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Massachusetts Museum of Contemporary Art Foundation v. Christoph Büchel: An Appellate Perspective on the Visual Artists Rights Act

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When the U.S. Congress passed the Visual Artists Rights Act (VARA) in 1990[1], no legislator really anticipated that courts would be applying the act to art installations that were only half-finished. But this was the very challenge that the U.S. Appellate Court for the First Circuit faced in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Christoph Büchel*.[2] Deliberating over a failed football-field-sized art installation wryly entitled "Training Ground for Democracy," the appellate court was asked to determine whether VARA protected Swiss artist Büchel's moral rights in his half-finished work that if completed would have given viewers "training to be an immigrant, training to vote, protest, and revolt, training to loot, training [in] iconoclasm, training to join a political rally, training to be the objects of propaganda, training to be interrogated and detained and to be tried or to judge, training to reconstruct a disaster, training to be in conditions of suspended law, and training various other social and political behaviors."[3]

The dispute arose in fall 2006 when Büchel and the Massachusetts Museum of Contemporary Art (MASS MoCA) attempted an ill-fated artist–museum collaboration. From the start, Christoph Büchel ignored MASS MoCA's efforts to formalize the working relationship through a signed written proposal. MASS MoCA in turn ignored Büchel's proposed contract requiring it to transport and organize the materials for the installation. Subsequently, the parties clashed over the budget of the exhibition, as Büchel requested a movie theater interior, a house, a bar, a mobile home, several sea cargo containers, a variety of vehicles, an aircraft fuselage, and a bomb carousel in order to complete the installation.[4] These disagreements, coupled with additional disagreements over whether MASS MoCA was properly assisting Büchel in properly executing the exhibit, led to major delays.

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By January 2007, Büchel refused to return to finish the exhibit. MASS MoCA sued Büchel in the District Court of Massachusetts in 2007, seeking a declaratory judgment that it was "entitled to present to the public the materials and partial constructions assembled in connection with an exhibit planned with the Swiss artist Büchel."[5] Büchel counterclaimed under VARA and Section 106 the Copyright Act. On a motion for summary judgment, the court ruled in favor of MASS MoCA, finding that Büchel had no legally cognizable claim under VARA or the Copyright Act.[6] In the district court's own words:

> When an artist makes a decision to begin work on a piece of art and handles the process of creation long-distance via e-mail using someone else's property, someone else's materials, someone else's money, someone else's staff, and, to a significant extent, someone else's suggestions regarding the details of fabrication—with no enforceable written or oral contract defining the parties' relationship—and that artist becomes unhappy part-way through the project and abandons it, then nothing in the Visual Artists Rights Act or elsewhere in the Copyright Act gives that artist the right to dictate what that "someone else" does with what he has left behind, so long as the remnant is not explicitly labeled as the artist's work.[7]

The appellate court disagreed with the district court's analysis, holding instead that artists protected under VARA have the right to artistic integrity, which includes a right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[8] The appellate court explicitly decided what the district court had left implicitly undecided: Does VARA apply to unfinished works of art?

Focusing on the Copyright Act and VARA's statutory plain language, the appellate court reasoned that even though VARA did not comprehensively define "work of visual art," the Copyright Act, which includes VARA, provides that a work may be protected when it is "fixed" and "where a work is prepared over a period of time, the portion of it that has been fixed . . . constitutes the work as of that time."[9] Therefore, a work in progress could be protected under VARA as long as it was "fixed" so that it "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[10] After its brief statutory analysis, the First Circuit Court gave a nod of approval to the Second Circuit for its implicit finding in *Carter v. Helmsley-Spear, Inc.*, 71 F. 3d 77 (2nd Cir. 1995) that VARA could apply to an unfinished sculpture being installed in a building lobby.[11] This decision, while conclusive, remains controversial in light of the fact that much of Büchel's installation involved ordinary functional objects that only became artistically expressive when "fixed" in a final configuration.

