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CITY BAR

ART LAW COMMITTEE

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VIA ELECTRONIC MAIL

Library of Congress
U.S. Copyright Office
Ms. Karyn Temple Claggett, Director
Attn.: Kimberley Isbell, Senior Counsel of Policy and International Affairs
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Re: Response to Study on the Moral Rights of Attribution and Integrity – Request for Recommendations to Address Issues Arising from Judicial Interpretation of “Recognized Stature” Standard

Dear Ms. Temple Claggett:

This letter is respectfully submitted by the Art Law Committee of the New York City Bar Association (the “ALC”). The New York City Bar Association is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the ALC address legal issues relating to works of art, including the moral rights of visual artists, throughout the United States and abroad. The ALC is comprised of numerous subcommittees, including Subcommittees on Artists’ Rights and Intellectual Property, for which legislation pertaining to moral rights is of special interest.

The ALC writes in response to the notice of inquiry published in the Federal Register on January 23, 2017 seeking comments in connection with the Study on the Moral Rights of Attribution and Integrity undertaken by the United States Copyright Office (the “Office”). Specifically, in response to Question No. 1 contained in the notice of inquiry, the ALC has opined on the “recognized stature” requirement of 17 U.S.C. 106A(a)(3)(A), which is a predicate for stating a claim to prevent destruction of a work of visual art, and has concluded based on a review of relevant case law that judicial application of the statutory term has been overly restrictive and has thwarted fulfillment of the statute’s objectives. The ALC accordingly submits these comments to highlight these issues and in the hope that they will contribute to the identification of possible solutions to them.

The Visual Artists Rights Act

The Visual Artists Rights Act of 1990, codified at 17 U.S.C. § 106A (“VARA”), provides a federal cause of action for violation of an artist’s rights of attribution and integrity, and was enacted following review of existing law for compliance with the United States’ new obligations on adoption of the Berne Convention (“Berne”). As recognized by the Office’s notice of inquiry, the rights of attribution and integrity under Berne are closely linked as non-economic, reputational rights. Among other specific embodiments of the attribution and integrity rights, an artist is entitled to have her name associated with the works the artist authored, and conversely, is entitled to *not* be associated with works of art she did not author. When a work is distorted, mutilated or modified and then continues to be associated with the artist, a viewer perhaps unaware of the modification will obtain a distorted view of the artist’s work and abilities that may be prejudicial to her honor or reputation.

Berne, however, contains no requirement that member countries provide a similar right against complete destruction of an artist’s work, although many countries have elected to provide some such protection. The theory of the differing treatment between modification and destruction appears to be that while an existing, modified work, continues to distort the artist’s *oeuvre* and impact her honor and reputation every time it is displayed or sold, thus negatively impacting her market and her incentive to create, a destroyed work has no such ongoing effect. By this rationale, a single destroyed work no longer has the potential to deceive viewers into a negative view of the artist’s capabilities and hence damage her reputation, even though its destruction will have impoverished the artist’s *oeuvre* and deprived posterity of the benefit of what may have been a major creative achievement.

Some moral rights legislation enacted by the states in the years leading up to VARA often looked beyond the personal reputation rights of the artist and referenced a broader societal benefit in protecting art from destruction. The early efforts to pass a federal moral rights statute consistent with Berne obligations similarly struggled with reconciling the dual aims of protecting an artist’s moral rights and preserving art for the good of society, while not clogging the courts with *de minimis* claims or overburdening property owners with unwanted obligations.

Thus, one early bill, introduced into the Senate in 1987 by Senator Edward Kennedy, protected against “significant or substantial distortion, mutilation or other alteration” and destruction alike, but only for publicly displayed works of recognized stature. S. 1619, 100th Cong. (1987-88). The public display requirement was derived from the New York moral rights act, N.Y. ARTS & CULT. AFF. LAW § 14.03, while the recognized stature requirement was drawn from the “recognized quality” standard of the California moral rights legislation, CAL. CIV. CODE § 987, which had in turn been incorporated into the moral rights law of Senator Kennedy’s home state, Massachusetts, MASS. ANN. LAWS ch. 231, § 85S, in 1984. Ralph Oman, Register of Copyrights, acknowledged that this reference to quality or stature was a departure from the traditional reluctance in copyright law to endorse an unequal treatment of a work of authorship based on aesthetic judgments. However, Mr. Oman argued that when the nature of visual art places a premium on the value of the physical work itself (as opposed to a copy), the preservation of that physical original takes on heightened importance, both for the artist and society as a whole.

