
COMMERCIAL LEASING LAW & STRATEGY

JUNE 2020

"VARA-90": What Landlords Can Do to Stop the Aerosol Spread … of Graffiti Artists' Claims

By Joseph I. Farca

No, it's not another virus. "VARA" is the federal Visual Artists Rights Act of 1990 (17 U.S.C. §101, *et seq.*). The Second Circuit U.S. Court of Appeals in February 2020 affirmed an award of $6.75 million in statutory damages — the maximum — to "aerosol" (a/k/a graffiti) artists against the owners of warehouse buildings on which the plaintiff-artists' works were painted because the building owners destroyed the works in violation of VARA. *See, Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

As the Second Circuit Court of Appeals summarized by way of background:

> VARA, added to the copyright laws in 1990, grants visual artists certain "moral rights" in their work. *See,* 17 U.S.C. §106A(a). Specifically, the statute prevents modifications of artwork that are harmful to artists' reputations. *Id.* §106A(a)(3)(A). The statute also affords artists the right to prevent destruction of their work if that work has achieved "recognized stature" and carries over this protection even after the work is sold. *Id.* §106A(a)(3)(B). Under §§504(b) and (c) an artist who establishes a violation of VARA may obtain actual damages and profits or statutory damages, which are enhanced if the artist proves that a violation was willful.

Castillo, *supra*, 950 F.3d at 163. *See, generally,* Michelle Bougdanos, "The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?" 18 N.Y.L. Sch. J. Hum. Rts. 549 (2002).

In awarding maximum statutory damages, the District Court found that the building owners willfully violated VARA by whitewashing the aerosol art with knowledge that artists were pressing VARA claims, that it was not necessary to destroy the art before beginning the owners' planned construction of luxury apartments, that the owners could have given artists time to photograph or recover their work, that the owners deliberately chose to violate VARA rather than to follow statutory notice procedures, and the owners told the court that they "would make the same choice today." *See, Cohen v. G&M Realty L.P.*, 320 F.Supp.3d 421, 445-47 (E.D.N.Y. 2018), *aff'd sub nom. Castillo*, *supra*, 950 F.3d 155 (2d Cir. 2020).

The owners' unrepentant attitude unsurprisingly contributed to the court's decision to impose the maximum penalty for violating VARA. Though their unsympathetic character made it easy for the court to rule against them, its binding authority as an appellate case bears scrutiny to avoid similar exposure by less culpable building owners.

So how did the artists qualify for protection under VARA, how could the owners know whether the artists had achieved "recognized stature" warranting prevention of their works' destruction, and what could the owners have done to avoid liability while retaining the right to dispose of their properties as they saw fit?

Quantifying an artist's reputation and determining whether an artist's work has achieved "recognized stature" are subjective judgments not easily susceptible to the sort of bright line rule that property owners crave for protection against claims. *See, Castillo*, *supra*, 950 F.3d at 166 ("aside from the rare case where an artist or work is of such prominence that the issue of recognized stature need not be tried, expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature."). Therefore, a prudent owner should not rely on his own judgment in deciding whether removal of a work could subject the owner to liability. Fortunately, for owners who decide to permit aerosol works to be applied to their properties, VARA contains safe harbor provisions that the owner can comply with to avoid liability.

Preferably, the owner will enter into a written agreement providing for the artist's waiver of rights under 17 U.S.C. §113(d)(1). That section specifically governs works that are incorporated into a building "in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work," and provides that the artist's rights may be waived if he "consented to the installation of the work in the building … in a written instrument." This instrument must be "signed by the owner of the building and the author" and must "specif[y] that the installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal."

But for the owner who lacked the foresight (or appropriate legal counsel) to obtain the artist's advance written consent, 17 U.S.C. §113(d)(2) provides that the artist's rights prevail unless the owner "(A) … has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or (B) … did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal."

17 U.S.C. §113(d)(2) continues by providing that:

> For purposes of subparagraph (A), 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 pursuant to paragraph (3).

However, since artists are not required to record their addresses with the Register of Copyrights in order to gain the protections under VARA, the preference should be for the owner to take the cautious approach and enter into a written agreement with the artist under 17 U.S.C. §113(d)(1).

Finally, for owners who have not consented to aerosol works being applied to their properties, VARA has been held inapplicable 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. *See, English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446 (HB), 1997 WL 746444, at 4 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999). Conversely, if the unauthorized work can be removed, the owner should take prompt action to do so, lest its consent be implied by acquiescence in permitting the works to remain for a significant length of time.

Indeed, the court in *Castillo* held that the duration requirement was met because the works survived longer than "several minutes" (950 F.3d at 168), even though the owners only gave verbal permission for the works to be applied to the buildings. (VARA applies to works fixed in any tangible medium of expression (17 U.S.C. §102[a]), and "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently

permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" (17 U.S.C. §101).) *See, Cohen*, *supra*, 320 F.Supp.3d at 432-434 ("nothing was ever reduced to writing and Wolkoff [the owner] only verbally laid out three rules for what could be put on the walls: no pornography, no religious content, and nothing political").

While it seems unlikely courts would interpret *Castillo* to apply VARA protections to true cases of vandalism just because an owner didn't remove the unauthorized graffiti within several minutes, a prudent owner should not assume that the vandal's reputation and "recognized stature" was lacking. Instead, to evidence their lack of consent or acquiescence, the owner should be proactive and either utilize cameras to detect application of graffiti to their buildings, or set regular weekly, monthly or even quarterly schedules, backed by written records, for inspecting and removing graffiti, coupled in either case with signage warning that aerosol or other graffiti will be removed and that vandals may be surveilled and reported to authorities for prosecution.

*****

Joseph I. Farca, a member of the Board of Editors of *Commercial Leasing Law & Strategy*, is a partner in New York Supreme Court Division of Borah Goldstein Altschuler Nahins and Goidel, P.C. *The views expressed herein are those of the author; they do not represent the views of his firm and are not intended as legal advice*.
