

Editor's Note: The following is an excerpt from a longer memo, originally written for a legal writing course. It has been edited for length and adapted to meet the submission requirements of most employers.

To: Partner
From: Sandy Wu
Date: November 17, 2024
Re: Elena Martinez, Visual Artists Rights Act claim; Client/Matter No. 3023-001

Questions Presented

Under the federal Visual Artists Rights Act (VARA), was Ms. Martinez's mural a work of visual art that qualifies for VARA protection, or was it excluded advertising and promotional material when Ms. Martinez painted her mural on the side of the Kinsman Public House with the intention of commemorating a historical event and expanding her artistic portfolio?

Under the federal Visual Artists Rights Act (VARA), which allows artists to recover for the destruction of a work of visual art if the work achieved recognized stature, was Ms. Martinez's mural a work of recognized stature when it received recognition from members of Buffalo's art community and the general public, as evidenced by past letters and articles?

Brief Answers

Yes. A court would likely find that Ms. Martinez's mural was a work of visual art that qualifies for VARA protection. A work of visual art is used for exhibition purposes only and does not intend to draw public attention and publicity to a product or business. Although Ms. Martinez painted her mural on the side of the Kinsman Public House, she did not receive compensation or artistic direction from the Kinsman Public House, nor did she create her mural with the intention of drawing public attention and publicity to the restaurant. Rather, she created her mural to commemorate a historical event and exhibit her artistic work, which would qualify her mural as a work of visual art.

Yes. A court would likely find that Ms. Martinez's mural was a work of recognized stature. A work achieves recognized stature when it is acknowledged as a work of high quality, status, or caliber by a relevant community. Ms. Martinez's mural was acknowledged as such by Buffalo's art community, which is evidenced by past letters and articles. Ms. Martinez's mural also received substantial non-expert recognition when it became a popular selfie spot among members of the general public.

Statement of Facts

In early September 2024, Mr. Caspar Jensen, the new owner of the Kinsman Public House, ordered his staff to paint over the mural that Ms. Elena Martinez created on the side of the restaurant. File at 2.

A couple months prior, in April 2024, Ms. Martinez approached the then-owner of the Kinsman Public House, Mr. Ted Dupont, and asked if she could paint her mural on the side of the restaurant to commemorate the anniversary of the Kinsman Disaster, a well-known event in Buffalo's history. Id. at 1. Mr. Dupont granted Ms. Martinez permission. Id. Although Mr. Dupont occasionally visited the mural while Ms. Martinez was in the process of painting it, he never provided her with artistic direction, nor did he commission or pay Ms. Martinez for her work. Id.

In May 2024, Ms. Martinez completed her mural, and it quickly became a popular selfie spot, frequently featured in social media posts. Id. at 2. During this time, her mural garnered public attention from the local art community and was featured in various news articles. Id.

In August 2024, the Kinsman Public House was sold to Mr. Caspar Jensen. Id. In an effort to disassociate the restaurant from the Kinsman Disaster, Mr. Jensen intentionally

destroyed Ms. Martinez’s mural by having his staff paint over it and did not give Ms. Martinez prior notice. Id. at 2, 10.

Now, Ms. Martinez would like to sue the Kinsman Public House for damages resulting from the destruction of her mural. Id.

Discussion

Ms. Martinez likely has a cause of action for the intentional destruction of her mural under VARA. Ms. Martinez’s claim against the Kinsman Public House depends on: (1) whether the mural was a work of visual art that qualifies for protection under VARA, or whether it is excluded as advertising and promotional material; and (2) whether the mural was a work of recognized stature, such that we may sue after its intentional destruction. A court would likely conclude that Ms. Martinez’s rights are protected under VARA because her mural was both a work of visual art and a work of recognized stature.

Under VARA, the author of a work of visual art has the right “to prevent any destruction of a work of recognized stature.” 17 U.S.C.S. § 106A (a)(3)(B) (LEXIS through Pub. L. No. 118-106). A work of visual art is defined as a painting, drawing, print, or sculpture that is signed by the author and exists in a single copy or in a limited edition of 200 copies or fewer. § 101. A work of visual art does not include advertising and promotional material, any work made for hire, or any work not subject to copyright protection. Id. Certain factors that would disqualify a work as a work of visual art—namely, whether it was made for hire or not subject to copyright protection—will not be addressed in this memo.

Advertising and promotional material excluded from the protections of VARA include artworks created with the intent to draw public attention and publicity to a product or business. Pollara v. Seymour, 344 F.3d 265, 267 (2d Cir. 2003). Ms. Martinez’s mural was a work of

visual art and not advertising and promotional material because it was a signed single copy of a painting that was not created with the intent to draw public attention and publicity to the Kinsman Public House.

