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VARA Protection for Spontaneous "Protest Art":

Balancing Artists' and Property Owners' Rights in the Context of Dynamic Political Artworks for an Increasingly Digital Audience

By: Megan E. Noh, Esq.*

Introduction

For generations, art has been a powerful tool for expressing political views and raising awareness of social justice issues.[1] The use of visual art to amplify the message of the Black Lives Matter ("BLM") movement is no exception, and as this activist initiative has gained momentum over the course of an unprecedented year in the United States (beset by COVID-19-related lockdowns, multiple high-profile incidents of police brutality, a historic unemployment rate, and related loss of healthcare coverage for millions of Americans), the number of BLM-related artworks—including both commissioned works and those installed spontaneously or without the property owner's permission—has grown exponentially. As a result, the scope and balance of interested parties' rights in so-called "protest art" has increasingly arisen as both a practical and an ethical question. This article examines existing precedent and explores application of the limited provisions of the federal Visual Artists' Rights Act ("VARA")[2] to spontaneous protest art (*i.e.*, works installed without the consent of the owners of the real property comprising the installation site).

* * *

The murder of George Floyd by Detroit police officers on May 25, 2020 sparked a wave of political demonstrations and protests across the United States. After centuries of systematic racial discrimination and oppression, exacerbated by months of impotent governmental response to the COVID-19 pandemic (which itself has dis-

proportionately impacted Black and indigenous communities and other persons of color), a new instance of police brutality propelled thousands of Americans into the streets to voice their righteous outrage. Fearing destruction to their premises and property, many proprietors of retail stores, restaurants, and other commercial establishments in major metropolitan areas took protective measures, including boarding up windows and installing barricades at their perimeters. In an inspiring gesture of solidarity, demonstrators converted some of these security barriers—along with building walls and other immovable structures—into 'canvasses' for murals depicting George Floyd, Breonna Taylor,[3] Tony McDade,[4] and other BLM-related imagery or text.[5]

When it's time to take down the plywood or other barrier, what should happen to the artwork adorning its surface?

Unlike commissioned works intended to be displayed permanently or a long term basis,[6] some of these 'surprise' artworks have placed property owners in a difficult position: when it's time to take down the plywood or other barrier, what should happen to the artwork adorning its surface? Has the artwork gained VARA protection, despite its creator not having obtained advance permission from the property-owner to install it? If so, what are the artist's and the property owner's respective rights in relation to the fate of the work?

Answers to these questions hinge on a number of complex and intersecting factors:

- whether the work is a "work of visual art" as defined by VARA;
- the impact, if any, of the work having been installed without the property owner's prior authorization;
- whether the work is incorporated into the real property in such a way that it can be removed without the work sustaining any damage, and if so, whether the work is signed and its author identifiable;
- alternatively, whether removal of the work will cause "distortion, mutilation, or other modification" which would be prejudicial to the artist's honor or reputation; and
- whether any damage resulting from removal of the work will rise to the level of its "destruction," and if so, whether the work is of "recognized stature."

<u>Can a Work Promoting a Political Message be a VARA-Protected "Work of Visual Art"?</u>

As an initial matter, VARA protects a narrower class of creative works than may qualify for copyright registration: only "work[s] of visual art" as enumerated in the Copyright Act's separate "Definitions" clause.[7] This class is limited not only by media,[8] but also by the type of resulting work; potentially important in the context of art with a political message is VARA's exclusion of "advertising" and "promotional" materials.[9] In a case involving a claim for damages by the artist Joanne Pollara, the Northern District of New York found that a mural commissioned by public interest group the New York State Defenders Association ("NYSDA") for use at a lobbying event was "promotional" in nature, *i.e.*, "designed to attract attention to" the organization's information table, at which materials were available discussing NYSDA's position in opposition to proposed legal aid funding cuts.[10]

In 2003, the Second Circuit affirmed the District Court's decision, noting that the mural had been "created for the purpose of drawing attention to an information desk, as part of a lobbying effort … overtly promot[ing] … a lobbying message."[11] Pollara specifically argued that this political message distinguished the work from the kind of commercial advertising that should be excluded from VARA protection, and the Second Circuit rejected this argument, noting the "broad[] exclusionary sweep" of the language at issue, which it interpreted as applying to "***all*** advertising and promotional materials, regardless of whether the thing being promoted or advertised was a commercial product or [an] advocacy group's lobbying efforts, and regardless of whether the work being used to promote or advertise might otherwise be called a painting, drawing, or sculpture."[12]

It's unclear just how broadly this "exclusionary sweep" might be applied in cases involving BLM-related or other protest art.[13] In *Pollara*, the court appears to have heavily weighted the fact that NYSDA actually *commissioned* the artist to create a work in support of its lobbying effort, *i.e.*, that at least some of the banner's content was pre-determined.[14] The opinion accordingly leaves open the possibility that in cases where an artist *independently* creates a work to speak to sociopolitical issues or themes, rather than being directly enlisted to do so by an organization, the resulting work may not be as easily categorized as "advertising" or "promotional material."

The possibility remains, though, that artwork created in support of the BLM movement could fall into the *Pollara* trap. While BLM is considered a decentralized and grassroots movement,[15] with local chapters[16] across a "global network,"[17] certain political principals are core to its publicly-espoused ideology—such as the "defunding" of state and city police forces in favor of re-investment in community resources and initiatives.[18] How might a court characterize a mural created independently (*i.e.*, not commissioned by or otherwise at the request of any BLM branch or event organizer) and specifically seeking to raise awareness for one of numerous new legislative initiatives aimed at police reform, such as the bill introduced by California Rep. Karen Bass, the "George Floyd Justice in Policing Act"[19]? What about a mural resulting from a similar independent (non-commissioned) effort, but explicitly directing viewers to support the local BLM branch? Would these artistic efforts automatically be deemed "promotional" in nature given their direct endorsement of a lobbying effort or a political organization, or might their authors' lack of direct affiliation with either initiative render them protected artworks with incidentally-political themes?

It's difficult to predict whether those scenarios would be distinguishable enough from the facts of the *Pollara* case to result in different outcomes, and how courts might seek to draw the relevant lines. Given the important role that art has historically played in conveying political messages,[20] a broad presumption that any art expressing support for a movement or advocacy group is excluded from VARA seems antithetical to core societal values. Yet this possibility certainly exists under a literal reading of the Second Circuit's decision, and the relative infrequency with which VARA has been litigated gives us little other precedent from which to extrapolate.

<u>Does the Work's "Unauthorized" Status Limit the Artist's Rights?</u>

Assuming that a particular work of protest art *is* protectable under VARA (*i.e.*, it is sufficiently creative,[21] has been executed in a medium sanctioned within the definition of "work[s] of visual art," and would not be deemed to be "advertising" or "promotional" material), the next key question is the impact of the failure of the artist to obtain consent from the property owner to the work's installation.

VARA attempts to strike a delicate balance between the rights of artists and those of the owners of the real property into which such works are incorporated. While precedent dictates the general proposition that non-removable VARA-protected art (*i.e.*, artwork which would be mutilated or destroyed as a result of removal) must be maintained in place for the life of its author,[22] the balance necessarily shifts in the context of non-removable art that has been installed without the property owner's consent.

