Muralists' Legal Rights

Prepared for the 2006 International Mural Conference in Mexico by Brooke Oliver, Esq., U.S.A.

Introduction

It is not only Michelangelo's Sistine Chapel frescos or the murals of Diego Rivera that inspire passion. On storefronts, city buildings, schools, and along alleys, murals and sculptures by some of the world's greatest artists illustrate themes ranging from the sublime to the political. *The Great Wall of Los Angeles* runs for a full half a mile along the Tujunga wash in Los Angeles, depicting California history decade by decade.[1] A San Francisco mural on the Women's Building covers two entire facades of a four story building with a multicultural painted tapestry of women's history, cultural contributions, and goddesses.[2] Thousands of publicly displayed murals or sculptures represent the best in easily accessible and understandable fine art, available without the price of admission to a museum. These modern masterpieces unexpectedly reach out from neighborhood walls to touch passers by, inspiring silent prayers, connections with cultural history, laughter, anger - - and untold numbers of copyright infringements and other violations of artists' rights.

Murals and sculptures have been at the center of recent public art controversies. Images by spray can artists in Los Angeles that L.A. ordered covered spurred a national debate over the extent of artists' freedom to express themselves when commissioned to paint on city-owned property.[3] Publishers and photographers often mistakenly assume that murals and sculptures displayed on public streets are somehow in the public domain, snapping up those images for use in books and commercials. In fact, murals and sculptures are protected from such misappropriation by federal copyright law. Murals and sculptures are also becoming commercially valuable, as rights to use them in films, television, publications, software, and music videos are licensed, and as artists use increasingly sophisticated technology and production techniques to increase the number and profitability of original murals or sculptures, in conjunction with business savvy to market mural or sculpture reproductions and merchandise.[4]

Developers and building owners who destroy or damage murals or sculptures in violation of federal law do so at their peril. A $200,000.00 public settlement following issuance of a mandatory injunction ordering removal of whitewash that a developer had painted over the Lilli Ann mural in San Francisco put developers, contractors, and attorneys all over the country on notice that the federal Visual Artist's Right Act has sharp teeth, and that damages can be far more than a slap on the wrist. This article will address the law of murals as it relates to artists, those public agencies or private parties who commission such artwork, the building owners on whose property the murals or sculptures are displayed, and conservators who may be retained to repair or conserve damaged works of art.

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[1] *The Great Wall of Los Angeles* © 1981 by Judith F. Baca.
[2] *Maestrapeace* © 1994 by Juana Alicia, Miranda Bergman, Edythe Boone, Susan Kelk Cervantes, Meera Desai, Yvonne Littleton and Irene Perez
[3] *Where Life Is Sideshow, Street Art Passes /Limit*: *Painting, With Police Beating, Is Covered*, New York Times, September 9, 1997. Also covered by Rush Limbaugh, September 2, 1997, and Politically Incorrect, week of September 22, 1997.
[4] *Cadre of Painters Cash In on Popularity*, Los Angeles Times, September 22, 1997.

MURALISTS' COPYRIGHTS PROTECT AGAINST UNAUTHORIZED REPRODUCTION

Murals Are Protected by International and National Copyrights

Murals are works of visual art protected by the international law and various national copyright laws. The Berne Convention Treaty, on which Mexico is a signatory, protects murals from unauthorized reproduction. Various national laws extend or restrict the Berne Convention's protections within that nation's borders. Berne, like most international copyright treaties, is based on the principle of national treatment for works by authors of other member states.[5] This means that each member state must treat the works of foreign authors (from other member states) the same as its own authors. For example, where an internet artwork by an American artist is modified or altered in Spain, the American artist is entitled to all of the protection of moral rights that Spanish law extends to its own authors and artists, and which protection may be greater than is afforded to the artist in the U.S.

U.S. Copyright Law:

In the United States, courts have ruled that murals are protected by federal copyright laws. Carter v. Helmsley-Spear, 71 F.3d 77, 84 (2d Cir. 1995 *citing* HR Rep. No. 514, 101st Congress, 2d Sess. @ 11 (1990)). Under copyright law, muralists are guaranteed certain rights that allow them to reap financial benefits from selling or licensing reproductions of their creative work. The muralist and *only* the muralist may: 1) freely reproduce the mural; 2) prepare other artwork (like photographs, postcards and posters) based on the original mural; 3) publicly distribute those reproductions; and 4) publicly display her copyrighted work. 17 U.S.C. 106. Others may do so only with the muralist's consent. These exclusive rights belong to the muralist from the moment her idea is fixed in a tangible medium of expression, such as painting it on a wall. 17 U.S.C. 102(a).