A work is of recognized stature when it is of “high quality, status, or caliber that has been acknowledged as such by a relevant community.” Castillo v. G&M Realty L.P., 950 F.3d 155, 155 (2d Cir. 2020). Ms. Martinez’s mural was a work of recognized stature, as supported by documentary evidence that demonstrates the mural was acknowledged by a relevant community as a work of high quality, status, or caliber.

Therefore, Ms. Martinez likely has a cause of action under VARA because her mural was a work of visual art and a work of recognized stature. A court would likely hold the Kinsman liable for the intentional destruction of Ms. Martinez’s mural.

I. MS. MARTINEZ’S MURAL WAS A WORK OF VISUAL ART AND NOT ADVERTISING AND PROMOTIONAL MATERIAL BECAUSE IT WAS NOT CREATED WITH THE INTENT TO DRAW PUBLIC ATTENTION AND PUBLICITY TO THE KINSMAN PUBLIC HOUSE.

A court would likely conclude that Ms. Martinez’s mural is protected under VARA as a work of visual art.

A work of visual art does not include advertising and promotional material. § 101. A painting is protected under VARA as a work of visual art if it does not advertise or promote and if it is “intended for exhibition use only.” Pollara, 344 F.3d at 269 (citing § 101). Advertising and promotional material refers to works that are created with the intent to draw public attention and publicity to a product or business. Id. at 267. Intent can be demonstrated if the artwork was commissioned and paid for by an organization and contains content that was determined in advance by the organization. Id. at 265.

Accordingly, a work would not be considered advertising and promotional material if it was not commissioned or paid for by an organization, and if its content was not determined in advance by an organization. See id. In Pollara, a non-profit legal aid organization hired the plaintiff to paint a banner that was to be erected behind an information table at a lobbying event for the purpose of informing the public of the organization's services. Id. at 266. The plaintiff herself was a professional artist frequently commissioned to create artworks for use at corporate gatherings and private parties. Id. The content of the plaintiff's commissioned banner in Pollara consisted of words urging people to "preserve the right to counsel" and images depicting people waiting in a legal aid office. Id. The court reasoned that whether a particular work can be considered a work of visual art depends on the work's objective, evident purpose, and intended use. Id. at 269. The court found that the plaintiff's banner was not a work of visual art because it was not intended for exhibition use only. Id. at 267. Rather, the court explained that the banner's content "overtly promoted in word and picture a lobbying message," thereby indicating that its intended use was to promote the organization's services and "attract public attention and publicity to the [organization's] information table." Id. The court also noted that the banner's objective, evident purpose to promote and advertise was evidenced by the banner having been commissioned and paid for by the organization, as well as the explicit artistic directions the organization had given to the plaintiff regarding the banner's content. Id. at 270. Therefore, the court held that the plaintiff could not recover for the intentional destruction of the painted banner because it was not a work of visual art, but rather advertising and promotional material excluded from the protections of VARA. Id. at 267.

Here, Ms. Martinez's mural was a work of visual art and not excluded advertising and promotional material because it was not commissioned or paid for by the Kinsman, nor was the

mural's content determined in advance by the Kinsman. See id. at 265. Ms. Martinez received permission from the Kinsman's former owner, Mr. Dupont, to paint the mural on the side of the restaurant building, but unlike the non-profit organization in Pollara, Mr. Dupont never paid Ms. Martinez for her work, nor did he provide any artistic direction for the mural. Further, Ms. Martinez's work was not advertising and promotional material because it was created for exhibition purposes only. See id. at 269. Unlike the plaintiff in Pollara who was frequently commissioned by external parties to create artwork for use at corporate gatherings and private events, Ms. Martinez has never been commissioned to create such promotional material for private events. Instead, her portfolio of work has been created at her sole discretion as an artist and has been exhibited in galleries and online platforms designed to showcase her work, which has neither been commissioned nor been given artistic direction by external parties. See file at 4, 5. In this instance, Ms. Martinez created the mural to raise her artistic profile by adding to her mural portfolio and to commemorate a historical moment by depicting the Kinsman Disaster. File at 1. As opposed to the banner in Pollara which promoted the non-profit's services in word and picture, the content of Ms. Martinez's mural did not include any reference to the Kinsman Public House in word or picture, thereby demonstrating that the mural was not created to attract public attention and publicity to the restaurant. See Pollara, 344 F.3d at 267. Therefore, a court would likely find that Ms. Martinez's mural was not advertising and promotional material, and therefore was a work of visual art protected under VARA.

