

Chicago Daily Law Bulletin

Volume 158, No. 142

Congress answers eternal question with Visual Artists Rights Act

Art is a human activity consisting in this, that one man consciously, by means of certain external signs, hands on to others feelings he has lived through, and that other people are infected by these feelings and also experience them. ... Art is not, as the metaphysicians say, the manifestation of some mysterious idea of beauty or God; it is not, as the aesthetical physiologists say, a game in which man lets off his excess of stored-up energy; it is not the expression of man's emotions by external signs; it is not the production of pleasing objects; and, above all, it is not pleasure; but it is a means of union among men, joining them together in the same feelings, and indispensable for the life and progress toward well-being of individuals and of humanity."

— Tolstoy, "What is Art?" (1896)

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Philosophers and aestheticians have long tried to answer the question "What is art?" Tolstoy's definition seems astute, though his application of the concept seems in many respects misguided. He wrote that a Russian folk song performed by a joyous group of peasant women was "real art," but that Beethoven's piano sonata, Opus 101, was "only an unsuccessful attempt at art, containing no definite feeling, and therefore not infectious." He felt that ballet, "in which half-naked women make voluptuous movements, ... is simply a lewd performance." He called "The Last Judgment" by Michelangelo "absurd." There have been many attempts to define art; obviously there will never be consensus.

Among those who have attempted to define art, in somewhat more pragmatic terms, is the U.S. Congress. The Visual Artists Rights Act (VARA), 17 USC Section 106A, provides limited "moral rights" to the creators of certain works of fine art. Moral rights are rights, distinct from

copyright, that artists may exercise to control the treatment and presentation of their original works by others. For a limited class of copyrightable works, VARA creates a right of attribution (the right to claim authorship of a work) and a right of integrity (the right to prevent the intentional distortion, mutilation, destruction or modification of a work).

These rights do not apply to all copyrightable works. Congress intended VARA to apply only to a narrow class of works. In defining those works, Congress got its chance to join the philosophers in answering Tolstoy's question. VARA provides that the attribution and integrity rights are available only for "works of visual art," a term which is defined in Section 101 of the Copyright Act.

Unlike Tolstoy, Congress does not insist that the viewer be infected by the condition of the artist's soul. Nor does it impose any standard of quality to the qualifying works. In this, the definition follows a century-old principle of copyright law that protection is not to be based on the aesthetic merit of a work. As Justice Holmes noted in *Bleistein v. Donaldson* in 1903, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves as final judges of the worth of pictorial illustrations. ..."

In VARA, Congress defines "works of visual art" to include only paintings, drawings, prints or sculptures that exist in a single copy or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. Photographs are included also, but only if they have been produced for exhibition purposes. The VARA definition is far more limited than the types of art that are protected by copyright generally. The definition in the Copyright Act of "pictorial, graphic and sculptural works" is very broad and covers every variety of fine, graphic and applied art.

Like Tolstoy, VARA refines the

INSIDE IP LAW

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definition by telling us what is not included. It does not cover applied art (artistic works that have a utilitarian function), technical drawings, books or audiovisual works (thus excluding the moral rights from movies). Merchandising items and promotional materials are also excluded from the definition. Works made for hire, likewise, are not "works of visual art."

We've seen how Tolstoy applied his definition of art (by the way, he also did not consider Wagner's operas to be art — and perhaps he's not alone there), so we should consider how the courts have applied Congress' definition. A case of particular local interest is *Kelley v. Chicago Park District*, in which a landscape artist claimed VARA rights in "Wildflower Works." This work was displayed in Grant Park and consisted of two enormous elliptical flower

beds, each nearly as big as a football field, featuring 60 species of native wildflowers, placed so they would blossom sequentially and increasing in brightness toward the center of each ellipse. The 7th U.S. Circuit Court of Appeals dismissed the case. It noted that the garden was not a work of visual art because it was neither a painting nor a sculpture. 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." The court also found that the gardens were neither authored nor fixed, as required for VARA protection.

Other objets d'art that failed to qualify for VARA protection include "La Contessa," an old school bus tricked up to appear as a "mobile, interactive replica of a 16th century Spanish galleon" for the Burning Man festival (*Cheffins v. Stewart*). The court held that it was applied art and thus outside the definition of a work of visual art. In *Kleinman v. City of San Marcos*, the owner of a novelty shop sought VARA protection for a wrecked automobile that had been colorfully painted and put to use as a cactus planter in front of the shop. While Tolstoy might have considered this an external sign that enabled viewers to experience the artist's feelings, the court held to it was "promotional" and thus not a work of visual art.

In contrast, a large outdoor stainless steel sculpture (*Martin v. City of Indianapolis*) and a mosaic consisting of glass tiles in the image of a tiger in a mall area on a college campus (*Jackson v. University of Missouri*) were protectable works of visual art under VARA.

The courts seem to be doing what Congress intended by applying the definition narrowly. While the VARA definition may not be as passionate as Tolstoy's, it is a pragmatic solution to the competing interests of artists' rights and modern commerce.

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