Indeed, were artists permitted to "freeze development of vacant lots by placing artwork there without permission,"[23] the burden on property owners would be too great—not least because they would not have had the opportunity to negotiate for a waiver. Accordingly, in *English et al. v. BFC & R E. 11th St. LLC et al*, a 1997 case involving a group of sculptures and murals installed in a community garden, the authors of which contended they were a "single work" that would be destroyed by removal, the Southern District of New York held that "VARA does not apply to artwork that is illegally placed on the property of others, without

their consent, *when such artwork cannot be removed from the site in question*."[24]

However, in *Pollara* case, in which the mural at issue—which was made of paper attached to a frame, rather than affixed to any wall or structure at the protest site—was displayed without a permit, the Northern District of New York characterized the *English* holding as being "limited to the situation where the artwork cannot be removed without destroying ... [or] damaging it."[25] The Court accordingly rejected the defendant's argument that the mural should be excluded from VARA protection as a result of its unauthorized status, concluding that "there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner."[26]

Taken together, the *English* and *Pollara* cases support the logical conclusion that if a work of protest art installed without authorization *is* safely removable, then it should not automatically be denied VARA protection as a result of its unauthorized status.[27]

What Physical Impact will Removal Cause to the Work?

Accordingly, the next question applicable to the unique facts presented by the spontaneous installation of a work of protest art is whether it is "removable" or "non-removable." One scholar has noted that this distinction is "vital," because the determination results in "drastically different effects"[28]—that is, the character of the artist's potential VARA rights depends on the nature and impact of the planned removal itself. Can the work in question be simply de-affixed from a surface, as might be the case if, for example, a single sheet of painted plywood might be detached from the window over which it had been installed as protective covering? Or will removal of the work prejudicially damage the work, as might be more likely to be the case with a mural painted on a brick wall?[29]

If the artwork *can* be removed without resulting in prejudicial distortion, mutilation, or modification, the work will not be excluded from VARA protection under the *English* case holding, *and* the property owner is required to make a "diligent, good faith attempt … to notify the [artist] of the owner's intended action affecting the work."[30] Upon receiving such notice, the artist has a 90-day period to remove the work or pay for its removal, thereby taking title to the work.[31] If such attempt fails,[32] or if the artist does not remove the work, then the artist's rights under the disavowal and integrity sections of VARA effectively lapse.[33]

By contrast, if the removal of a VARA-protected work is *not* possible without prejudicial mutilation or destruction, the options are generally narrower. For works installed with a property owner's consent, the statute provides that the artist and the property owner may execute a "written instrument … that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification by reason of its removal," with the artist agreeing to *waive* her VARA rights.[34] If no waiver is agreed, the work must be left intact for the duration of the artist's rights—*i.e.*, for works created on or after VARA's June 1, 1991 effective date, for the remaining life of the author.[35] For spontaneous protest art, however, the impact of the *English* case appears to be that where removal is inherently impossible, the work is effectively excluded from VARA protection, and the artist has no recourse if the property owner wishes to do away with it.

How Does "Recognized Stature" Impact the Analysis?

Despite the dramatically different results it leads to, the determination of a work's removability or non-removability may not be easy to reach.[36] Similarly, predicting the extent of the damage that may be caused to a work may be extremely difficult.[37] Under VARA, the distinction between "intentional distortion, mutilation, [and] other modification," on the one hand, and "intentional destruction," on the other, is also critical, giving rise to yet another difficult-to-navigate bifurcation in the treatment of claims. Specifically, in order to state a claim in relation to *destruction*, the work must be of "recognized stature."[38]

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Exacerbating the problem, the term "recognized stature" is not defined in the statute, and has proven to be a tricky beast, with different courts arriving at seemingly disparate interpretations over the course of the 30 years since VARA's enactment. In fact, in its April 2019 report on moral rights,[39] the US Copyright Office noted that the statute might benefit from a clarification to "ensure that [it] supports the overall goals of VARA of protecting the moral rights of visual artists," including by recognizing that "the recognition of a work of art can originate from outside the 'fine arts' academy and instead from the local community where the art resides," and need not focus solely on a work's aesthetic merit.[40]

Practically speaking, a property owner faced with the unexpected installation of a work of protest art might be prudent to assume that a work *can* be removed without destruction,[41] and thus that the artist who created the work will accordingly not need to meet the higher bar of the "recognized stature" standard. This set of assumptions leads to a conservative course of action by which the artist's rights are more likely to be proactively respected, and mitigates in favor of good faith attempt to contact the artist[42] and preserve the work pending the artist's opportunity to remove it.

Conversely, an artist in the more typical situation of seeking to bring a claim in relation to a piece of spontaneous protest art which has *already* been removed by the owner of the installation site should be prepared to argue not just that the work *was* safely removable (thus avoiding the *English* pitfall), but also that the removal effectively destroyed the work, *and* that it had achieved recognized stature.[43]

Although Congress has not heeded the recommendation to amend VARA to define or otherwise clarify "recognized stature," the Second Circuit's February 2020 opinion in the appeal of the 5Pointz case,[44] used language similar to that recommended by the Copyright Office's report, finding that "a work of art is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by the relevant community."[45] The appropriate community to determine stature would "typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts," but the Second Circuit noted that recognition from the general public may also be relevant.[46]

And as the importance and utility of digital and social media platforms continues to increase, the definition of "community" may in turn be expanding. This seems particularly the case during the prolonged pandemic period, during which many art enthusiasts have been confined to their homes, and artists and arts institutions have ramped up their digital engagement initiatives. In addition to enabling "viral" content of other kinds, social media can be effectively used to publish and disseminate images of a work of art quickly and to a discerning audience. Indeed, the district court's 2018 opinion in the 5Pointz case expressly cited "social media" coverage as being among the factors evidencing that the murals at issue had "achieved artistic recognition."[47] It is accordingly not difficult to imagine a high-quality work of protest art gaining heightened recognition within a relatively short period after its spontaneous installation, and potentially even the achieving requisite "recognized stature" to achieve protection against destruction.

Conclusion

Applying the complex "decision tree" created by the language of VARA's provisions to the novel facts of artwork spontaneously installed

in the current protest climate—often created by artists employing technology platforms to identify and popularize their works in ways that the drafters of the 30-year-old statute could not have anticipated—gives rise to myriad questions. The limited guidance provided by previously-decided VARA caselaw establishes few relevant guideposts, and suggests that VARA jurisprudence may continue to develop in response to this dynamic political and cultural environment, as well as to our relentlessly digital landscape.[48] In the meantime, the artistic community will continue to give visual expression to the growing demand for change—literally manifesting the "writing on the wall" for ignorance of and apathy towards racial injustice in America. ♦

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[1] * Co-Chair, Art Law, at Pryor Cashman, LLP. This article does not constitute legal advice nor represent the views of that firm.

[1] *See generally* Brooke Davidson, *A Thousand Words: Pollara v. Seymour and the Trend to Under-Value and Under-Protect Political Art* , 14 DePaul-LCA J. of Art & Ent. L. 257, 258-59 (2004) (noting that "Political art is an invaluable contributor to the marketplace of ideas," generating "political and moral debate" and inspiring change). At least one scholar has commented on the important role that *street* art, in particular, plays in "shaping … history and influencing the future." Carmen Cowick, *Preserving Street Art: Uncovering the Challenges and Obstacles*, J. of the Art Libraries Society of N. America 34, no. 1 (Spring 2015), at 29-44 (further noting that street art with political themes has been integral to political and social movements in the 20th and 21st centuries).

[2] 17 U.S.C. § 106A.

