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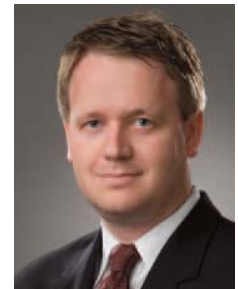
Published in Intellectual Property Today

VARA and CAPA: Lessons from the *Twitchell* case

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In early June 2006, the famous Los Angeles mural *Ed Ruscha Monument* by Kent Twitchell was painted over. Public outcry followed, and Twitchell filed suit under the Visual Artists Rights Act and California Artists Protection Act, which give the artist so-called “moral rights” (from the French *droit moral*).¹ Twitchell also brought claims for conversion, negligence, negligent supervision and California statutory unfair competition. Eventually, thirteen defendants were sued, including the United States, the Los Angeles YWCA and various contractors and subcontractors. Almost two years later, the case settled for \$1.1 million.

The case presented a “perfect storm” of issues under the Visual Artists Rights Act (“VARA”, codified at 17 U.S.C. §§ 106A, 113(d)) and the California Artist Protection Act (“CAPA”, at Cal. Civ. Code § 987). Several difficulties with VARA were brought to light, and some changes to the law should be considered.

First, some background on the case. Between 1978 and 1987, Twitchell painted the *Ed Ruscha Monument (ERM)* on a building in downtown Los Angeles owned by the United States Department of Labor (“DOL”) and occupied by the Los Angeles Job Corps Center (“LAJCC”). The LAJCC is operated by the YWCA. The mural was painted at the invitation of a former director of the LAJCC, though Twitchell had total artistic control over the mural and its subject, famous Los Angeles pop artist Ed Ruscha. The mural was not covered by any written agreement, nor was Twitchell paid.

The mural was desecrated in the context of structural work. An engineering firm from Virginia under contract with the

government drafted the scope of work and interfaced between the DOL and LAJCC. Several contractors were hired. Work on rebar required that holes be punched in the mural and patched, and the mural was painted over with one coat of primer on Friday, June 2, 2006. The media immediately noticed, and work ceased after one coat—leaving the figure of Ruscha as a ghostly image on the wall.

Twitchell pointed out the VARA and CAPA statutes, but application of the law was not straightforward, for several reasons, including: the building is owned by the United States; the mural was completed before the effective date of VARA but after the 1980 date for California’s CAPA statute; and the mural was painted directly on the side of a building. A special 90 day notice provision of VARA applies before some art incorporated into a building can be destroyed or altered, but, apparently, only if the owner of building intended to have the artwork removed or destroyed. 17 U.S.C. § 113(d). One question posed by the case was whether the notice provision applied to anyone other than the owner; this is a thorny issue when there are multiple layers of contractors involved in planning and executing the work.²

Federal Preemption

VARA is part of the Copyright Act enacted to comply with the treaty obligations of the United States. Nimmer, *Nimmer on Copyright*, § 8D.06. VARA’s preemption provision is similar to the Copyright Act’s, which states that “equivalent” state rights are preempted by VARA. See H.R.Rep. No. 101-514 at 21 (1990), reprinted in 1990 U.S.C.C.A.N. 69 1 5, 693 1. But with VARA creating a novel right, this deter-

¹ For instance, in France, artists’ moral rights include the right of disclosure, the right to withdraw from publication or make modifications, the right of authorship and the right of integrity. See generally, Lerner & Bresler, *Art Law*, at 1253, 1254. According to Lerner, moral rights are generally distinguished from more typical legal rights as “personal, perpetual and inviolable and unassignable.”

² The history of the 90 day notice provision is quite complex and was the result of a balancing of interests between the building owner and author. See Patry, “Destruction of Works of Visual Art”, *The Patry Copyright Blog*, May 25, 2005 for a discussion.

VARA and CAPA Continued...

mination is not simple. For instance, one defendant filed a motion arguing that Twitchell could not pursue his common law claims of negligence or conversion. Judge Florence Marie Cooper denied the motion, finding that the negligence and conversion claims relate not to Twitchell's moral rights, but to his rights as an owner of personal property.

