties should be working toward the same outcome.

Another effective tool to be employed at the beginning of any conversation about commission contract language is *empathy*. Commissioning Parties are concerned with liability and efficient expenditure of public, donor, or investor funds. Artists are concerned with building and maintaining sustainable careers and being treated respectfully. Commissioning Parties approach most issues from an objective standpoint that puts the financial interests and well-being of the community or company front and center. Artists, no matter how business-savvy, tend to focus on creative expression and aesthetic impact. Ultimately, creative and aesthetic considerations are what makes artistic interventions powerful and able to touch a diverse audience. Most lawyers try to keep personal feelings out of the work of drafting contracts, but passion and engagement is a crucial component to creating good art. This is where the nexus of art and law can expose a disconnect in the different thinking processes of lawyers and artists. Luckily, the goals of Commissioning Parties and Artists need not be mutually exclusive. Using good communication and empathy, both parties will be able to better negotiate mutually satisfactory contract language and sustainable public art programs.

**B. THE COMMISSIONING PARTY PERSPECTIVE**

**Commissioning Parties Worry About Future Liabilities**

As we deploy empathy to consider the position of Commissioning Parties, an important question to ask is: Why, contrary to best practices, do lawyers want to include blanket waivers of rights and copyright transfers in the commission agreements in the first place? They are almost certainly not planning to go into business exploiting the works for gift shop profits (though that is another potential concern in some cases). Generally, the answer is that waivers and transfers are an easy and expeditious way to ensure that Owners need not advise Artists of what happens to the artwork in the future, and Artists cannot raise any objections down the road to the way in which the art is treated, exploited, maintained, relocated removed or destroyed. The fear of possible future liability can be heightened in the public context by the fact that many municipalities commissioning work are self-insured. Thus, government attorneys tend to be especially highly motivated by the quest to reduce potential municipal liabilities, present and future. Ultimately, it is hoped that requiring blanket waivers and transfers will nip in the bud any potential future challenges from artists and definitively ensure that Artists do not create other duplicate works for another client down the road. Unfortunately, this stance may unwittingly create other potential concerns.

**Owners Must Be Prepared To Manage And Protect The Copyrights**

When a copyright is transferred to an artwork, the owner (Commissioning Party or otherwise) also acquires the administrative burden that comes with the ownership of intellectual property rights. Proper intellectual property management dictates that copyrights should be registered with the Library of Congress. Proof of registration is the only way to access potential remedies in the event of third party infringements. Failure to register the copyrights will prevent the owner from pursuing any enforcement actions and could result in squandering the intellectual property and damaging the reputation of the artist. It is both disrespectful to the artist and the artwork and a waste of individual, company or taxpayer resources to require the waivers and transfers solely to prevent future issues with the artist while neglecting to properly manage and defend, if necessary, the intellectual property assets.

**Copyright Transfer Does Not Include or Negate Moral Rights**

Pursuant to the terms of the Visual Artists Rights Act (VARA) found at §106A of the Copyright Law, even if copyright ownership is transferred pursuant to a signed writing, the moral rights granted by VARA are not transferrable and last for the life of the author. Additionally, a number of states also have state law equivalents to VARA which either match or exceed the protection offered under VARA. In order to avoid future liability based on state or federal moral rights legislation, commission agreements often contain a waiver of these rights. Again, best practices dictate that when moral rights are waived, there should be some replacement language included in the agreement which provides for reasonable notice to the artist of any impending plans to remove, relocate or destroy an artwork.[[2]](#footnote-2) Rather than hinder the process of commissioning and maintaining public art, recognition of sensible and administrable rights should clarify what each party can reasonably expect in the future with regard to how the artwork and Artist will be treated.

**The Big Picture**

The attorneys advising art programs need to be especially cognizant of the way that contract terms impact the overall reputation and character of the program. Choosing to take a hardline approach might create more certainty with regard to liability issues and sound good to owners and oversight bodies relatively uninformed on art-specific issues. But fostering a program that is viewed as not friendly to artists can have long term effects on the ability of that program to attract the best talent and curate the best public art collection. Taking a softer approach that focuses on what the Commissioning Party actually needs and letting the Artists retain the rest, broadcasts a very different approach. Showing that a company or community is enlightened about artists’ concerns will set the stage for not only a better public art collections, but allow for broader support of the increasingly popular (and necessary) public-private collaborations: using art as a means to promote community engagement; diversifying into temporary and performance-based works; and embedding artists as residents in other private and municipal programs to support creative thinking in a variety of sectors.

