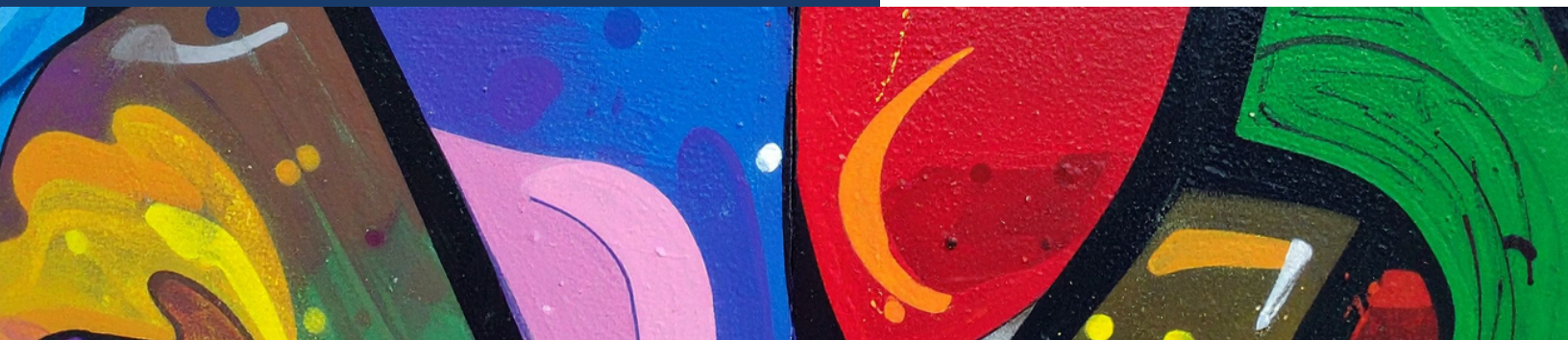




When Building Art Becomes a Liability: **Property Owners and the Reach of Artists' Rights**

One of the stranger stories about the recently concluded FIFA World Cup competition occurred off the playing field.

Our tale opens in Dallas, Texas, during the pre-tournament promotion. That is when Slate Asset Management was approached by local Dallas and FIFA host committee officials to donate a 17,000 square foot exterior wall on its building at 505 N. Akard Street for a vibrant mural painting promoting the tourney. Slate Asset Management agreed to donate the massive space for this purpose.

The problem: an immense mural already occupied that same space and had been there for more than 25 years. The preexisting work was artist Robert Wyland's "Whaling Wall 82" (also titled "Ocean Life"). Wyland had created the mural as part of his global series of roughly 100 "Whaling Walls" in cities across the world, each intended to raise awareness about ocean conservation. Over the decades, Whaling Wall/Ocean Life had become a treasured Dallas icon.

But Whaling Wall/Ocean Life now stood in the way of the World Cup promotion, and it had to go. Work for the new mural progressed to the point where Wyland's mural was mostly eradicated, and then work apparently stopped.

That was because Wyland had made his objections known. Wyland claimed that no one sought his consent for the destruction of his piece. He sued for damages under the Federal Visual Artists Rights Act ("VARA") of 1990 (17 U.S.C. § 106A).

Wyland may have a claim.

VARA is the diluted Americanized version of the long-established European concept of moral rights (*le droit moral*). The doctrine recognizes that an artist retains a personal and reputational interest in his creation; an interest that survives even after the artist has sold the piece. VARA grants an artist the right of attribution, meaning the right to claim (or reject) authorship of a work of art, and the right of integrity, meaning the right to prevent the defacement or destruction of the artist's work in a manner that would impugn the artist's honor or reputation.

It is that second right, the right of integrity, which trips up unknowing property owners, and comes into play here.

The most famous case on point is the 5Pointz litigation in Long Island City, New York (*Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421 [E.D.N.Y. 2018]). From the 1980s onward, Long Island City had been a neighborhood of dilapidated warehouses. During this period, the owner of the 5Pointz warehouse site allowed his building facades to become world-renowned for the exhibition of graffiti art. The best tag artists from around the world competed for space there, and the site became popular in movies and other media as a sought-after reflection of urban grit.

But the economics changed in the early 2000s when Long Island City neighborhood development took hold, and real estate values skyrocketed. The 5Pointz owner set out to demolish his buildings and redevelop the site into sleek, modern \$400mm residential towers. To his horror, the owner then learned that he had inadvertently allowed the graffiti artists to acquire VARA rights to preserve their works. Nonetheless, the owner chose to “bulldoze ahead”, and without the artists’ approval, the owner destroyed some 45 different works of graffiti art at the site. The Court assessed the owner \$6.75mm in statutory damages.

Similar issues arise in the Wyland/FIFA case. Had Wyland’s cooperation been sought, his mural might have been preserved alongside an appropriate temporary promotion of the FIFA World Cup tournament, and all parties could have been satisfied. But no such consensus approach was attempted.

Wyland commenced his VARA suit, and while it is too early to predict the final outcome, we believe that a strong potential exists for an award of, at least, statutory damages up to \$150,000 for the destroyed Whaling Wall/Ocean Life. There are reports that Wyland may even have had an installation contract back in 1999, and that this contract may provide him with even greater remedies.

The moral of the story: Property owners need to be mindful of the visual art they incorporate into their buildings or place on their site. They may be inadvertently granting rights to artists which may restrain future owner action. Sculptures also count.

The best course of action is for the property owner to obtain a specific VARA waiver from an artist prior to installation. But if that is not done, and the owner’s development contemplates destruction of the artist’s work, direct engagement with the artist should come next. Unilateral action by the property owner can land the owner in court.

Douglas F. Wasser, Esq.
(516) 663-6558
dwasser@rmfpc.com

Adam H. Russ, Esq.
(516) 663-6557
aruss@rmfpc.com

**** Brandon Licorish, a summer associate at Ruskin Moscou Faltischek, also contributed to the drafting of this article.**