Two years later, in 1989, a revised bill was introduced that would protect any work from destruction, distortion, mutilation, or other modification which would be prejudicial to honor or reputation and stated that any such change or destruction of a work of recognized stature was assumed to be prejudicial and therefore a per se violation. H.R. 2690, 101st Cong. (1989-90). Mr. Oman criticized the proposal in the House Hearings, suggesting instead that “[p]erhaps a per se standard could be justified in the interest of preservation, and only the destruction of the work could constitute a per se violation. Alternatively, distortion or mutilation, as well as destruction, might constitute per se violations of the right in works of recognized stature.” See *Visual Artists Rights Act of 1989: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Admin. of Justice of the Comm. on the Judiciary, H.R. 2690*, 101st Cong. 66 (1989-90).

In the end, the Committee on the Judiciary elected to remove all reference to recognized stature for any harm not rising to the level of complete destruction, and VARA was passed in that form.¹ In support of its decision, the Committee cited fears of increased costs of litigation due to a battle of expert witnesses over the standard, and a desire to make clear that “an author need not prove a pre-existing standing in the artistic community’ to be protected.” H.R. Rep. No. 101-514, at 14-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, at 6925. The change reflects a desire to broaden the right of integrity to a more diverse pool of artists and artwork and to encourage artists to enforce their right by removing standards that might burden them with excessive litigation costs. But it does not follow that by retaining the limitation of recognized stature for destruction, the Committee believed that either expert testimony was necessary, or that the author must prove a pre-existing stature in the community. Rather, the Committee’s choice recognized that such evidence was likely to be more relevant when the Court no longer had the benefit of examining the original.

Commentary

The different treatment of destruction of a work of visual art has led to a number of problems.

¹ Thus, 17 U.S.C. §106A reads in relevant part:

a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art

...

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

First, in keeping with the courts' reluctance to interpret VARA broadly, especially when traditional property rights may be in conflict (a trend which is reflected in some overly expansive holdings of the statutory exceptions and the ubiquitous use of the waiver provision), there has been a gradual tendency to assert that the recognized stature standard should be a high bar. The first case to analyze recognized stature, *Carter v. Helmsley Spear*, introduced a two-tiered analysis of "recognized" and "stature," requiring the plaintiff to show "(1) that the visual art in question has 'stature,' *i.e.* is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." 861 F.Supp. 303, 325 (S.D.N.Y. 1994). The court applied its standard to the testimony of the art experts proffered by the parties, but the standard has been criticized as being too stringent, *see* Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1955, 1969 (2000), and the *Carter* court itself acknowledged that expert testimony may not always be necessary to show recognized stature. Indeed, the court recalled that the earlier versions of the VARA bill had followed the California moral rights model by explicitly suggesting that "[i]n determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art." 861 F.Supp. at 325, n.10, citing S. 1198, 101st Cong., 1st Sess., 135 Cong. Rec. S6811-13 (June 16, 1989). The Southern District of New York opined that this list was omitted from the final Act to provide courts with even "greater discretion" on the sources to consult on recognized stature, including apparently consulting representatives of "some cross-section of society." *Id.*

In some other early cases, it was acknowledged that expert testimony was not always going to be necessary or even available to show recognized stature. In *Martin v. City of Indianapolis*, for example, the Seventh Circuit upheld a district court grant of summary judgment on a VARA claim for the destruction of his sculpture based on the proffered newspaper articles, published testimonials and letters. 192 F.3d 608, 613 (7th Cir. 1999).