**C. THE ARTIST PERSPECTIVE**

**Artists Need To Be Free To Create Derivative Works**

If the empathy is to be employed in the opposite direction to take into account the Artists’ perspective, Commissioning Parties will need to consider the nature of working as an Artist. Artists, who build sustainable careers working in the public art arena, need to be free to create works in different locations and settings over time. These works will, in many cases, have a common theme, thread or style that identifies the work as that of the particular artist. When copyright is assigned or transferred, one of the rights included is the right to create derivative works. By transferring ownership of the copyright, an artist potentially jeopardizes his or her ability to create works that could be considered derivative and this could negatively impact the artist’s ability to work in the field.[[3]](#footnote-3) Lawyers need to understand that this is a legitimate concern for artists. Artists should not be asked to simply trust that the Commissioning Party or owner will act reasonably in the future. Generally speaking, a simple assurance from the Artist that the commissioned work is a unique artwork and will not be exactly duplicated elsewhere will serve to adequately protect the Commissioning Party’s interests and needs.

**Public Art Budgets Are Mostly Not Big Enough To Warrant Copyright Transfer**

Another concern with requiring waivers and copyright transfers is the shift in project esprit that this creates. Often the commission budgets are not enough to justify the transfer of the artwork itself *and* the copyright. Generally, there is barely enough money in the budgets to pay for the fabrication of the artwork and allow for a modest artist fee. Adding a requirement that the intellectual property assets be transferred with no additional compensation feels exploitative and does not engender good feelings on projects that should feel unreservedly mutually-beneficial. Leveraging the power differential between Commissioning Parties and Artist to change the rules and expand the historic scope public art commissions by forcing Artists to also transfer their copyrights could be seen as overreaching. It could also diminish the ability of a public art program to establish a reputation as an artist-friendly collaborator. Again, considering the big picture, everyone wins when there is a collective effort to construct an artist-friendly ecosystem, which in turn enhances the creative economy for everyone.

**D. THE ANSWER**

**Limited Waivers and Licenses Can Address All Concerns**

A Commissioning Party need not own the copyrights to a public art project in order to have assurances that it can freely manage its public art collection without burdensome requirements to obtain the artist’s permission. The best way to accomplish this is through limited licenses and waivers. Normally, Commissioning Parties want the freedom to reproduce two-dimensional images of the artwork for educational, marketing and promotional purposes;[[4]](#footnote-4) and to have the freedom to address maintenance, conservation and removal or relocation issues that come up from time to time. The best way to obtain this type of enduring flexibility is to create a limited, perpetual license as well as a waiver of moral rights with replacement language that establishes a base level respect for the artist and the artwork. One example of effective language to address intellectual property and moral rights issues is as follows:

**INTELLECTUAL PROPERTY OWNERSHIP**

**a. General. Except as provided in this Agreement, Artist retains all copyrights and other intellectual property interests in the Artwork and in the Design, drawings, sketches, prototypes and other materials for the Artwork. Artist may place a copyright notice on the Artwork and may, at Artist’s option, register the copyright with the Library of Congress.**

**b. Reproductions. Artist hereby grants to Owner the non-exclusive right to make, and to authorize the making of, photographs and other two-dimensional reproductions of the artwork for any Owner-related purposes, including, but not limited to educational, advertising, marketing, public relations, promotion, any documentation of Owner’s art collection or other noncommercial purposes in print or electronic media. This license does not include the right to create three-dimensional works or to reproduce the Artwork for merchandising purposes. Any rights to reproduce the work three-dimensionally or to merchandise the Artwork must be established pursuant to a separate agreement with the Artist.**

**MAINTENANCE, REPAIR AND RESTORATION. For the lifetime of the work, which for purposes of this Agreement is defined as no less than ( ) years, Owner will be responsible for the routine inspection and maintenance of the Artwork in accordance with the Maintenance Manual. Owner shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Artwork will be made. It is the policy of Owner to consult with Artist regarding repairs and restorations undertaken during Artist’s lifetime when practicable. In the event the Owner wishes to have Artist personally undertake or supervise repairs, Owner agrees to pay Artist a reasonable fee for such supervision to be negotiated at the time. In the event that Owner makes repairs or restoration not approved by Artist, Artist shall have the right, at Artist’s sole option, to have Artist’s association with the Artwork severed. All repairs and restorations, no matter who performs them, shall be made in accordance with professionally recognized principles of conservation and in accordance with the Maintenance Manual.**