Muralists' Copyrights Suffer Only a Few Limitations.

Collaborative Projects – Joint Copyrights

First, if the mural was a collaborative project among several muralists, the copyrights belong to all of them jointly. That means that any one of them can license the entire mural to anyone, unless a written agreement among them restricts an individual copyright holder's rights. For example, muralists could agree that a license may be granted only by unanimous consent or by a vote of the majority of collaborators.

Duration: Lifetime Plus 70 Years

Second, the rights last for only a specific time -- for the muralist's lifetime (or the life of the last living muralist), plus seventy (70) years. 17 U.S.C. 302(a). In the case of joint works prepared by authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death. 17 U.S.C. 302(b). A deceased joint author's heirs may assert copyrights passing to them by will or descent

[5] Article 5.

until 70 years after the last surviving author's death. After that time, the mural passes into the public domain, free for everyone to use.

Works Made For Hire

Third, the muralist may have given up her copyrights if the mural is created as "Work Made For Hire." If she created the mural as an employee in the scope of her employment, the mural is a Work Made For Hire. 17 U.S.C. 201. If the muralist is working independently, words like "work made for hire" in a contract should be a red flag – it means that the muralist is agreeing that the commissioning party owns the copyrights, and all the economic benefits that flow from them.

Even if a written contract calls the mural a Work Made For Hire, the muralist may challenge the validity of the Work Made for Hire designation, unless the mural fits into one of nine specific categories.[6] In 17 U.S.C. 101 these categories are defined as "a work prepared by an employee as part of his or her job; or ...a commissioned work which the parties agree in writing is a work made for hire, and which is either a contribution to a collective work, like an anthology of stories, a part of a movie or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test or a test answer, or an atlas.[7] In California, if the work is a work for hire, a commissioning party must also provide unemployment and workers' compensation insurance. Cal. Lab. Code 3351.5(c) (referencing 17 U.S.C. 101).
Few murals fit into any of those categories. Some murals, like multi-panel pieces for which different artists each create independent panels, might be collective works. Others, which assemble preexisting designs or photographs together in such a way that the resulting mural constitutes an original work of art, may fit into the compilation category. Such murals could truly be Works Made for Hire, if the muralist so agrees in writing. If the commissioning party truly needs the copyrights, and the independent muralist agrees, the contract should provide for a transfer of copyrights, not merely state that the mural is work made for hire. Seldom, however, does the commissioning party actually have to own the copyrights in a mural; they simply want to be able to use the image for some purposes. It generally makes more sense for the muralist and commissioning party to negotiate over the terms of a license to reproduce the mural for particular purposes, as part of the original commission fee or for additional fees, than to do the work as a Work Made for Hire.

A Cautionary Note for Nonprofits

Since many murals are commissioned by nonprofit organizations, they and the muralists must carefully consider the issue of who shall own the copyrights. Non-profits can easily run afoul of federal 501(c)(3) restrictions against "private inurement" if the muralists are insiders -- like directors, members, or staff -- and are allowed to personally benefit from copyrights in murals created with the non-profit's funds. It is wise for nonprofits to seek expert legal help in making agreements relating to copyrights, trademarks, and patents.

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[6] *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).
[7] A Work Made For Hire is a work prepared by an employee as part of his or her job, or is a commissioned work which the parties agree in writing is a work made for hire, and which is either a contribution to a collective work, a part of a movie or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test or test answer, or an atlas. 17 U.S.C. 101.

"Fair Use" vs. Licensed Uses

The final exception to copyright protection is a legal doctrine known as "fair use." This is a favorite response from publishers who are caught with unauthorized reproductions of murals in their publications. It is true that others may use copyrighted artwork in certain limited ways without the muralist's consent. 17 U.S.C. 107. For example, an art critic might be able to use a photograph of a mural to illustrate his critical comments about it. However, courts evaluate whether a use is a "fair use" on a case-by-case basis, and no court has yet ruled on what is a fair use of a mural. Where the major part of an original mural has been reproduced to make money for an infringer, and the infringing reproduction harms the market for the original mural and authorized reproductions, it is unlikely a court will find the infringing reproduction a fair use. Many muralists' claims against publishers and filmmakers for copyright infringement have resulted in negotiated settlements and licenses for past and/or future use. Such negotiated settlements have been reached with the New York Times, 20th Century Fox, Chronicle Books, Michelin, Lonely Planet, Corbis, and many others.