[3] Breonna Taylor was a 26-year-old emergency medical technician who was fatally shot by Louisville police while sleeping in her home on March 13, 2020. *See* Richard A. Oppel Jr. and Derrick Bryson Taylor, "Here's What You Need to Know About Breonna Taylor's Death," N.Y. Times, July 31, 2020 (available at https://www.nytimes.com/article/breonna-taylor-police.html).

[4] Tony McDade was a 38-year-old transgender man who was killed in a police officer-involved shooting in Talahassee, Florida on May 27, 2020. *See* Elliott Kozuch, "HRC Mourns Tony McDade, Black Trans Man Killed in Florida," May 29, 2020 (available at https://www.hrc.org/blog/hrc-mourns-tony-mcdade-black-transgender-man-killed-in-florida).

[5] *See, e.g.*, StreetArtNYC, Artists Transform Soho's Boarded-Up Windows and Doors into Open Air Museum," June 11, 2020 (available at https://streetartnyc.org/blog/2020/06/11/artists-transform-sohos-boarded-up-windows-and-doors-into-an-open-air-museum-dena-paige-fischer-sacsix-jo-shane-kamila-zmrzla-otcasek-sara-lynne-leo-denis-ouch-optimo-nyc-more/); Gabriel Elizondo, "NYC Artists Display BLM Street Art on Boarded-Up Storefronts," *Al Jazeera News*, June 21, 2020 (available at https://www.aljazeera.com/news/2020/06/nyc-artists-display-blm-street-art-boarded-up-storefronts-200621104811500.html); David Farley, "Street Artists are Transforming Manhattan's Boarded-Up, Plywood Storefronts into Murals," *Insider*, June 29, 2020 (available at https://www.insider.com/boarded-up-windows-in-soho-turned-into-black-lives-matter-murals-2020-6); Ilana Novick, "In SoHo, Artists Turn Boarded-up Storefronts Into Canvases," *Hyperallergic*, July 2, 2020 (https://hyperallergic.com/574633/soho-street-art-amid-pandemic/) (noting that "[a]s stores begin to reopen, the future of these artworks is in limbo"); Rani Boyer, "How Graffiti Artists Are Propelling the Vision of the Black Lives Matter Movement," *Artsy*, July 20, 2020 (available at https://www.artsy.net/article/artsy-editorial-graffiti-artists-propelling-vision-black-lives-matter-movement); Seph Rodney, "New York's Sidewalk Prophets are Heirs of the Artisans of France's Lascaux Caves," New York Times, August 6, 2020 (available at https://www.nytimes.com/2020/08/06/arts/design/street-art-nyc-george-floyd.html?referringSource=articleShare).

[6] One prominent example of an officially-commissioned BLM mural is the New York City Public Design Commission's installation of a 600-foot mural in Lower Manhattan at Foley Square on Centre Street, for which participating artists were selected by the Department of Cultural Affairs. *See* Julia Jacobs, "The 'Black Lives Matter' Street Art That Contains Multitudes," New York Times, July 16, 2020, at https://www.nytimes.com/2020/07/16/arts/design/black-lives-matter-murals-new-york.html.

Given the important role that art has historically played in conveying political messages, a broad presumption that any art expressing support for a movement or advocacy group is excluded from VARA seems antithetical to core societal values. Yet this possibility certainly exists under a literal reading of the Second Circuit's decision, and the relative infrequency with which VARA has been litigated gives us little other precedent from which to extrapolate.

[7] 17 U.S.C. § 101.

[8] "Work[s] of visual art" are defined as paintings, drawings, prints, or sculptures existing in a single copy/cast or a limited edition of 200 copies or fewer, and photographs produced for exhibition in a limited edition of 200 copies or fewer. *Id.*

[9] "Work[s] of visual art" expressly exclude posters, maps, globes, charts, technical drawings, diagrams, models applied art, motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, databases, electronic information services, electronic publications, and "any **merchandising item or advertising, promotional**, descriptive, covering, or packaging material or container." *Id.* (emphasis added).

[10] *Pollara v. Seymour*, 206 F. Supp. 2d 333, 227 (N.D.N.Y. 2002).

[11] *Pollara v. Seymour*, 344 F.3d 265, 270 (2d Cir. 2003).

[12] *Id.* (emphasis added).

[13] *See* Davidson, *supra* note 1, at 276-77 (discussing *Pollara* concurring opinion that majority's reading of VARA was overbroad and interpreting such reading as "potentially excluding political art from [its] protection").

[14] *See* Lang Chen, *My Art versus Your Property: A Proposal for VARA Application to Site-Specific Art*, 46 AIPLA Quarterly J. 341, 352 n. 55 (2018).

[15] *See* Black Lives Matter "Herstory" (available at https://blacklivesmatter.com/herstory/).

[16] *See* Black Lives Matter "Chapters" (available at https://blacklivesmatter.com/chapters/).

[17] *See* Black Lives Matter, "Black Lives Matter Global Network Foundation Announces $6.5 Million Fund to Support Organizing Work," June 11, 2020 (available at https://blacklivesmatter.com/black-lives-matter-global-network-foundation-announces-6-5-million-fund-to-support-organizing-work/).

[18] *See* Black Lives Matter, "#DefundThePolice," May 30, 2020 (available at https://blacklivesmatter.com/what-defunding-the-police-really-means/).

[19] H.R. 7120, 116th Congress (2019-20) (available at https://www.congress.gov/bill/116th-congress/house-bill/7120/text).

[20] *Supra* note 1.

[21] *See* Celia Lerman, *Protecting Artistic Vandalism* , 2 N.Y.U. J. Intel. Prop. & Ent. Law. 295, 308-309 (2013) (noting that "simple tags … and other spray-paint graffiti may be too small or too simple," and "[g]raffiti that consists of words and short phrases, familiar symbols and designs, or mere variations of typographic ornamentation, lettering or coloring cannot be protected," nor can individualized "graffiti typefaces") (citing 37 CFR 201.1(a), (e)).

[22] *Carter v. Helmsley Spear, Inc.*, 861 F. Supp.

303, 328-329 (1994) (noting that VARA protection "subsists … for the life of the last surviving author of a covered work," and enjoining the distortion, mutilation, modification, or destruction of disputed artwork installed in lobby of building). Note that the Second Circuit ultimately reversed this decision on appeal, finding that the artwork in question was a "work for hire" excluded from VARA protection. 71 F.3d 77 (2d. Cir. 1995). Sadly, there are very few cases addressing injunctive relief *prior* to destruction of VARA-protected works; the vast majority of VARA cases are commenced *after* the disputed work has already been removed or otherwise destroyed.

[23] *English et al. v. BFC & R E. 11th St. LLC et al.*, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), at *4.

[24] *Id.* at *5 (emphasis added); *see also generally* Lerman, *supra* note 21, at 330-336 (discussing *English*).. Although not framed in terms of the "site specificity" that the First Circuit subsequently ruled is *not* protected by VARA, *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006), one wonders whether the *English* plaintiffs would have fared better had they conceded that some or all of the individual component artworks comprising the installation could have been relocated.

[25] *Pollara v. Seymour*, 150 F. Supp. 2d at 396, n.4 (N.D.N.Y. 2001).

[26] *Id.*; *see also* Cathay Y.N. Smith, *Street Art: An Analysis under U.S. Intellectual Property Law and Intellectual Property's 'Negative Space' Theory*, 24 DePaul J. of Art, Tech. and Int. Prop. L. 259 (2014), at 269.