Conversely, Mr. Jensen may argue that Ms. Martinez's mural was advertising and promotional material because the mural's depiction of the Kinsman Disaster served to promote the Kinsman Public House, which was named after the Kinsman Disaster. Mr. Jensen may assert that the historical event commemorated in Ms. Martinez's mural is so closely associated with the

restaurant's identity that her mural served to promote the restaurant itself. See file at 10. To support his argument, he may refer to the hashtag '#kinsmanmural' used by social media users when they took selfies with Ms. Martinez's mural, which could be construed as a reference to the Kinsman Public House, the Kinsman Disaster, or both. See file at 7; see also Kleinman v. City of San Marcos, 597 F.3d 323, 329 (5th Cir. 2010) (holding that works "closely associated with" a business and are "distinctive symbol[s]" of the business are promotional material excluded from VARA protection). However, the mural's depiction of the Kinsman Disaster does not sufficiently prove that the mural's purpose was to advertise and promote the Kinsman Public House itself. The Kinsman Disaster is a well-known event in Buffalo's history, and Ms. Martinez's mural only included imagery that depicted scenes from the disaster. The mural did not contain the Kinsman Public House's logo, nor did it contain any other reference to the restaurant in word or image. File at 7. Furthermore, the Kinsman's logo does not contain any imagery of ships or similar themes that could be tied to the shipping crash depicted in Ms. Martinez's mural. Id. at 9. Most importantly, Ms. Martinez's intent when creating the mural was not to advertise or promote the restaurant, but to commemorate the anniversary of the Kinsman Disaster, as evidenced by her conversation with Mr. Dupont. Id. at 1. Therefore, a court would likely reject the opposing argument that Ms. Martinez's mural was advertising and promotional material.

Thus, the first element of Ms. Martinez's cause of action will likely be satisfied. A court would likely find that Ms. Martinez's mural was a work of art.

II. MS. MARTINEZ'S MURAL WAS A WORK OF RECOGNIZED STATURE BECAUSE IT WAS ACKNOWLEDGED BY A RELEVANT COMMUNITY AS A WORK OF HIGH QUALITY, STATUS, OR CALIBER.

A court would likely conclude that Ms. Martinez's mural is a work of recognized stature, thereby allowing Ms. Martinez to recover for the intentional destruction of her mural.

Federal law states that the author of a work of visual art has the right to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right. 17 U.S.C.S. § 106A (a)(3)(B) (LEXIS through Pub. L. No. 118-106). A work is of recognized stature when it is one of “high quality, status, or caliber that has been acknowledged as such by a relevant community.” Castillo v. G&M Realty L.P., 950 F.3d 155, 166-67 (2d Cir. 2020), aff’g Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421 (E.D.N.Y. 2018). The relevant community typically consists of “the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.” Id. at 166. The most important factor when determining whether a work is of recognized stature is artistic quality as judged by a relevant community, which can be demonstrated by expert testimony from members of the art community or by substantial evidence of non-expert recognition. Id. at 158. An artist’s pre-existing standing in the artistic community is also relevant in determining recognized stature, and merit ascribed to an artist by another prominent artist, museum curator, or art critic is more likely to establish a work is of recognized stature. Id. Documentary evidence in the form of past articles and letters may be used to establish sufficient support that a work is of recognized stature. Martin v. City of Indianapolis, 192 F.3d 608, 609 (7th Cir. 1999).

[Text omitted for brevity: case illustrations, application to client’s case, counterargument, and rebuttal.]

All in all, there is likely enough evidence for a court to conclude that Ms. Martinez’s mural is a work of recognized stature. However, we may be able to strengthen our position in two ways: (1) by collecting expert testimony from Buffalo’s art community to support our documentary evidence; and (2) by providing quantitative data that measures the frequency at

which social media users have shared pictures of Ms. Martinez's mural. By using hashtag analytics tools to track the number of posts associated with the hashtag '#kinsmanmural,' we can provide further evidence of substantial non-expert recognition to establish Ms. Martinez's mural as a work of recognized stature. See Castillo, 950 F.3d at 158.

Thus, the second element of Ms. Martinez's cause of action will likely be satisfied. A court would likely find that Ms. Martinez's mural was a work of recognized stature.

Conclusion

A court would likely find that Ms. Martinez's mural was a work of visual art and a work of recognized stature, thereby qualifying her for protection under VARA. If we filed suit on behalf of Ms. Martinez, a court would likely hold the Kinsman liable for violating Ms. Martinez's rights when they intentionally destroyed her mural.