In the absence of any clear, bright line, it is prudent for publishers and filmmakers to seek permission from the muralist for any proposed use to avoid the risk of a copyright infringement claim. Most muralists are willing to offer free or lower price license agreements for educational and documentary uses of their work, especially if an appropriate artist's credit is provided, and will provide the publisher with accurate information about the mural and its creators. License fees for commercial uses, broadcast television, and major motion pictures are higher. The Graphic Artists' Guild *Ethical Pricing Guide* and Aspen's *Licensing Royalty Rates* are good standard pricing guidelines. Under 17 U.S.C. §118, public television broadcasts may receive a compulsory license to reproduce copyrighted works of art in broadcasts. The compulsory license fees are set in the Code of Federal Regulations, if the parties cannot agree upon a price.

VISUAL ARTISTS' MORAL RIGHTS PROTECT ORIGINALS
MURALISTS' RIGHTS OF INTEGRITY & ATTRIBUTION

Muralists' rights to protect their original murals from alteration, mutilation, and destruction are protected under international, national, and many states' laws. Muralists also have the right to claim or disclaim authorship of a particular art work. These rights are referred to internationally as artists' moral rights, and are protected to varying degrees internationally. Typically, Europe protects artists' moral rights much more broadly than does the United States, and the degree of protection offered in Latin America and on other continents varies.

International Law:

In general, the question of the whether an artist has moral rights depends whether that artists' nation is a signer of the Berne Convention Treaty, which requires that the member nations protect artists' rights of integrity (wholeness of the piece) and attribution (artists' credit). Where a work is created by an artist in one nation and harmed in another nation, the extent of the artists' moral rights depends on the existence of the Berne Convention treaty to which both countries belong and which protects the particular work and rights involved. Some countries, such as Germany and France, protect the moral rights of foreign authors from countries with which they

do not have treaties.[8] Furthermore, it should be noted that although the European Union has adopted a directive to harmonize copyright protection amongst the member states, the Copyright Directive[9] does not reach moral rights, which remain under the legislation of the member states and relevant treaties.[10]

Berne Convention Article 6*bis* requires protection of the moral rights of paternity/attribution and integrity, but does not have a procedure for enforcing that requirement. Rather, it is the duty of each member country to enact and enforce laws consistent with Berne.[11] In the United States, the moral rights protected by Berne are embodied in the federal Visual Artist's Rights Act (17 U.S.C. 106A) ("VARA"). Berne, like most international copyright treaties, is based on the principle of national treatment for works by authors of other member states.[12] This means that each member state must treat the works of foreign authors (from other member states) the same as its own authors. For example, where an internet artwork by an American artist is modified or altered in Spain, the American artist is entitled to all of the protection of moral rights that Spanish law extends to its own authors and artists, and which protection may be greater than is afforded to the artist in the U.S.

Similarly, when a foreign artist's work is acquired by a U.S. museum, claims by the artist against the museum for alteration and modification of the work within the United States are governed by VARA, which may provide narrower protection than the moral rights laws of the artist's home country. In both of these examples, the violation of moral rights is presumed to take place within a certain jurisdiction. Nonetheless, global display of New Media art on the internet raises the question of whether the artist may be able to bring moral rights claims—and the museum or others defend them—in jurisdictions where the modified or altered work is merely displayed. In a written contract, museums or others commissioning a mural and the muralist can agree to choice of law and venue provisions, providing that the copyright law of a particular nation will apply in addition to the standard choice of law terms that appear in most contracts. Additionally, applicability of moral rights laws can be expressly modified. While under U.S. law, these rights can be entirely waived, complete waivers will not necessarily be upheld under VARA and in other nations.[13]

U.S. Law:

The federal Visual Artists' Rights Act of 1990 (17 U.S.C. §§ 106A, 113) is the United States' embodiment of artists' moral rights as required under the international Berne Convention treaty.

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[8] Paul Goldstein, International Copyright: Principles, Law, and Practice § 4 (2001).

[9] DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf.

[10] According to Section 19 of the European Copyright Directive, "the moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive." DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf.

[11] Article 6*bis*(3).

[12] Article 5.