[27] *See also* Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 Chicago-Kent J. of Intel. Prop. 204, 209-210 (2013) (noting that *Pollara* "seems to leave open the possibility that a private property owner … may be estopped from modifying or destroying an unauthorized work of art affixed to his property if he acquiesces or fails to take legal action against such unauthorized use….").

[28] Keith A. Attlesey, *The Visual Artists Rights Act of 1990: The Art of Preserving Building Owners' Rights*, 22 Golden Gate U.L. Rev. 371, 385 (1992); *see also* Michelle Bougdanos, *The Visual Aritsts Rights Act and its Application to Graffiti Murals: Whose Wall is it Anyway?*, 18 N.Y. L. School J. of Human Rights 549, 566-67 (2002).

[29] *See generally Board of Managers of Soho Int'l Arts Condominium v. City of New York*, 2003 WL 21403333 (S.D.N.Y. June 17, 2003), at *8-9, noting that for removal which has already occurred, the "operative" concept under VARA is whether such removal resulted in the destruction, distortion, mutilation or other modification of the work as described in § 106A(a)(3). The *Soho* cases suggest that "conclusory" artist testimony will be insufficient to establish removability.

[30] 17 U.S.C. § 113(d)(2)(A). In the case of protest art, identifying the artist may be less simple than VARA's drafters imagined, given the phenomena by which "writers"—*i.e.*, aerosol artists—sign their work using "tags" (*i.e.*, pseudonyms) to *obscure* their identities. *See generally* Cowick, *supra* note 1, at 43 (discussing importance of anonymity to creators of street art). Where an artist's tag is easily traceable to their legal name, it seems consistent with the spirit of the statute to assume that such a tag would be a sufficiently identifying mark. But in instances where the artist behind the pseudonym remains a mystery (as is the case with famed street artist Banksy), should the property owner be required to hire a "street art" expert—or even a private investigator—to seek to identify the artist?

Still other works of protest art are likely to be ineligible for VARA protection on the basis of being *un*-signed. *See* 17 U.S.C. § 101 (noting that to qualify as a "work of visual art," a painting or drawing must be signed, and a sculpture must bear a signature or "other identifying mark of the author").

[31] 17 U.S.C. § 113(d)(2)(B).

[32] While logical in their intent, VARA's notice provisions do not necessarily contemplate the type of spontaneous and rapid installation that has been witnessed in the context of the recent protests. Assuming the work in question bears some sufficiently identifying mark, the relevant statutory language notes that "an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights …" 17 U.S.C. § 113(d)(2)(B). Yet, it seems unlikely that many political activists responding to the dynamic political events of the spring and summer of 2020 are rushing to file "Visual Arts Registry Statements" and pay associated recordation fees to the Copyright Office. 37 CFR § 201.25.

Even if the creators of protest art do diligently pursue their registrations of artworks incorporated into buildings, how long might it take for the Copyright Office to record such statements? And should an artist's failure to file such a statement itself be considered a waiver of VARA rights, despite the language of the statute implying that such recordation is not mandatory, *i.e.* that the artist "***may*** record his or her identity and address with the Copyright Office"? *See* 17 U.S.C. § 113(d)(3) (emphasis added).

In the absence of such a recorded artist's statement, might a property owner's effort to contact the author of an artwork be deemed "diligent" and "good faith" if the property owner posts a notice of intended removal on its website and on social media? The issue of what constitutes sufficient attempt to locate an artist for the purposes of notice has not apparently, been litigated, and accordingly leaves practical questions unanswered, particularly in the context of the pandemic and the increasing popularity of modes of digital communication.

[33] *See* 17 U.S.C. § 113(d)(2) ("the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless" such measures are taken).

[34] 17 U.S.C. § 113(d)(1)(B); such a waiver may be negotiated at the inception of such an installation, or after the fact through a settlement and compromise of the artist's claims, in exchange for valuable consideration. A waiver of the artist's *lifetime* duration of rights may still provide for a specified term of display of the work in question.

[35] 17 U.S.C. § 106A(d)(1). While it has been theorized that this provision imposes an unconstitutional "taking" on the property owner, the Southern District of New York concluded the opposite in the *Carter v. Helmsley Spear, Inc.*, case, since, *inter alia*, the restriction is temporary. 861 F. Supp. 303, 327-28 (1994). *Compare Board of Managers of Soho Int'l Arts Condominium v. City of New York*, 2005 WL 1153752 (S.D.N.Y. May 13, 2005), at *12 (noting that *re*-installation on building exterior of VARA-protected work owned by non-profit organization would effect an unconstitutional taking of the building owner's property).

Note that it is permissible to *cover* or otherwise conceal a protected work, as long as such covering does not physically alter the work. *See Massachusetts Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 61 (1st Cir. 2010) (finding that use of tarpaulins to partially cover artwork installation was not "an intentional act of distortion or modification"); *English*, *supra* note 23, 1997 WL 746444, at *6 (noting

While logical in their intent, VARA's notice provisions do not necessarily contemplate the type of spontaneous and rapid installation that has been witnessed in the context of the recent protests … it seems unlikely that many political activists responding to the dynamic political events of the spring and summer of 2020 are rushing to file "Visual Arts Registry Statements" and … how long might it take for the Copyright Office to record such statements? … In the absence of such a recorded artist's statement, might a property owner's effort to contact the author of an artwork be deemed "diligent" and "good faith" if the property owner posts a notice of intended removal on its website and on social media?

that construction of additional buildings which would "not touch the walls on which the urals are painted" but would obstruct their view would not "result in the mutilation or destruction" of those works, as "they will not be physically altered in any way"). *See also* 17 U.S.C. 106A(c)(2) (exempting from actionable modification claims those arising from "public presentation").

[36] *See* Smith, *supra* note 26, at 269-270 (citing Bougdanos, *supra* note 28, at 588 ("most murals are considered removable in the art world")).

[37] In *Board of Managers of Soho Intern. Arts Condominium v. City of New York*, for example, the Southern District of New York appears to have concluded that removal presumptively results in destruction. 2005 WL 1153752, at *3 (S.D.N.Y. May 13, 2005). *Compare* Order Granting Prelim. Injunction, *Campusano et al. v. Cort et al.*, No. C98-3001-MJJ (N.D. Cal. Sept. 16, 1998) (noting that despite whitewashing with Kel-Bond II, mural could be restored and potentially removed).

[38] 17 U.S.C. § 106A(a)(3)(B).

[39] United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States (A Report of the Register of Copyrights)*, April 2019 (available at https://www.copyright.gov/policy/moralrights/full-report.pdf).

[40] *Id.* at 80.

[41] *See* Brooke Oliver, "Vara Update 2005: Artists' Rights of Integrity and Attribution in Murals & Sculptures," presented at CLE International Visual Arts & the Law Conference, at 11 (available at https://www.50balmy.com/wp-content/uploads/2015/01/VARA-update-2005-final-CLE-Vis-Arts-Law.pdf) (noting that "murals are often removable with minimal damage," as "[t]echnology exists which will allow … removal … without causing excessive damage"); *see also Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 443-44 (noting expert testimony to the effect that "curation techniques had evolved to the point where removal of works of art from the wall of a building was feasible and had been done," including at the Berlin Wall).