Holding that VARA applies to the partially completed "Training Ground for Democracy," the court went on to evaluate rights of integrity and rights of attribution. The court found that under VARA's right to integrity, artists have a right to be protected from modification of their works that cause injury or damage to

their reputation "in relation to the altered work of art."[12] Under VARA's right to attribution, artists can claim injunctive relief to assert or disclaim authorship of a work.[13] On the right of attribution, the appellate court had no need to review injunctive relief since the art installation had already been completely dismantled. On the right of integrity, the First Circuit concluded that because the museum may have modified the installation without Büchel's authorization in a manner that impacted Büchel's reputation, there were material disputes of fact that should have been resolved by the jury at the district court level of review.[14]

The appellate court agreed with the district court that there was no intentional distortion or modification of Büchel's work simply by covering the project with tarps. It did not matter that some observers may have formed impressions of "Training Ground for Democracy" based on the layout of the tarped objects.[15] Curiously, appellate court Judge Lipez continued on in his analysis to comment on the *mens rea* of MASS MoCA in shrouding Büchel's exhibit by opining that "[i]t might be a fair inference that the Museum was deliberately communicating its anger with the Büchel by juxtaposing his unfinished work with the successful artistic collaborations depicted in its new exhibition."[16]

Concluding its analysis of VARA, the court found that in spite of Büchel's claims, VARA did not provide any right of disclosure preventing a party from disclosing a work without an author's consent. Although the court refused to proceed on Büchel's lack of consent as a moral right issue, the court examined Büchel's lack of consent as a traditional copyright claim based on Büchel's economic rights to be the exclusive party entitled to "display the copyrighted work publicly."[17]

The appellate court strongly disagreed with MASS MoCA that finding in favor of Büchel's VARA claim would foreclose long-distance collaboration between artists and museums in the future. They found that as long as the artist's vision guides the collaborative relationship and not the institution's vision, artists and institutions can continue to work cooperatively. Unfortunately, the appellate court provided no further insight on where an artist's vision may blur with an art institution's mission. In a collaborative project, is there only room for one artist and his or her singular vision?

While Büchel may not have achieved his grand artistic vision, the controversy over "Training Ground for Democracy" has proved to be an active training ground for both moral rights activists and museum curators. Given that the case has been remanded to the district court for review of Büchel's VARA claim on right of integrity and his claim under the Copyright Act, the last chapter of this saga of contemporary gallery drama has yet to be written.

Yet this case serves as a cautionary tale.[18] Museums that intend to collaborate with living artists need to insist on clearly written contracts from any would-be artists that spell out in detail the working relationship between the institution and the artist. Museums that fear a similar incident in their galleries may also insist on joint authorship of large-scale installations, especially where museums are supplying staff and materials. Up-and-coming artists will need to read these contracts

carefully to ensure that they are not inadvertently waiving their rights under VARA to protect of any finished or partial works.

Meanwhile, Christoph Büchel continues to create his hyper-real art across Europe, and MASS MoCA continues to engage edgy contemporary artists to design exhibitions. With this appellate court ruling now widely circulated among art law practitioners, it seems that there may be a need for a few more lawyers to help navigate and negotiate future creative transactions among artists, galleries, and museums.

ENDNOTES

1. Pub L. No. 101-650; 104 Stat. 5089
2. *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Christoph Büchel*, 593 F. 3d 38 (1st Cir. 2010) ("Appellate Decision").
3. Id., at 43 (Quoting an affidavit submitted by Büchel to the district court.)
4. Id., at 44.
5. Id., at 46. (Quoting MASS MoCA's complaint.)
6. *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Christoph Büchel*, 565 F.Supp.2d 245 (D.Mass.,2008)
7. *Id*. at 248.
8. VARA, *supra* note 1 *at* 17 U.S.C. §106A(a)
9. Appellate decision, *supra* note 2 at 51 (Citing 17 U.S.C. § 101.)
10. VARA, *supra* note 1at 17 U.S.C. § 101.
11. Appellate decision, *supra* note 2 at 51, fn. 11 (Noting that the Second Circuit exempted the sculpture in the *Carter* case from VARA because it was a "work for hire.")
12. *Id*. at 54.
13. *Id*. at 55.
14. *Id*. at 58.
15. *Id*. at 61.
16. *Id*. at 62.
17. 17 U.S.C. § 106(5).
18. Appellate Decision, supra note 2 at 61.