Mural Ownership

The Court's ruling on conversion made one thing clear: physical ownership is distinct from moral rights, even in the example of a mural. This is easier to understand in the case of sculpture attached to a building. However, even a mural painted on concrete like the *ERM* can be moved by several techniques, one being the so-called "Strappo" method devised in Venice to remove frescoes. This technique involves spreading dozens of layers of a chemical that adheres to paint more strongly than concrete. The piece is then "reverse jack-hammered" off and the "canvas" rolled up and moved. In another case, the Court denied a motion to dismiss based in part on the possibility of applying Strappo.³

There is little or no law addressing ownership of murals in the absence of a written agreement. Both federal and state law acknowledge implicitly that ownership of art is distinct from other rights. VARA states that it applies to works created before [June 1, 1991] . . . but title to which has not, as of the effective date, been transferred from the author." California Civil Code § 988(b) reiterates that conveyance of the right to reproduce or "publicly display a work of art" does not disturb the artist's ownership of the physical work. Similarly, section 988(c) clarifies that any ambiguity should be resolved in favor of the artist. Thus, it appears that a mural is piece of property comprising separate ownership rights of title, possession, copyright and moral rights.

Because of these distinctions, *Twitchell* could have produced some strange results. By VARA's own terms, if title had not passed before the effective date in 1991, then VARA applied. However, if title had passed, then Twitchell may have kept his rights under CAPA because the extinction of VARA rights would have meant that CAPA had non-equivalent rights. Similarly, a case in Massachusetts held that the design of a

park was not protected by VARA but possibly could be under the Massachusetts law. *Phillips v. Pembroke Real Estate, Inc.*, 288 F.Supp. 2d 89 (D. Mass. 2003).

Who and What Are Protected: VARA's "author" of a "work of visual art" versus CAPA's "artist" creator of "a work of fine art"

VARA creates rights for "the author of a work of visual art." The Copyright Act does not define "author" but does define a "work of visual art" at 17 U.S.C. § 101. The definition is quite specific. Most significantly, the definition imports the substantial body of copyright law on the question of works for hire, which are not "works of visual art."

CAPA does not incorporate the same work for hire concept, but it does exclude certain commercial works from its protection via its definition of artist. CAPA provides rights to an "artist," who is an "individual or individuals who create a work of fine art." Civ. Code § 987(b)(1). A "work of fine art" "shall not include work prepared under contract for commercial use by its purchaser." Civ. Code § 987(b)(2). Finally, "commercial use" means fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media. Civ. Code § 987(b)(7). Thus, there is a limited "work-for-hire" exclusion under CAPA, but only for works that are used in specific ways.

The CAPA statute provides stronger protection for artists. Twitchell created the *ERM* at a time when public art was burgeoning in Los Angeles. Many of these artists made a living in any way possible. During the nine years he was working on the *ERM*, he received grants and funding from various sources. Nevertheless, some of the defendants were developing an argument that VARA might not apply because Twitchell created the *ERM* as a work for hire because of grant money he received.

If this argument had been substantiated, it would have involved considerable discovery into loose arrangements arrived at decades ago. CAPA's approach is more desirable. CAPA limits artist rights only when it is very clear that the art was created pursuant to a contract and for commercial use.

³ This was the "Lili Ann Mural" case from San Francisco. Court orders and supporting documents for this case can be found at www.artemama.com.

VARA and CAPA Continued...

What Rights Are Protected?

VARA and CAPA protect slightly different rights. The most important distinction relates to the right to prevent damage or destruction of the work. Seemingly similar, these provisions may be quite different.

VARA does not explicitly include rights against those who authorize the damage, as contrasted with those who perform the intentional acts. Also, VARA differentiates between works of visual art and such works which also are of "recognized stature." A literal reading of VARA protects against intentional distortion, mutilation or other modification of a work of visual art generally, but not the **destruction** thereof; only works of recognized stature are protected against intentional or grossly negligent destruction. There is no comparable dichotomy in CAPA. To be a work of fine art under CAPA, the work has to be of "recognized quality," which can be subject to expert and artist opinion. Civ. Code § 987(f).

Again, these distinctions had importance in *Twitchell*. Most significantly, under VARA, Twitchell arguably had no claim against the contractors and engineers who completed and authorized the desecration. His only claim would be against the Government, which for better or worse, had less actual knowledge than almost anyone involved. This limitation of VARA is short-sighted, given the complexities of building ownership and contracting in the contemporary era.

Also, the distinction between preventing modification of "visual art" and destruction of works of "recognized stature" seems to have little practical value, and VARA could ease some confusion by listing ways to prove that a work is of "recognized stature," as CAPA does for works of "recognized quality."