[42] Per the discussion *supra* notes 30 and 32, this may be easier said than done for artworks that are signed only with a "tag." Yet other artists who created works in the recent protests helpfully signed those works with their social media handles, suggesting that such an identification method may be a far more reasonable burden for artists than the Copyright Office recordation scheme. *See* Amelia Holowaty Krales and Vjeran Pavic, *33 Powerful Black Livews Matter Murals*, The Verge, July 5, 2020 (available at https://www.theverge.com/2020/7/5/21304985/black-lives-matter-murals-round-up-artists) (tracing murals based on Instagram handles used as artist signatures and linking to the corresponding social media accounts).

[43] In the 5Pointz case—which is not entirely apposite as the works at issue therein were installed with the property owner's consent—the artists argued that removable works had been destroyed, and accordingly had to satisfy the "recognized stature" burden with respect to those works. *Id.* at 444; 2018 WL 2973385 at *7-10 (finding recognized stature for 45 of the 5Pointz works).

[44] The appeal was taken on the Eastern District of New York's grant of a high-profile judgment against a real estate developer who had whitewashed numerous artworks created by a group of at an aerosol "mecca" in Long Island City, New York. *Cohen v. G&M Realty L.P.*, 2018 WL 2973385 (E.D.N.Y. June 13, 2018). The case is popularly referred to by the name of that site: 5Pointz.

[45] *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020).

[46] *Id.* at 166-168.

[47] *Cohen*, 2018 WL 2973385, at *10.

[48] Indeed, parties-in-interest are apparently already jockeying for position in relation to ownership and continued display of works installed on plywood storefronts in New York's SoHo neighborhood, *see* BoweryBoogie, "The Brewing Turf War Over Plywood Protest Art In SoHo," June 29, 2020 (available at https://www.boweryboogie.com/2020/06/the-brewing-turf-war-over-plywood-protest-art-in-soho-photos/2/), and efforts to recover deinstalled and now-missing artworks are underway. *See* SoHo Broadway Initiative, "Help Us Locate Missing Art," July 1, 2020 (available at https://sohobroadway.org/help-us-locate-missing-art-along-broadway/).

Frontiers in Art: *Artists Moving Across Borders*

This article is part of the 2020 ABA Special Project entitled Frontiers in Art, which aims to provide a comprehensive overview of a little-studied subject of art in the context of globalization: the circulation of artists around the world.

By: Anne-Sophie Nardon[1] and Betina Schlossberg[2]

The movement of artists across borders is an essential part of artistic production. The development and diffusion of a country's artistic activity cannot take place without the mobility of goods and people. Throughout history, artists have moved across borders for a variety of reasons; either by choice or forced to move by wars, natural disasters, and other hardships. In the art installation "When Home Won't Let You Stay", Chinese artist Ai Weiwei explores how contemporary artists are responding to the migration, immigration and forced displacements of today. His is just one example of the use of migration and exile as recurrent themes in art as well as in the lives of artists around the globe.

Crossing borders is seldom easy for artists - even if their presence is specifically required for an exhibition or conference. Within the intersection of Art and Immigration Law lies the paradoxical reality that oftentimes works of art and other cultural goods are able to move much more freely than the people who create them.

Photo © Daniela Gobetti

This article addresses an aspect of art law which, for once, focuses on the artist as a person, rather than on the art work. Here we will refer to the European Union, with particular attention to France, and to the United States.

For foreign artists entering the EU, there are two visa options, depending on the length of stay. For short stays (less than 90 days), the EU has a visa process implemented by the Regulation of July 13th 2009[3], which facilitates visas to nationals of countries not otherwise eligible for them. A Directive of May 2009[4] also allows artists who demonstrate the need for frequent travel to and from the Schengen area to receive a multiple-entry visa valid for a longer period of time.

Depending on a variety of factors including country of origin and nature of work, some artists staying in the EU up to three months will have to apply for a short-stay Schengen work visa (Schengen Type C visa). This visa allows artists to fulfill their business obligations and travel to all EU countries within 90 days.

For longer stays (90 to 180 days), artists must apply for a national or Schengen Type D visa – known as a Skills and Talent Passport in France- which waives the need for an additional work permit. An applicant for this "passport" must be a performing artist (salaried or self-employed), author of a literary or artistic work, or artist of international renown. Support workers, such as show technicians, cannot apply for a skill and talent passport but may be exempt from temporary authorizations for short-term contracts. If applying in France, artists must provide a work contract and sometimes business licenses and documentation of the nature and duration of trips may be necessary. Practitioners should note that the Type D visa allows short stays in other countries of the Schengen area, but does not entitle an artist to work in another country.

Like immigration to the EU, foreign artists traveling to the United States permanently or temporarily often require visas to enter. Typically, a trip of under 90 days will be straightforward using a visa waiver or a visitor's visa. Other stays, even when short, may require a specific visa depending on the activities the artist will carry out in the US and whether the artist will receive payments. For visa purposes, artists can be asylees, refugees, visitors, culturally unique, or recognized as extraordinary in their field.

The visa type often considered as the "artists' visa" is in fact a classification for people with extraordinary ability in the sciences, business, education, athletics, or the arts.[5] The interpretation of "art" in the regulations is broad[6] and allows for the applicant to prove that his/her work should be classified as art. Therefore, some fields outside the classic art world can apply – examples include the gaming industry, marketing, or business management of art organizations. Whether or not an adjudicator will consider the field in question to be a valid art form is another question, and may cause additional delays and fees accrued during the application process. As with any work visa in the US, artists' visas are based on evidence from itineraries, employers, and job duties; moreover, there may be constraints on types of activities an artist may perform while in the country.

While this article provides an overview of legal processes surrounding immigration of artists, the complexities of entry into the EU and US are extensive and often convoluted. The many factors an artist must consider when traveling to the EU and US reveal the often extreme limitations of movement against which artists must consistently struggle to be successful in their careers and bring their productions to new locations and wider audiences. ♦

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[1] Anne-Sophie Nardon is a lawyer based in Paris, specialized in Art law. She also serves as Vice-chair of the Art and Cultural Heritage committee of the ABA, in charge of special projects.

[2] Betina Schlossberg is a lawyer in Ann Arbor, specializing in immigration and art law. She is also Vice-Chair of the Immigration committee of the ABA Section of International Law, in charge of programs.

[3] REGULATION (EC) No 810/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 establishing a Community Code on Visas

[4] COUNCIL DIRECTIVE 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

[5] INA 101(a)(15)(O)

US Nonprofit Issues Free Publications on Art and Heritage Law

By: Kate Fitz Gibbon[1]

For the last two years, the Committee for Cultural Policy (CCP)[2], has been working with the Thomson Reuters Foundation's TrustLaw[3] and an international team of law firms to create independent, professionally produced research papers on art and heritage laws, policy and administration. The publications are intended to be a resource for cultural institutions, heritage specialists, legal professionals and policy makers around the world. By making the series available for free download on the Web, we hope to give students, teachers, and the interested public easy access to cultural policy studies from a range of countries and cultural perspectives.

In June 2020, we published the first nine volumes of the Global Art and Heritage Law Series, covering Bulgaria, China, England and Wales, India, Italy and the EU, Nigeria, Peru, Turkey, and the United States, all written by volunteer attorneys who gave their time to the TrustLaw project.

The primary task before each TrustLaw team was to gather together the national laws, treaties and agreements signed by each country, to describe each country's cultural heritage administration, documentation, and preservation activities, and if possible, to examine the social and political context in which heritage was managed in each country.