Increasingly, however, parties have proffered, and courts have relied upon, art experts who in some cases propose a very high bar. Their testimony may be centered on narrow definitions of what constitutes artistic stature and by whom it should be recognized. The "5Pointz" case exemplifies this trend. The mini-trial on recognized stature held by the court in its preliminary injunction hearing featured testimony from defendant's expert Professor Erin Thompson on recognized stature, which was summarized by the court in its opinion denying the injunction. *Cohen et al. v. G & M Realty et al.*, 988 F.Supp.2d 212, 221 (E.D.N.Y. 2013). The court stated that in Professor Thompson's view, "stature" was only in part a matter of innovation and originality; "ultimately to qualify as [a work of stature], it should be at a level where scholars agree that it is 'changing the history of art.'" *Id.* For the "recognition" prong of the *Carter* test, Professor Thompson focused on preexisting academic publications and online citations. For 19 of the 24 works of graffiti under review, "there were no dissertations, no journal articles, no other scholarly mentions of the work." The work that came closest to recognized stature largely did so because it was the only one which "had been mentioned in a dissertation, or a scholarly book or journal article." *Id.* While apparently acknowledging that the "recognition" prong for a work of graffiti art could in part be evidenced by its popularity among the viewing public, it is telling that the testifying expert's example of a mural artist of stature was Banksy, whose work

had by the time of this litigation been mentioned extensively in scholarly articles, dissertations and the press online, and had achieved a secondary (resale) market.

The *Cohen* court reserved for trial the issue of whether such a restrictive view of recognized stature was appropriate, but the ALC respectfully submits that it is much too narrow, especially for a work of public art such as a mural or large scale sculpture whose genesis and daily existence is intertwined with the life of the community in which it resides. Indeed, one could argue that the less established the art and the artist, the less relevant scholarly or critical articles (or their absence) become, and the more determinative the community's unscholarly opinion should be. The recognized stature of such a localized work may not be primarily aesthetic in nature at all; the work may have become iconic for non-aesthetic reasons, or it may reflect the social concerns of the community in a way that an acknowledged masterpiece may not. Moreover, with the advent of digital technology – in particular, social media platforms such as Facebook, Twitter, and Instagram, which enable the dissemination of images of, and information about, such artworks -- it is worth revisiting whether other metrics of social recognition of a work of visual art should be given more weight. In any event, the preservative aims of the recognized stature provision should not be undercut by an inflexible dependence on a scholarly consensus of aesthetic importance.

A second issue concerns whether a work must necessarily have been exposed to the public prior to its destruction to qualify for recognized stature. The earliest version of the VARA bill had included the New York-derived requirement that only works which had been “publicly displayed” were to be protected. This requirement was quickly dropped, but some cases have taken the position that a work cannot be a work of recognized stature unless viewed by the public. *See, e.g. Scott v. Dixon*, 309 F. Supp. 2d 395, 397-98 (E.D.N.Y. 2004) (no recognized stature where the work was in a private back yard and had not been made available to the public or critics); *Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) (Gleeson J. concurring) (agreeing with affirmance of Northern District of New York's dismissal of VARA claim on ground that “it seems clear that a work that has never been exhibited cannot, as a matter of law, be a work of recognized stature.”). The assumption is that a work must have been shown to have obtained recognized stature prior to its actual or threatened destruction, and thus, that only a work to which the public has previously had access can qualify for protection.

But, as the *Carter* court opined, the act is silent on when the work must have achieved recognized stature.

VARA does not delineate when a work must attain “recognized stature” in order to be entitled to protection under this Section. Considering the purpose of this Section, the Court does not view this as unintentional. The test is whether the art work at issue is of recognized stature, not when it attains this status. This interpretation is wholly consistent with the preservative goal of this Section. It should be noted, however, that there is evidence in the record that the Work became a work of recognized stature prior to the filing of plaintiffs' complaint in this action.

Carter, 861 F. Supp. at 325, n.12. In *Pollara*, the district court had denied defendant's motion for summary judgment, which relied on the argument that the work should as a matter of law be excluded from protection because it had not been exhibited prior to destruction. 150 F. Supp. 2d 393, 398 (N.D.N.Y. 2001). Crediting the Act's preservative purpose, the court concluded that "prior recognition should not be a necessary precondition to the existence of a cause of action under VARA," and that VARA may apply whether or not a work's "relative merits [were] previously debated" if the evidence shows it to have acquired recognized stature by the time of trial. *Id.* at 397.