[13] Waiver of Moral Rights in Visual Artworks. http://www.copyright.gov/reports/exsum.html.

The expressly limited United States Visual Artists Rights Act (17 U.S.C. § 106A, 113 "VARA") protects the artist's rights of integrity and attribution in the "original" piece of a work of visual art. However, unlike laws of many other nations, U.S. law excludes audiovisual works from the penumbra of its protection. The Visual Artists' Rights Act has been most often litigated in cases where a muralist's moral rights in their artwork conflict with a building owner's goals for the building upon which the mural is painted. Such conflict has most often arisen in the context of large publicly displayed murals and sculptures, where the rights and interests of building owners, developers, commissioning parties (like nonprofits or City governments), and artists collide.

In the U.S., Artists' "moral rights" of integrity and attribution are embodied in both federal and many states' laws. The right of attribution refers to the artist's rights to be credited as the author of the work, or to disclaim authorship under certain conditions. 17 U.S.C. § 106A(a)(1); Cal. Civ. Code § 987(d). The right of integrity refers to the integrity of the artwork itself as a whole, integrated, complete piece of visual art. However, if a mural or sculpture has been created as a Work Made For Hire, under federal law, or for commercial purposes under some states' laws, these rights of integrity and attribution do not apply. 17 U.S.C. §§ 101, 106A(a); Cal. Civ. Code § 987(b)(2, 7).

Elements of a VARA Legal Claim

In the United States, if an artist (or artist's lawyer) wants to enforce the muralists' rights under VARA, they should undertake the following analysis:

I. DOES VARA APPLY AT ALL?

1. **Standing as an artist – does not apply to works made for hire.** Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995)

2. **Status of art work as a covered "work of visual art"**

   Art is a painting, drawing, original limited edition print (signed, 200 or fewer), sculpture, or still photograph (signed, 200 or fewer). Not glass art works.

   A clay sculpture created as a preliminary piece before casting a bronze from it is a covered "work of visual art." Flack v. Friends of Queen Catherine, Inc. 139 F.Supp. 2d 526 (S.D.N.Y. 2001)

   VARA does not protect advertising, promotional, or utilitarian works, and does not protect works for hire, regardless of their artistic merit, their medium, or their value to the artist or the market. *See* 17 U.S.C. § 101; Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003)

   VARA does not protect site-specific work from being moved. "[A]n artist has no right to the placement or public presentation of his sculpture." Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 100 (D. Mass. 2003)

3. **Time of Creation and Title are Significant – VARA's effective date was June 1, 1991**

   VARA protects pre-VARA murals or sculptures for which title has not been transferred from the artist to someone else. 17 U.S.C. § 106A(d)(2). For those works, VARA rights survive the author, and last the same period of time as the Section 106 copyrights, life of the artist(s) plus 70 years, so heirs can enforce. 17 U.S.C. § 106A(d)(2). For works created after June, 1991, VARA rights do not survive the muralists and the heirs cannot enforce.

4. **Registration of copyrights in the artwork is not required** to file suit, or to claim statutory damages and attorneys fees. 17 U.S.C. 411

II. IF IT IS AN ATTRIBUTION CLAIM:

1. **ATTRIBUTION LACKING- Defendant failed to properly credit authorship** or credit was inconsistent with plaintiff's status as author
2. **ATTRIBUTION W/O ARTIST'S CONSENT - Defendant continued to identify artist as author of a work after modification**

III. OR IF IT IS AN VIOLATION OF THE INTEGRITY RIGHT

1. **DAMAGE OR MODIFICATION OF ORIGINAL ART WORK –**

a. **Art was <u>damaged, distorted, mutilated or modified, or threat of such damage</u> by defendant,**

AND

b. defendant's conduct was **intentional OR** defendant acted with **knowledge or reckless disregard** for prospective harm to art, including a claim for **negligent conservation work** (but not mere damage from fading or lighting).

AND

c. Defendant's modification, distortion, mutilation or damage to art is **injurious to the artist's honor and reputation**

OR

2. **DESTRUCTION OF AN ORIGINAL ART WORK**

a. defendant's conduct was **intentional,**

AND

b. the art was a work of **recognized stature**

<u>Carter v. Helmsley-Spear, Inc.</u> 71 F.3d 77, 84 (2d Cir. 1995).
<u>Martin v. City of Indianapolis</u>, 192 F. 3d 608, 612 (7th Cir. 1999)
<u>Polara</u> order – recognized stature is a question for the jury that survives summary judgment.

