

“What a Shame”: When Artist and Museum Fight, No One Wins

By Lisa M. Tittlemore, Partner

On July 11, 2008, United States District Court Judge Michael Ponsor issued a decision which not only told a sad tale regarding a work of art that could have been, but thoroughly discussed the history and purpose of the Visual Artist Rights Act of 1990 (“VARA”).

His decision, in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Buchel*, is a worthy read for anyone interested in either the making of contemporary art or the history and purpose of VARA.

By way of background, copyright law in the United States grants authors of original works the ability to control the use and distribution of those works. In addition to the rights of the copyright owner provided in 17 U.S.C. §106, the Copyright Act also provides authors of works of “visual art” further rights, known as the “rights of attribution and integrity.” 17 U.S.C. §106A.

These rights give an artist the right to claim authorship of a work, to prevent use of his name on works he did not create, and to prevent use of his name on a work in the event of distortion, mutilation, or modification of the work. They were included in the Copyright Act via VARA in order to bring U.S. law into closer conformity with the Berne Convention, an international treaty governing copyright issues which requires signatories to recognize certain “moral” rights that are commonly recognized in other countries.

In *Buchel*, Judge Ponsor held that VARA was unlikely to apply to “unfinished art.” In reaching this conclusion, he described the relationship between a Swiss artist and the MASS MoCA museum in North Adams, Massachusetts, which deteriorated to such an extent that in the end the artist “abandoned” the work, leaving it unfinished. The artist then sought to preclude the museum from showing the unfinished work or even allowing patrons to walk past it while it was covered.

The story is all the more powerful because of the size and potential impact of the work at issue, an installation called “Training Ground for Democracy” which covered a space “roughly the size of a football field.” As the judge described

it, it was to be a “mammoth exhibition” which invited the viewer “to step, so to speak, through the picture frame and encounter the artwork as a three-dimensional world.” “To the extent that the assembly of objects was an attempt to say anything about democracy, an impression of decay, hypocrisy, and despair, either now or in the near future, was unavoidable.”

After analyzing the legislative history of VARA, Judge Ponsor’s concluded that its scope should be narrowly interpreted, and that, because the statute does not mention unfinished works, “unfinished works may not be covered by VARA at all. To the extent that an artist seeks protection for an uncompleted work, a violation of one of VARA’s two explicitly recognized rights must be demonstrated with special clarity.” Accordingly, the judge determined that “it is doubtful that VARA even covered the assembled materials that constituted this unfinished work of art.”

Further, even if VARA would have applied, because the museum did not intend to associate Buchel’s name with the artwork and because there was no completed work for the museum to distort, mutilate or modify, “display of this unfinished installation would have violated neither Buchel’s right of attribution nor his right of integrity.”

With respect to the artist’s claim that, by allowing patrons to walk past the unfinished work covered with tarpaulins, the museum had violated his rights, the judge concluded there was no basis for VARA liability: “A legal rule to the effect that when a museum allows an unfinished, covered assembly of materials to be seen, it has violated VARA, would create at least an awkward, and probably an unmanageable, burden for both artists and exhibitors.” For this reason, the judge granted the museum’s motion for summary judgment and denied the artist’s motion.

It is clear from the decision that the matter touched the judge personally. He notes in his decision that:

The undersigned (as one of the very few people to see the nearly completed “Training Ground for Democracy”) must add a rare personal observation. This is a sad case. As a result of a possibly

avoidable breakdown in the relationship between the parties, a substantial work of art that might well, if completed, have powerfully touched many people has been scattered to the four winds. Despite the comedic elements of this particular brouhaha, something barbaric always adheres to the deliberate destruction of a work of art – even one that is not quite finished. Since responsibility for the collapse of this creative initiative, like responsibility for its partial completion, was shared by the museum and the artist, one is tempted to wish a plague on both their houses. But it is probably more apt to say: what a shame. ✧