The crucial importance of this issue is reflected in the *Cohen* case. If a work's stature is dependent on a scholarly consensus that the work is "changing the history of art," and that stature is recognized only by pre-published scholarly works and commentaries, then the public and art world outcry that greeted the threat to the "5Pointz" graffiti would have no place in the analysis. But it may be that the reaction to a threat or actual destruction of a work of art on the part of scholars, members of the broader art community, and some cross-section of society that lives and interacts with the artwork on a regular basis – a reaction that elevates a previously little known, or unseen, or only locally admired work – should be considered just as important as a work's pre-existing reputation as evidence of a work's recognized stature. Just as an expert may opine on the aesthetic stature of a destroyed work he has never seen, so should recognition of that stature not be limited to its prior expression alone.

Finally, the dual standard between destruction, on the one hand, and distortion, mutilation or modification, on the other, leads to confusing and inconsistent results. The practical distinction between the destruction and mutilation of a work of art is not always a neat one, especially when the work has a highly finished appearance or it has been radically altered or only partially destroyed. When it comes to the right of attribution, artists are frequently and understandably very particular about the condition of their artwork, and may be quick to disavow a work on the basis of what others may consider *de minimis* damage, simple wear and tear or restoration falling outside the protection of VARA, with potentially catastrophic results on the value of a collector's investment. On the other hand, for a claim of violation of the right of integrity, neither artists nor courts always take care to analyze whether the damage, or potential damage, to a work of art constitutes its destruction or simply its mutilation.

For example, in the *Pollara* case, an artist alleged that her 10 x 30 foot mural painted on paper, stretched on a metal frame and affixed to a wall, was destroyed when it was torn from the wall, "severely damaged" and left crumpled on the floor. As the court explained, "the mural was ripped in three sections. There were two long, vertical rips that ran through the width of the mural. The rips were repaired and the mural taped to the wall for display at the event . . . Following the event, the damaged mural was returned to Pollara. She kept it in her studio, unrolling it once to be photographed by a local newspaper. When displayed in court, it was crumpled and clearly had sustained damage." 206 F. Supp. 2d at 235. The recitation of the facts suggested that the work had been mutilated, rather than destroyed under Section 106A(a)(3)(b) as alleged in the complaint. If the artist had simply alleged that the work had been mutilated in a way that was detrimental to her honor or reputation, she could have avoided the burden of showing recognized stature (and the expense of expert witnesses), or at the very least put the

defendants in the unenviable position of having to claim that they had destroyed the mural rather than simply damaging it.

The plaintiff in *Kelly v. Chicago Park District* alleged that the reduction of his wildflower garden by half and its partial reconfiguration with other elements amounted to its complete destruction, rather than its mutilation, and thus experts were hired to opine on recognized stature. 635 F.3d 290, 300-301 (7th Cir. 2011). Yet, in an earlier case, *Pavia v. 1120 Avenue of the Americas Associates*, the public display of only two elements of a four-piece sculpture was deemed a mutilation rather than the destruction of the work. Nonetheless, the court still made the seemingly unnecessary factual finding that the entire work “was recognized by critics and the news media as a noteworthy work of art.” 901 F.Supp. 620, 627 (S.D.N.Y. 1995).

Conclusion

As discussed above, the distinction between the elements of a claim for modification of a work of visual art and destruction of that work was introduced shortly prior to the passage of VARA, and has had some unfortunate results, including the imposition of an unreasonably high bar to a showing of “recognized stature,” the inconsistent imposition of a statutorily-unsupported requirement that a work of visual art have been publicly displayed prior to its threatened destruction, and the proliferation of unpredictable and contradictory precedent. Given the short period of time in which submissions may be made to the Office under the notice of inquiry, the ALC is not in a position to say what, if any, amendments to VARA would be appropriate to address these issues. The ALC offers these comments in the hope that they will highlight certain problems arising from the statute as enacted and as interpreted by the courts, and inform the debate over a possible solution to them.

The ALC thanks the Copyright Office, in advance, for the opportunity to weigh in on this important issue, and welcomes further inquiry thereon.

Art Law Committee
Steven R. Schindler, Chair

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