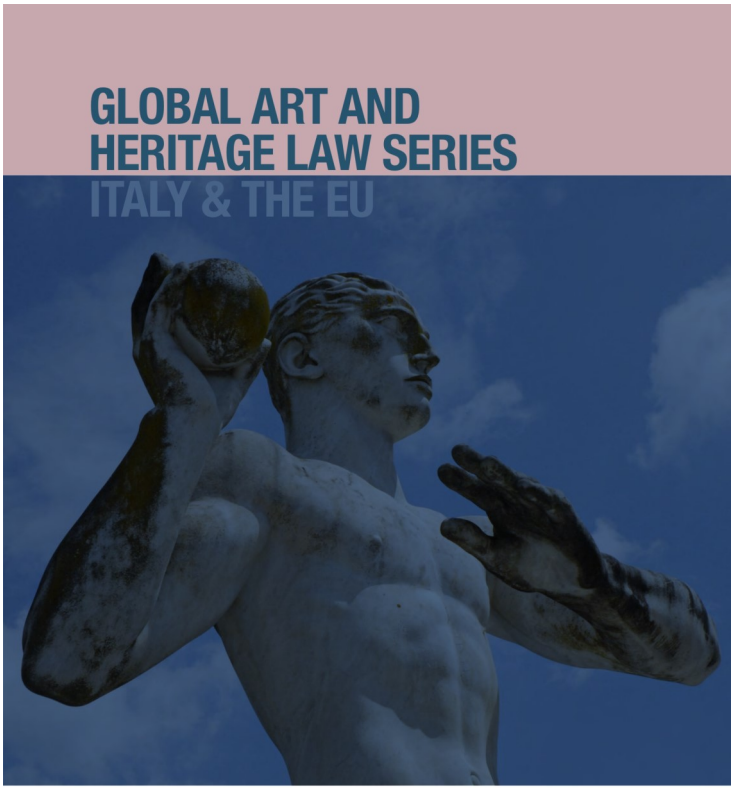
The project is both experimental and very ambitious – a model for international legal cooperation we hope others will expand upon. By setting forth the basic systems for each country's heritage management, we hope to make loans and exchanges between museums around the world a little easier. We believe that enabling a better understanding of different legal regimes can help in the development of workable international cultural policies. Better access to data on crime and law enforcement should also contribute to building effective systems for the lawful circulation of art and resolve claims for return of looted materials.

While the volunteer attorneys and their firms did not necessarily specialize in art law, all the participants had a personal interest in the arts and recognized the benefits of developing a practice in a little-served area of the law. They were familiar with their home-country's legal and regulatory structures; this awareness of community practices gave them insights into the actual workings of local heritage systems. As one volunteer attorney experienced in Bulgarian law explained, "There are laws but there are also unofficial 'doorways' through which people work to make things happen."

The volunteer legal teams knew that while lists of treaties and domestic legislation could be relatively easily organized, other information was not publicly accessible, and in some countries, cultural heritage matters were politically very sensitive. We did not expect to be able to find answers to all of our questions – but the results were well worth the time and energy – and a source of inspiration to expand the project further and add additional country reports.

The choices of countries depended upon the firms that volunteered for the project. We were extraordinarily lucky to find dedicated volunteer attorneys widely dispersed around the globe. The firm of White & Case LLP volunteered to coordinate and attorneys Olivia Franklin and Hazel Levent were instrumental in organizing the project. They also volunteered as project authors; Franklin co-authored the England & Wales volume and Levent co-authored that of Turkey.

The reports differ in length and content but all are highly informative. Their variety derives in part from the complexity of domestic heritage management in each country and the types of its cultural institutions. The content also depends upon the authors' available resources. For example, the China report is a tour de force of multi-lingual legal research – a detailed compilation of national and regional legislation and regulations. The India report is strong on history but also includes a dissection of heritage policies under India's Ministry of Culture and the Archaeological Survey of India based upon a major investigation commissioned by the Parliament.



The reports also show how each country's cultural regime was informed by its unique history and political experience. The Peruvian and Nigerian heritage regimes reflect both past colonial experiences and the sophistication brought by trained academics to international cultural diplomacy. Bulgaria offers an example of the changes wrought since the Communist's downfall and its entry into the EU. Turkey's rich history of empire and diverse population are key factors in both its historical cultural policies and in those of today.

The UK, USA, and Italy each has thousands of museums; each has historically been a major center for the international trade in art. Each has an industrialized infrastructure in which economic development has coexisted for decades with archaeological interests. But despite these many similarities, the three countries have evolved unique cultural policies – among them the USA's tradition of public funding and volunteer support for museums, England and Wales' Portable Antiquities Scheme for rewarding finders and their focus on public education to protect sites and monuments, and Italy's protectionist export policies and complex delegation of powers over cultural heritage through regional legislation.

A primary goal of the project is to open readers' eyes to the different ways that different countries have – even within this narrow legal field - of thinking about cultural property. The Committee for Cultural Policy is planning additional reports now. We welcome contributions from legal researchers in other nations – let us hear from you! ♦

[1] Kate Fitz Gibbon is executive director of the Committee for Cultural Policy. She was organizer of the Art and Heritage Law Series, wrote the USA volume with Katherine Brennan, and co-authored the India volume.

[2] The Committee for Cultural Policy, Inc. is a 501(c)(3) nonprofit committed to strengthening the public dialogue on arts policy. It publishes detailed research on art and the law and the online Cultural Property News at culturalpropertynews.org and culturalpropertylaw.org.

[3] The Thomson Reuters Foundation's TrustLaw connects volunteer law firms and legal teams to non-governmental organizations and social enterprises effecting social and environmental change.

Barnet v. Ministry of Culture & Sports of the Hellenic Republic

By: Lois Wetzel[1] and Patty Gerstenblith[2]

In *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193 (2d Cir. 2020), the Court of Appeals for the Second Circuit considered whether it had subject-matter jurisdiction over Greece pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-11.

The Trustees of the 2012 Saretta Barnet Trust consigned an ancient Geometric period horse figurine to Sotheby's for auction in 2017. A few days before the auction was to take place in May 2018, the Greek Ministry of Culture sent Sotheby's a demand letter asserting a claim to the figurine pursuant to Greek laws that vest ownership of certain moveable ancient objects in the State. Sotheby's withdrew the figurine from auction and Sotheby's and the Barnet Trust (hereafter Plaintiffs) sued Greece, seeking a declaratory judgment that the Barnet Trust was the rightful owner of the figurine. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 391 F. Supp. 3d 291 (S.D.N.Y. 2019).

Greece moved to dismiss the action on the grounds that the court lacked subject matter jurisdiction under the FSIA. Per the FSIA, a foreign sovereign is presumed to be immune from the jurisdiction of U.S. courts subject to certain codified exceptions. *See Matar v. Dichter*, 563 F.3d 9, 12 (2d Cir. 2009). Plaintiffs relied on the third, or "direct-effect," clause of the FSIA's "commercial activity exception" as the basis for jurisdiction. This exception applies where the underlying action is based upon an act outside the territory of the United States that was taken in connection with a commercial activity of the foreign sovereign elsewhere that caused a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The district court found that sending the demand letter to Sotheby's satisfied the "direct-effect" clause. Greece appealed principally on the issue of whether it was engaging in a "commercial activity".