BUT IF ART IS AFFIXED TO A BUILDING (17 U.S.C. §113)

3. Not Removable: Art is/was **affixed** to a building, and removal would likely result in so much damage to the art that it would harm artist's honor and reputation, *and*

a) Art is relatively new (i.e. it was created on or after June 1, 1991); and

b) No express written agreement by artist acknowledging prospect of damage on removal

4. ***Removable:*** Art is/was **affixed** to a building where removal would not likely result in too much damage or modification to the art work and

a) Defendant has **failed to provide artist with 90 days written notice**, *or*

b) Defendant has failed to **make a diligent, good faith attempt to notify artist** of intended action affecting the artwork- A LETTER SENT FIRST CLASS TO ARTIST'S LAST KNOWN ADDRESS IS ENOUGH!

IV. REMEDIES

1. **Damages – Actual or Statutory** <u>Martin v. City of Indianapolis</u>, 192 F. 3d 608, 612 (7th Cir. 1999)
2. **Attorneys' Fees are also available.** *Id.*

V. PROVING A VARA CLAIM & OTHER PRACTICE TIPS

1. Standing as An Artist

a) Must be a natural person who create the work of visual art (author)

i) Not an employee or work made for hire situation. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995)

ii) *Practice Tip*: If a company or nonprofit commissions the work as a work made for hire and acquires copyrights upon creation, then no VARA rights attach to the work, because moral rights are personal to the artist. If the artist later transfers the copyrights to the company or nonprofit, the artist keeps the VARA rights, because they cannot be transferred. This is a drafting issue in copyright registrations and mural commission contracts. In the commission contract, to preserve the VARA rights, the drafter must split out the copyrights and VARA rights into different sections, reserving the VARA rights to artist, even if the copyrights are being transferred to the commissioning party. The drafter must then address issues related to who will have the right and/or obligation to enforce the VARA rights and pay for and benefit from any such enforcement actions. If the entity claims copyright ownership in its registration of the copyrights, the copyright registration form must say that the copyrights have been transferred by written agreement, not that the work was a work made for hire.

2. Status of art work as a covered "work of visual art"

a) Art is a painting, drawing, original edition print, sculpture, or still photograph

i) If original print or sculpture, existing only as an original or edition of 200 or fewer signed by the artist and numbered in a series. Use photos of the original artwork, great if they also show the artist painting it. Encourage clients to document their work well. Certificates of authenticity for limited edition prints are excellent.

ii) If a photograph, produced for exhibition purposes only, and part of an edition of 200 or fewer signed and numbered. Use documentation from where the photos are/will be exhibited (exhibit announcements, gallery ads, website print outs, etc.). Certificates of authenticity for limited edition photos are excellent evidence.

Either

3. Defendant failed to properly credit authorship or credit was inconsistent with plaintiff's status as author

Or

4. Art was <u>damaged, distorted, mutilated or modified</u> by defendant, and

a) Defendant's conduct was **intentional or** defendant acted with knowledge or **reckless disregard** for prospective harm to art.

i) Damage cannot be from accident or negligence- *See* <u>Lubner v. City of Los Angeles,</u> 53 Cal. Rptr. 2d 24, 29 (1996).

ii) Damage cannot be from fading due to exposure to light or other effects of aging.

b) If defendant undertook conservation or display of art, the conservation or display intentionally or through gross negligence modified, distorted, mutilated, or damaged the art. Defendant exhibited indifference to the effect of its activity on the art.

And

5. Defendant's <u>modification, distortion, mutilation or damage</u> to art is injurious to the artist's honor and reputation

a) When Plaintiff is an established artist (has a reputation to be harmed), expert evaluation of artist's work to show that as modified it is inferior to his/her other work

(1) Diminished Market Value

(2) 'Would subject plaintiff to ridicule or unfavorable comment in art community

(3) Would cause reduction of desirable commissions or other employment opportunities;

b) For a less established artist, expert evaluation of artist's work to show that the distortion, damage, or modification would prevent or delay acceptance into the more favored art community.

c) Work as modified is different artistically from what artist intended.

d) And if it is an attribution claim:

6. Defendant continued to identify artist as author of a work after modification

a) Or

7. Art was <u>destroyed</u> by defendant

a) Defendant's conduct was **intentional**

i) Not the same standard as willful infringement.