Duration of Rights

VARA and CAPA provide rights of different duration. CAPA applies regardless of when the work was created, as long as the acts occurred on or after January 1, 1980. Civ. Code § 987(j). VARA, on the other hand, applies to works created after its effective date of June 1, 1991, and works created before that date but title to which had not, as of that date, been transferred from the author. Rights for works after the

effective date endure for the life of the author. Rights for works created before the effective date endure the same length as a copyright, which is now life of the author plus 70 years. 17 U.S.C. § 106A(d); 17 U.S.C. § 302(a).

CAPA has a single term, which expires on "the 50th anniversary of the artist's death." Civ. Code § 987(g)(1).

Again, CAPA makes more sense. Indeed, given the periodic lengthening of the copyright term by Congress, it is very strange that in the field of fine art—where the author is often most famous after death—VARA protections would expire upon death. The *ERM*, as a work created before the effective date of VARA and without a transfer of title, was actually subject to a "life plus 70" term of protection akin to normal copyright law. Aside from being confusing, this state of affairs highlights that VARA should protect beyond the life of the author. Twitchell was 64 when we filed the case and 66 when it was settled. If he had completed the *ERM* in 1991 rather than 1987, his rights would have disappeared if he died during the case or subsequent appeal.

Remedies

Because VARA is part of the Copyright Act, remedies are basically the same as for copyright infringement, though a detailed determination must be made of the effect on the violation to the artist's reputation. 17 U.S.C. § 501. This is expensive and requires expert opinion into the abstract question of the effect of an absence from the artist's resume.

CAPA is self-contained and provides for injunctive relief; actual damages; punitive damages (to be paid in judicial discretion to an organization engaged in charitable or educational activities involving the fine arts); reasonable attorneys' fees and expert witness fees; and "any other relief which the court deems proper." Cal. Civ. code sec 987(e)

Once more, the *Twitchell* case showed that CAPA is superior. One of Twitchell's primary reasons for pursuing the case was to raise awareness to the plight of mural artists in protecting their work, and also to educate the public about this law. A large punitive damage award given to arts' rights organization would have served both purposes. Further, there is very little case law on damage to "reputation" under VARA.

VARA and CAPA Continued...

Waiver of Sovereign Immunity

Perhaps the most disturbing difference in VARA and CAPA is in waiver of sovereign immunity. Presumptively, CAPA would apply against the government, but not so with VARA.

Under the Federal Tort Claims Act ("FTCA"), the United States waives immunity for torts committed in the various states and submits to the jurisdiction of the local states. Thus, Twitchell's conversion claim was brought properly in California. In cases originating under the Copyright Act and Patent Act, the United States has waived sovereign immunity, but the cases are tried before the Court of Claims. 28 U.S.C. § 1498.

Thus if violation of VARA is a tort, the government can be sued locally. If not, it may be sued under the Copyright Act. But moral rights are new, and this is not clear. Congress should have clearly expressed a waiver of governmental immunity. With no waiver of sovereign immunity, it is possible that the government could destroy art at will with little or no consequence.

Indeed, in the *Twitchell* case, the government brought a motion to dismiss for lack of jurisdiction in the District Court. The Court agreed that it did not have jurisdiction over the VARA claim, but it retained jurisdiction over the common law tort claims. The Court's ruling could lead to a difficult situation where the artist suing the government under VARA must bring suit locally and in the Court of Claims. This is hardly an enticing prospect for the artist.

Recommendations

In conclusion, *Twitchell* showed VARA to be wanting in many areas. First, it should not simply co-opt Copyright's work for hire language but should instead create a presumption that the artist maintains VARA rights unless the work was commissioned for a commercial purpose. Second, protections against destruction should apply to all works, not just works of "recognized stature." Third, VARA rights should extend beyond the life of the author. Fourth, VARA should not be subject to exclusive jurisdiction like copyright; it should be more akin to trademark law, which recognizes local protections. Finally, VARA should expressly waive sovereign immunity and grant venue in the district where the events occurred.

Because of all these issues, it is recommended that a Plaintiff in a VARA case continue to assert all possible state law causes of action.

William Brutocao and Eric Bjorgum are attorneys with the intellectual property law firm Sheldon Mak Rose & Anderson PC. Mr. Brutocao served as Mr. Twitchell's lead trial attorney in the case involving the destruction of the Ed Ruscha Monument and Mr. Bjorgum was a member of the team.