The Second Circuit agreed that the core predicate act was Greece's sending a letter asserting ownership of the figurine. The Second Circuit then engaged in a two-step analysis to determine whether sending the letter was an act taken in connection with a commercial activity. The first step was to identify the activity of Greece outside the U.S. to which the predicate act related; the second was to determine whether that activity was "commercial" under the FSIA. If the act is exclusively sovereign in nature, then it is not commercial.

The district court analyzed whether sending the letter was a commercial as opposed to sovereign act. The Second Circuit explained that this was error because the FSIA requires the commercial activity in the second element to be distinct

from the core predicate act of the first element. Sending the letter could not be both the predicate act and the commercial activity. If sending the letter was both the predicate act and the commercial activity to which the predicate act related, then it would be more appropriate for the Plaintiffs to assert jurisdiction under the first clause of the commercial activity exception.

The Second Circuit found that Greece's sending the letter was taken in connection with its assertion of ownership under Greece's vesting laws. Thus, the activity to be assessed for its commerciality was Greece's adoption and enforcement of its ownership laws.

FSIA caselaw instructs that the commerciality of an activity should be determined by reference to the "nature" of the activity and not its "purpose." In the seminal FSIA case, *Republic of Argentina v. Weltover, Inc.,* the Supreme Court described an activity's purpose as "the reason why the foreign state engages in the activity," while the nature of an activity is "the outward form of the conduct that the foreign state performs or agrees to perform". 504 U.S. 607, 617 (1992) *quoting De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, at 1393 (5th Cir. 1985). The Second Circuit then decided, without analysis, that the "outward form" or nature of Greece's activity was the vesting of ownership through the enactment and enforcement of its ownership laws. The Court drew from past precedent to characterize the nationalization of property as a distinctly sovereign act.

Plaintiffs argued that because Greece had not physically seized the figurine, it had not undertaken a distinctly sovereign activity when asserting its claim of ownership. The Second Circuit rejected that argument, saying that the mere act of adopting ownership laws and enforcing compliance are sufficiently sovereign activities and the FSIA does not obligate Greece to execute its full seizure authority to maintain its immunity from suit.

The Court quoted *Weltover* that the distinction between a commercial and a sovereign activity depended on whether it was an exercise of "those powers that can also be exercised by private citizens" rather than "powers peculiar to sovereigns". 504 U.S. at 614. Plaintiffs' success in the court below hinged upon the argument that sending a letter claiming ownership was an act that a private party could undertake and therefore was not peculiar to sovereigns. The Second Circuit dismissed as immaterial the argument that a private party can send a letter disputing the ownership of an object because the relevant activity to assess was not the sending of the letter but the enactment and enforcement of ownership laws. The court then declared that no private party could nationalize certain objects and regulate their export and ownership.

Because Greece's act of sending the letter was not an act taken in connection with a commercial activity outside of the United States, the Court held that the direct-effect clause of the commercial-activity exception had not been satisfied, without addressing the third element of the clause. The Second Circuit therefore reversed and remanded with instructions to dismiss the action for lack of subject matter jurisdiction. The decision is significant because it allows foreign sovereigns to assert ownership to antiquities sold or otherwise present in the United States without thereby losing the protection of sovereign immunity to which it is otherwise entitled under the FSIA's presumption of immunity. The decision also recognizes the uniquely sovereign nature of vesting title to antiquities in the State, without need for the State to first reduce the antiquity to physical possession. ♦

[1] Associate Attorney, Barnes, Richardson and Colburn, LLP

[2] Distinguished Research Professor, DePaul University College of Law

Southern District of New York Re-Opens Instagram Sub-Licenses

By: Laura Tiemstra[1]

The Sinclair v. Ziff Davis case[2], originally dismissed on a 12(b)(6) motion (and reported in the Spring 2020 issue of this Newsletter), has been revived by the Court's granting of Sinclair's motion for reconsideration.

Photographer Stephanie Sinclair sued the media platform Mashable and its parent company, Ziff Davis, for copyright infringement after an Instagram post by Sinclair was imbedded in an article published on Mashable.

On the 12(b)(6) motion, the Court found that Sinclair's agreement with Instagram included granting Instagram the right to issue sublicenses of any image Sinclair posted on a "public" Instagram account.[3]

The Court further found that Instagram offers an open invitation of a sublicense to anyone who embeds Instagram posts using Instagram's application program interface (API), and that when Mashable utilized Instagram's API, it was exercising the sublicense on offer from Instagram.

Finally, the Court ruled that the fact that Ziff Davis controls Mashable does not extend liability to Ziff Davis for any copyright infringement committed by Mashable.

Sinclair moved for reconsideration on several grounds, primarily challenging whether (a) there is a valid agreement to sublicense between herself and Instagram (arguing lack of consideration, ambiguity of the contract); and (b) whether Mashable has met its burden of proving a valid sublicense agreement between itself and Instagram.

On June 24, the Court granted the motion for reconsideration as to the claim of copyright infringement by Mashable (but upheld the dismissal of Ziff Davis). The Court found on reconsideration that, at the pleadings stage, there was insufficient evidence to establish a valid sublicense agreement between Mashable and Instagram. The Court stated it previously had not given sufficient weight to the fact that a license – or in this case a sublicense – "must convey the licensor's 'explicit consent' to use a

copyrighted work."

In granting the motion to reconsider, the Court also relied on the June 1, 2020 decision in *McGucken v. Newsweek LLC*, a very similar case also in the Southern District of New York wherein Newsweek used Instagram's API to embed a copyrighted photograph owned by McGucken. As in *Sinclair v. Ziff Davis*, Newsweek asserted as a defense that it had exercised the sublicense offered by Instagram. In *McGucken*, the Court denied the Rule 12(b)(6) motion to dismiss and found that there were insufficient grounds to find an agreement between Instagram and Newsweek.

Therefore, both *Sinclair* and *McGucken* cases will move forward, but only as to whether Mashable and Newsweek received explicit consent to sublicense images from Instagram, not as to whether Instagram has the right to issue those sublicenses. Ultimately, the decisions from the Southern District of New York may increase the burdens on Instagram and similar social media giants in issuing sublicenses, but have found consistently that the user agreements granting Instagram, et al. the right to issue a sublicense are enforceable agreements. ♦

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[1] Law Offices of Armen R. Vartian, Chicago, IL.

[2] *Sinclair v. Ziff Davis, LLC, and Mashable, Inc.*, No. 1:18-CV-00790 (S.D.N.Y. April 13, 2020).

[3] "Private" Instagram accounts are restricted. Not only are they visible only to persons following that Instagram account but the account-holder must individually approve each "follower". In other words, only people who already know of the private Instagram account may view the postings by that Instagram account.

"Public" accounts are therefore necessary for anyone hoping to increase awareness and market their work via Instagram. With the Sinclair ruling, however, users will have to balance marketing their work against diminishing its value through Instagram's sub-license.

[4] *McGucken v. Newsweek LLC et al.,* No. 1:19-CV-09617 (S.D.N.Y. 2020).

The *Marabar* Controversy

Purpose, selection and meaning of public art, site-specificity and art history

By: Sharon M. Erwin, Esq.*

Recent controversies over public sculpture and public art have centered primarily on the removal, relocation or re-contextualization of monumental works viewed by many as symbols of racism, colonialism, white supremacy or cultural suppression. In the United States, recent disputes involve Confederate monuments, racism and cultural suppression, while elsewhere controversies often involve the history of colonialism and immigration. A different public art controversy has unfolded in Washington, D.C. over Elyn Zimmerman's 1984 site-specific sculptural installation, *Marabar,* and the National Geographic Society's plans to remove the work from the plaza in front of its headquarters under plans for a redesigned space.

