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VARA Issues Blossom into a Copyright Claim

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If you own (or lease or operate) a building, an art gallery, a museum, if you are a governmental entity overseeing public property, if you are the creator of certain works of visual arts or if you fit a myriad other circumstances, a recent U.S. Court of Appeals case provides you with another example of the risks of copyright infringement for you to consider. The Visual Artists Rights Act of 1990 (VARA) creates certain inalienable copyright rights that must be considered when dealing with specific types of copyrighted works. These rights are not divested from the author (artist) simply by a transfer of copyright.

VARA was enacted when the U.S. joined the Berne Convention, and introduced into the U.S. Copyright Law a limited set of moral rights known as "rights of attribution" and "rights of integrity" that supplement general copyright protection. These rights are held by the artists who create specific types of visual art as defined in the Copyright Act. The "rights of attribution" include the rights to be recognized as the author of a work, to publish anonymously and pseudonymously, to prevent attribution of one's name to works one did not create, to prevent one's work from being attributed to other artists and to prevent the use of one's name as the author of any work of visual art in the event of distortion, mutilation or other modification of that work of visual art which would be prejudicial to one's honor or reputation. The "rights of integrity" include the right to prevent any intentional distortion, mediation or other modification of a work of visual art which would be prejudicial to one's honor, reputation.

§101 of the Copyright Act defines a "work of visual art" and applies to only limited sub-categories of §102 (a)(5) "pictorial, graphic, and sculptural works" (e.g., a painting, drawing, print or sculpture, or a still photographic image produced for exhibition purposes only, existing in a single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author). Plus there are certain exclusions (e.g., any poster, map, chart, technical drawing, diagram, model, applied art, audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication; any merchandising item or advertising; any work made for hire; or any work not subject to copyright protection). Neither this definition nor list of exclusions is exhaustive.

In addition, the Copyright Act provides certain exceptions for works that have "…been incorporated in or made part of 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…." This "building exception" contains a timing element determinative of the rights of the author of the work of visual arts which may trigger infringement liabilities for building owners who wish to remove a work of visual art which is a part of a building.

This year, in *Kelley vs. Chicago Park District*, the U.S. Court of Appeals, 7th Circuit, had occasion to consider VARA. Chapman Kelley, a nationally recognized artist, was granted permission in 1984 by the Chicago Park District to install a large wildflower display, known as "Wildflower Works," in a prominent public space in downtown Chicago. For many years Kelley and a group of volunteers maintained the garden, but by 2004 it had deteriorated and the Park District's plans for the area had changed. The Park District modified the garden, changed some of the planting materials, reduced its size, and reconfigured the shapes of the flower beds. Kelley sued, alleging violation of his right of integrity under VARA.

After determining that the right of integrity issue was in question in *Kelley*, the Court looked to the definition of a "work of visual art" plus the "public presentation" exception and the "building exception." The Court stated that "to qualify for moral-rights protection under VARA, Wildflower Works cannot just be 'pictorial' or 'sculptural' in some aspect or effect, it must actually be a 'painting' or a 'sculpture.' Not metaphorically or by analogy, but really."

After examining "originality," the touchstone of copyright, the Court stated, "The real impediment to copyright here is not that Wildflower Works fails the test for originality (understood as 'not copied' and 'possessing some creativity') but that a living garden lacks the kind of authorship and stable fixation normally required to support copyright. Unlike originality, authorship and fixation are explicit constitutional requirements; the Copyright Clause empowers Congress to secure for 'authors' exclusive rights in their 'writings.'"

Concerning the "fixation" issue, the 7th Circuit concluded that the Wildflower Works garden did not have the requisite fixation required to support a copyright. "Simply put, gardens are planted and cultivated, not authored." … "Moreover, a garden is simply too changeable to satisfy the primary purpose of fixation; its appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement."

Although in *Kelley* the copyright claimant failed to prevail on his copyright claim due to his failure to meet the definition of a copyrightable work, when the work is a valid copyrightable work of visual art, the possibility of infringement liability is real. The bottom line is that, since the rights granted by VARA are not transferable, but may be waived, proactively and properly addressing these issues may avoid liability or involvement in infringement lawsuits.