

THURSDAY, OCTOBER 16, 2025

GUEST COLUMN

Banksy and the right of integrity

Banksy's mural at London's Royal Courts of Justice highlights the complex legal landscape of the Visual Artists Rights Act, which grants authors of recognized visual art the 'right of integrity' to prevent destruction or alteration of their works, creating potential liability for building owners even when artworks are installed without permission.

By Jeff Miles

One morning in London, a Banksy painting appeared on the wall of the Queen's Building in England's Royal Courts of Justice complex. For a brief period last month, Sept. 8 to be exact, Banksy's mural depicted a protester lying on his back, holding a blank blood-spattered sign being beaten by the gavel of a bewigged judge.

Even though Banksy's works can be worth millions of dollars, the painting was immediately covered and removed because the court is "legally obliged to maintain the character of the building because of its listed status."

While not everyone is a Banksy fan, many people thought the painting made an important political statement on the suppression of protest at the hands of the Courts, which was only strengthened by the government's decision to remove it.

This incident prompts us to wonder what if Banksy recreated this installation on a public or private building in the United States – even perhaps on *your building*?

Well, for one, most property owners would be delighted to stumble upon a newly sprayed Banksy mural and probably preserve or sell the piece for tens of millions of dollars, even if they found its message distasteful or its sudden installation an inconvenience.

But you, the building owner, municipality or developer, should pause if you are considering destroying or painting over a piece of graffiti by an established vandal-artist like



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Banksy, Swoon, Paul Insect or Slawn: A vandal-artist of "recognized stature" could assert the right of integrity to attempt to protect the work from "destruction" or "mutilation" (and could seek damages if it is destroyed without providing the artist an opportunity to remove the work). 17 U.S.C. § 113(d).

The Visual Artists Rights Act of 1990 (VARA) amended the Copyright Act to give the authors of "works of visual art" certain "moral" rights, including the "right of integrity," or the right to prevent the distortion, mutilation, modification or destruction of their works. See 17 U.S.C. 106A(a)(3). Normally, copyright only protects intangible works of authorship, not particular tangible

copies of those works. But that won't cut it when it comes to works of visual art, because the tangible copy is the work. Accordingly, the right of integrity protects physical artworks by giving their author a copyright infringement claim if they are damaged or destroyed.

There are lots of limits on the application of the right of integrity. It only protects works of visual art, which the Copyright Act defines as paintings, drawings, prints, sculptures and photographs that exist in a limited edition of 200 copies or fewer. 17 U.S.C. § 101. It only lasts for the life of the author and can't be transferred but can be waived. 17 U.S.C. 106A(d)-(e). It only protects copyrightable works, which

excludes many artworks. And it's limited by the fair use doctrine. 17 U.S.C. §106A(a).

The scope of the right of integrity itself is also limited. It only prohibits the intentional modification of a covered work and only prohibits the destruction of works of recognized stature. What's more, there are lots of limitations on and exceptions to the application of the right of integrity, especially when it comes to works incorporated into buildings. Specifically, if the owner of the building wants to remove the artwork or demolish the building, they are obligated to notify the author and provide an opportunity to preserve the artwork at the artist's expense. 17 U.S.C. § 113(d).

As a practical matter, the right of integrity is rarely, if ever, relevant to most artworks, because the interests of the author and the owner are usually aligned. The owner of a valuable artwork has every incentive to maintain its integrity, in order to preserve its value, and if they don't want the artwork anymore they can always sell it to someone who does. If the artwork is fragile or of low value, the owner can simply offer to return it to the author.

Right of integrity disputes typically involve public artworks and artworks incorporated into buildings or other real estate. Governments and landlords can be fickle, especially when administrations change or buildings are sold. The once-perfect artwork becomes inconvenient, unpopular or an eyesore, and has to go. Unfortunately, it's often difficult or impossible to remove the artwork without damaging or destroying it, especially because artists tend to insist that the artwork at issue is "site-specific" and can't exist anywhere else. In fact, the creation of the right of integrity was at least apocryphally a response to the relocation of Richard Serra's massive steel sculpture *Tilted Arc* (1981) from New York's federal plaza to a storage space in Maryland, which outraged Serra until his death last year.

Courts have largely solved the problem by pretending it doesn't exist. They ignore site-specificity and simply apply VARA's Section 113(d) safe harbor, essentially telling authors, "Come get your stuff." When it comes to the right of in-

tegrity, authors can't always get what they want, but hopefully they get what they need, or at least some reasonable approximation thereof. And it does turn out rather often that some site-specific works can survive reincarnation on a new site – and there are very expensive conservators that specialize in the transpositional process.

But it doesn't always work out so smoothly. For example, the recent 5Pointz dispute was a disaster for both sides. In a nutshell, developer Jerry Wolkoff bought a warehouse in Long Island City in the early 1970s. In the early 1990s, he started leasing the space to artists, and allowed them to graffiti the building, which soon became a Mecca for graffiti artists. When Wolkoff decided to demolish the building in 2013, the artists objected and sued to stop him. The court entered a preliminary injunction, but a week later Wolkoff's employees whitewashed the entire building, erasing all the paintings. The artists sued Wolkoff for infringing their right of integrity and won in 2018, receiving a \$6.7 million damages award. *See generally Cohen v. G&M Realty, L.P.*, 320 F. Supp. 3d 421 (2018). The irony is that Wolkoff almost certainly would have won if he hadn't whitewashed the paintings. Maybe the opportunity to express himself through his own form of graffiti was just too tempting?

The true landmine lurking in the application of VARA to these works, is that there is no binding 9th Circuit precedent that has found that

consent in installation is a prerequisite to protection. On the contrary, a recent Northern District of California decision found that if an otherwise VARA eligible artwork is removable, *even if the work was installed without permission of the building owner*, VARA protocols and protections apply. "For artwork that is removable, VARA protections apply under § 113(d)(2) regardless of whether the building owner consented [to its installation or application]." *Canilao v. City Commercial Invs.*, Docket No. 20-cv-08030-EMC at *6 (N.D. Cal. October 18, 2022) (Chen, J.).

Judge Edward M. Chen went on to explain that "§ 113(d)(2) regarding removable works of art does not trigger the same concerns as § 113(d)(1) regarding nonremovable works ... Because building owners have reasonable recourse to address removable works on their property, no pre-existing agreement nor prior building owner knowledge and consent is required." *Id.*

Anyway, the upshot to the right of integrity is that it depends on who you are advising. Artists should know the right exists, how it's limited and how to avoid some of those limits – for example, by not waiving their rights. Governments and property owners should also know the right exists and understand the potential liabilities associated with it. If you fall into the latter category, you should consider requesting a VARA waiver when commissioning public artworks to avoid a possibly complicated process when trying to remove or alter the artwork later.

And, strangely enough, if you wake up to find a Banksy has been installed surreptitiously on your building, remember to contact the elusive and mysterious artist to provide the artist an opportunity to preserve the artwork before you take it down, else you might be liable for statutory damages for its destruction, even though its installation and application was unsanctioned. *See* 17 U.S.C. § 113(d); *see also Canilao v. City Commercial Invs.*, Docket No. 20-cv-08030-EMC at *6 (N.D. Cal. Oct. 18, 2022) (Chen, J.).

In some cases, that is easier said than done. However, Banksy can be contacted via Pest Control, the "Parent/Legal guardian for the artist Banksy," at: info@pestcontroloffice.com.

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