ii) Practice Tip: To make the strongest argument for coverage by the defendant's commercial liability insurance, claim should be a personal injury claim (injury to artist's honor and reputation) rather than a property damage claim (negligence is generally an element for property damage coverage, but a viable VARA claim requires an intentional act.) This is issue was recently argued at the Ninth Circuit, but has not yet been decided.

b) The art was a work of **recognized stature**

i) The work has received favorable notice in the art community- local newspaper articles, mural dedication events with speeches by public figures, etc.
ii) <u>Carter v. Helmsley-Spear, Inc.</u> 71 F.3d 77, 84 (2d Cir. 1995).
iii) <u>Marvin v. City of Indianapolis</u>, 192 F. 3d 608, 612 (7th Cir. 1999)
iv) <u>Polara</u> order – recognized stature is a question for the jury that survives summary judgment. (For copy of the order, see Brooke Oliver & Associates website, <u>www.50Balmy.com</u>, artists' rights/landmark cases section.

v) Plaintiff is a distinguished artist with an established reputation for producing high quality art

c) If, however

8. Art is/was **affixed** to a building, and removal would likely result in so much damage to the art that it would harm artist's honor and reputation **(*Not Removable)***

a) Art was created on or after June 1, 1991, *and*

b) No express written agreement by artist acknowledging prospect of damage on removal

Or

9. Art is/was **affixed** to a building where removal would not likely result in too much damage or modification to the art work ***(Removable)***, and

a) Removeability is an issue of fact, and murals very often can be removed. *See* Botello v. Shell Oil Co., 229 Cal. App. 3d 1130, 1138; 280 Cal. Rptr. 535 (1991) and *Order Modifying Preliminary Injunction*, Hon. Martin Jenkins, Northern District of California, in the Lilli Ann mural case (Campusano v. Cort), order on Brooke Oliver's website www.50Balmy.com, artists rights/landmark cases section.

b) Defendant has failed to provide actual written 90-day notice to artist of defendant's intent to remove the art work, *or* Defendant has failed to make a diligent, good faith attempt to notify artist 90 days in advance of intended action affecting the artwork: *Letter sent via first class mail to artist's last known address is sufficient. This is a very small burden on the building owner. In addition, the City of San Francisco also sends such notices to local mural and other arts organizations, requesting that they transmit it to the artist if they know their address. This is not addressed in the statute, but is evidence of making a good faith effort to contact the artist.*

c) Art work was created *before* June 1, 1991 and artist has retained title to the artwork. To show that artist has retained title, even where work is displayed on a building not owned by the artist, show absence of bill of sale, or any other evidence of artist merely permitting display, but continuing to exercise some sort of ownership or control, like going and cleaning off graffiti without charge, or restoring the mural if it is damaged or faded. Also show that building owner permits mural to be displayed on the wall, but never took delivery or title, or never accepted responsibility for or did any maintenance of the mural. Show written contracts that retain artist's services but don't transfer title, or if title is transferred, show absence of delivery or acceptance. VARA does not protect old, sold art work, but CAPA does and is probably not preempted.

10. Damages – Actual or Statutory

a) For damaged, mutilated, distorted or modified art

i) Cost to restore art to original condition. Get estimates from expert conservators.

ii) Cost of inspection and evaluation, transportation, food and lodging, time and materials. Get cost estimates from carriers, etc.

iii) Diminution of the work's fair market value. Expert appraisals.

b) Losses arising from injury to artist's reputation

i) Diminished future earning power. Expert appraisals, preferably with experience at licensing valuation. Appraiser statements about impact of destruction of artwork on the artist's honor and reputation, ability to get future work.

ii) Loss of commissions, licensing and lecture fees, academic employment. Expert testimony, any actual losses. Proof of past licenses using same or similar works.

iii) Cost of publicizing fact that the work is distorted or modified.

c) For destroyed art

i) Fair market value of art. Expert appraisals.

ii) Loss of future earnings attributable to loss of work, including lost publicity for work otherwise displayed in a prestigious location;

iii) Delay in artist's acceptance into greater art community. Statements from expert art historians.

d) Punitive Damages

e) Attorneys fees (and court costs are available in some states, like under CAPA)

Or

f) Statutory Damages of $750 to $30,000; up to $150,000 for willful "infringement;" subject to reduction to as little as $200 for "innocent infringement" under 17 U.S.C. Section 504(c)(1) and (2), plus

g) Attorneys fees under Section 505

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