**MODIFICATION, DESTRUCTION OR REMOVAL OF ARTWORK.**

* 1. **Owner shall notify Artist in writing of any proposed significant alteration of the Site that would affect the intended character and appearance of the Artwork including removal or relocation of the Artwork that might result in the Artwork being destroyed, distorted or modified. The Owner shall make a good faith effort to consult with the Artist in the planning and execution of any such alteration. The Owner shall make a reasonable effort to maintain the integrity of the Artwork. If the Artwork cannot be successfully removed or relocated as determined by the Owner, the Artist may disavow the Artwork or have the Artwork returned to the Artist at the Artist’s expense.**
  2. **The Artwork may be removed or relocated or destroyed by the Owner should the Artist and the Owner not reach mutual agreement on the removal or relocation of the Artwork after a period not to exceed ninety (90) days after written notice to the Artist. During the ninety (90) day period, the Parties shall engage in good faith negotiations concerning the Artwork’s removal or relocation.**
  3. **In the event of changes in building codes or zoning laws or regulations that cause the Artwork to be in conflict with such codes, laws or regulations, the Owner may authorize the removal or relocation of the Artwork without the Artist’s permission. In the alternative, the Owner may commission the Artist by a separate agreement to make any necessary changes to the Artwork to render it in compliance with such codes, laws or regulations.**
  4. **If the Owner reasonably determines that the Artwork presents imminent harm or hazard to the public, other than as a result of the Owner’s failure to maintain the Artwork as required under this Agreement, the Owner may authorize the removal of the Artwork without the prior approval of the Artist.**
  5. **Owner shall have the right to donate or sell the Artwork at any time. Before exercising this right, Owner, by written notice to Artist at Artist’s last known address, agrees to give Artist the opportunity to purchase the Artwork for the greater of the Contract Amount or the amount of any offer which Owner has received for the purchase of the Artwork, plus all costs associated with the removal of the Artwork from the Site, clean-up of the Site and delivery to Artist. Artist shall have thirty (30) days from the date of Owner’s notice to exercise the option to purchase the Artwork.**
  6. **This clause is intended to replace and substitute for the rights of the Artist under the Visual Artists’ Rights Act (“VARA”) and, if applicable, the California Art Preservation Act (CAPA), to the extent that any portion of this Agreement is in direct conflict with VARA and/or CAPA rights. The parties acknowledge that this Agreement supersedes that law to the extent that this Agreement is in direct conflict with VARA and/or CAPA.**

If you have further questions or concerns about this topic or other art law matters, please do not hesitate to contact Sarah Conley Odenkirk at sodenkirk@cdas.com or call 310.990.9581.

1. “Artists should retain copyright to their Artwork. However, Artists should expect to grant license to the contracting agency or ultimate owner for reasonable use of images of the Artwork for publicity, educational, and reasonable promotional purposes upon which the parties agree.” Best Practices as published by Americans for the Arts online at <https://www.americansforthearts.org/by-program/networks-and-councils/public-art-network/tools-resources/public-art-administrators> . [↑](#footnote-ref-1)
2. “If Visual Artist Rights Act (VARA) rights are waived, Agreements should nonetheless provide that, in the event of damage, alteration, or destruction of an Artwork that is not remedied to Artist’s satisfaction, or relocation without Artist’s approval, if the Artist believes the Artwork no longer represents his/her work, the Artist should have the right to remove his/her name from the Artwork.” Best Practices as published by Americans for the Arts online at https://www.americansforthearts.org/by-program/networks-and-councils/public-art-network/tools-resources/public-art-administrators. [↑](#footnote-ref-2)
3. Though less likely, it could also cut off an artist’s ability to take advantage of the popularity of a public art piece by creating merchandise derivatives of the original work. Generally speaking, municipalities are not in the business of creating, marketing and distributing merchandise, but this may be an issue appropriately considered at the outset of the contracting process. If merchandising is in fact a viable opportunity, it could be one shared by the parties to everyone’s mutual benefit. Of course, if the artist has an international reputation, the negotiation power lies with the artist who will likely not want to share merchandising rights or profits with the municipality. [↑](#footnote-ref-3)
4. If they intend to make images or derivative works for sale, then the use of the artwork then falls into a different category of commercial use for which a separate agreement is advisable and the artist should be additionally compensated. [↑](#footnote-ref-4)