The *Marabar* controversy provides a prism through which to reflect on other public art disputes. *Marabar* raises its own unique issues, including what it means to remove or destroy a site-specific work, the historical importance of a recognized public artist's first monumental work, the significance of feminist art generally, the importance of a work in the context of art history, and the respective rights of private organizations, the public and artists regarding privately commissioned works on privately owned property in historically designated areas. Nevertheless, the controversy provides another reflection on the importance of public space in a democracy.

Marabar is the first large-scale stone project of artist Elyn Zimmerman.[1] It includes five massive mahogany-colored granite boulders flanking a long and narrow reflective pool (6' x 60").[2] The National Geographic Society (NGS) commissioned the work for its campus in Washington, D.C., to be integrated as a focal point in its then-existing modernist public plaza, designed by David Childs of Skidmore, Owens & Merrill (SOM), in collaboration with landscape architect James Urban.[3]

Completed in 1984, *Marabar* is named after the fictional cave in E.M. Forster's novel, *A Passage to India,* in which the cave's interior walls of living rock were mysteriously polished. The artist named the work upon its completion because her installation reminded her of the imaginary cave in the novel. The Marabar cave, in turn, was inspired by the real-life ancient Barabar caves near Gaya, India, dating from the third century B.C.[4]

Elyn Zimmerman is a recognized and celebrated pioneer artist, "one of the earliest contemporary female artists to work at such a monumental scale. Her large-scale artworks have contributed to and defined the use of natural elements in the field of outdoor sculpture and public art."[5] Ms. Zimmerman emerged in the 1970s as a leading exponent of the Los Angeles "Light and Space" movement.

Marabar has remained in place, enjoyed by the public, for more than 35 years, as Ms. Zimmerman's career flourished. In July of 2019, however, NGS filed plans seeking approval from the District of Columbia Historical Preservation Review Board (HPRB), "to unify the existing National Geographic campus with a new pavilion, plaza, renovated ground level and cohesive streetscape." To provide a new main entry and events space, the proposed renovation would demolish Zimmerman's sculpture.[6] The HPRB has jurisdiction because of the location of the NGS pavilion in the District's Sixteenth Street Historic District and because of the pavilion's connection to the Edward Durell Stone building on the campus, which is a pending landmark building.[7]

The Preservation Board approved the NGS plans in August of 2019, although it appears that the Board was not aware of *Marabar's* presence in the plaza, or of its significance. Following HPRB approval, NGS sought approval for the project from the District of Columbia's Department of Consumer and Regulatory Affairs, necessary to obtain building permits. While that review remained pending, The Cultural Landscape Foundation (TCLF) learned of the potential loss of *Marabar* and asked the HPRB in March of 2020 to revisit the plans for the new pavilion in order to make a full assessment of its effect on the sculpture.

TCLF, a nonprofit group established to educate and engage the public on the importance of landscape design, designated *Marabar* a Landslide® site, TCLF's designation for landscape features that are at risk of demolition. The goal of the TCLF Landslide® program is also to "rally support at the local, state, and national levels by calling attention to threatened and at-risk landscapes . . .."[8] TCLF argues that the removal of *Marabar* will mark the erasure of the first large-scale stone project in the artist's repertoire and a critical representative of American site-specific art. TCLP believes that the NGS plans to reimagine its campus need not be at the expense of *Marabar.*

Numerous prominent artists, architects, art historians, landscape architects, public art professionals, curators, and museum leaders joined in TCLF's request to HPRB through letters articulating why they thought the HPRB should reconsider its original vote and why *Marabar* should be preserved in its site-specific location.[9]

In response, NGS argued to the Review Board that it "should not reconsider its concept approval to account for *Marabar* because *Marabar* is not historic, reconsideration would establish a bad precedent, NGS was forthcoming with its plans, *Marabar* removal is necessary for an improvement, and *Marabar* is NGS' private property. [10]

Those seeking reconsideration raised different perspectives on the importance of *Marabar*. Some focused on the integration of art, architecture and landscape; others focused on the stature

of the artist and *Marabar's* importance in the trajectory of her work. Still others noted Marabar's importance to feminist art. Artist Joyce Kozloff, for example, wrote that the early eighties were "a wonderful time for women artists emerging in public art. There were opportunities in this new field when galleries and museums were not open to us." Other supporters emphasized the beauty of the open and public space, as well as its tranquility.

In response to all of the submissions, HPRB voted on May 28, 2020 to revisit its original vote, stating:

The Board considered the many public letters it received regarding the proposed removal of the Marabar sculpture at the National Geographic headquarters and determined that it did not have sufficient information on the sculpture when it approved redevelopment plans that would result in its removal. The Board asked that the project be scheduled for reconsideration at a future meeting so it could hear from the project applicants and proponents of the sculpture's retention, and strongly encouraged National Geographic to consider whether the sculpture could remain in place or be incorporated into its proposed project.

A future meeting has not yet been scheduled.

Regardless of the outcome, an encouraging aspect of this and other controversies over public monuments and sculptural installations is that they often lead to serious consideration of the purpose, selection and meaning of public art, heritage, and history. The controversies and their resolution confirm that in a democracy, "the constructing and revising of public spaces is . . . a realm of democratic discourse, influenced by popular opinion and competitive electoral politics."[11] Public art is very much a reflection of how we see the world and our place in it.♦

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[*] Principal, Law Office of Sharon M. Erwin, LLC, focusing on arts and nonprofit law, as well as consulting on arts-related litigation.

[1] https://www.elynzimmerman.com/marabar-.

[2] *Planned Removal of Stone Sculpture from National Geographic campus continues to generate outrage*, Matt Hickman, May 13, 2020, The Architect's Newspaper.

[3] *Id.*

[4] *The Ancient Barabar Caves near Gaya*, Ruchi Pritam & Kumar Jayant, September 19, 2019, http://www.pragyata.com/mag/the-ancient-barabar-caves-near-gaya-808.

[5] Letter of Penny Balkin Bach, Executive Director and Chief Curator of the Association for Public Art, to the District of Columbia's Historic Preservation Review Board (HPRB), dated April 8, 2020. https://tclf.org/association-public-art-urges-review-board-preserve-marabar.

[6] See https://tclf.org/sculptural-installation-marabar-artist-elyn-zimmerman-national-geographic-society-headquarters?destination=search-results.

[7] NGS letter of May 22, 2020 to HPRB, https://app.box.com/s/dhn9muwq7e6fqor5v5v40hn1w7yanfma/file/668526397130.

[8] Id.

[9] An extensive sampling of the letters can be accessed at https://tclf.org/feature-type/marabar-letters-support?destination=search-results.

[10] The NGS submission is available at https://app.box.com/s/dhn9muwq7e6fqor5v5v40hn1w7yanfma/file/668526397130. Note: The creation of Marabar predates the passage of The Visual Artists Rights Act (VARA), and, therefore, there are no VARA issues.

[11] *Things to Think About When Taking Down Statues*, Steve Coll, The New Yorker, August 31, 2017.

To get involved with the Committee, contact David Bright or Birgit Kurtz, Committee Co-Chairs for Membership, at DBright@pughhagan.com or birgit.kurtz@gmail.com
For newsletter subscriptions and submissions, contact Armen Vartian, Committee Vice Chair for Publications, at armen@vartianlaw.com