

# The Legal and Ethical Consideration of Mural Conservation: Issues and Debates

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The Getty Conservation Institute

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The Getty Conservation Institute works internationally to advance conservation and to enhance and encourage the preservation and understanding of the visual arts in all of their dimensions—objects, collections, architecture, and sites. The Institute serves the conservation community through scientific research; education and training; field projects; and the dissemination of the results of both its work and the work of others in the field. In all its endeavors, the Institute is committed to addressing unanswered questions and to promoting the highest possible standards of conservation practice.

The Institute is a program of the J. Paul Getty Trust, an international cultural and philanthropic institution devoted to the visual arts and the humanities that includes an art museum as well as programs for education, scholarship, and conservation.

## **Preface**

The following essay was originally presented at “Mural Painting and Conservation in the Americas,” a two-day symposium sponsored by the Getty Research Institute and the Getty Conservation Institute, May 16–17, 2003, at the Getty Center in Los Angeles.

At this event, a cross-disciplinary roster of art historians, conservators, and artists discussed the social, artistic, and political dimensions of murals, the value they hold for different constituencies, and the rationale and conservation techniques for ensuring their long-term survival.

The views expressed in this essay are those of the author and do not represent the views of the J. Paul Getty Trust.

I want to thank the Getty Conservation Institute and the organizers of the conference, especially Will Shank, and my fellow presenters, from whom I have learned a great deal.

You should know that I am licensed in New York and the District of Columbia and have learned my California law from extensive research. Although California protected the works of California visual artists with the California Art Preservation Act (CAPA) of 1979, approximately eleven years before the United States Congress voted to protect the works of visual artists throughout the United States, I think your understanding of the law would be clearer if I started this discussion with the federal law, the Visual Artists Rights Act, known by the acronym of VARA. Then I will discuss California law and the California Art Preservation Act. The reason to discuss the federal law first is because the supremacy clause of the U.S. Constitution gives federal law preemption over state law. Please note that neither law mandates conservation.

The second part of my discussion will concern itself with the application of VARA and CAPA to the conservator and to the building owner wanting to either commission a mural, conserve a mural, or destroy a mural.

In December 1990, after more than ten years of debate, Congress passed the Visual Artists Rights Act, representing one of the most significant changes in American copyright law in its two-hundred-year history. This law granted new rights for American artists called “moral rights”: first, the “right of attribution,” which grants artists the right to be identified with their works, and second, the “right of integrity,” which grants artists the right to protect their works from modification or destruction. The passage of VARA imposes a legal liability for those who destroy, alter, or mutilate a mural and requires conservators to preserve the artistic intent of the artist.

A copyright is a proprietary interest that vests in a creator from the moment an idea is fixed in a tangible medium of expression. In the United States, copyright law is derived from the clause in the Constitution that delegates to Congress the authority “to promote the useful arts and sciences.” It is by this authority that Congress has statutorily granted proprietary rights in the expression of original ideas. At its core, copyright law is actually a bundle of five distinct rights.

Artists (called "authors" under the Copyright Act of 1976) and their estates, for seventy years after the artists' death, have the exclusive rights to reproduce, prepare adaptations (called "derivative works"), distribute, perform, and display their original works.

The scope of copyright protection for a work depends upon the circumstances surrounding the creation of a work and the country in which the work is created. In the United States, the underlying premise of copyright is largely economic: a proprietary interest is granted in a work as an incentive to promote progress and innovation. The notion is that if an artist knows that a defensible proprietary interest exists in a work of art and that an artist can prevent others from copying it, then the artist will be more willing to "publish" the idea, or make the idea known to the public. An additional concept that you want to be familiar with is that when a work is created by an artist within the scope of the artist's employment, the work is a "work made for hire." It is also a work made for hire when the work is created under a written contract that includes the specific provisions set forth in the U.S. Supreme Court case *Community for Creative Non-Violence (CCNV) v. Reid*. It is the work that the artist produces while employed by another; for example, what a graphic designer creates while employed by a design firm belongs to the design firm. The artist retains no proprietary interest in a work made for hire. Instead, the employer holds all the rights, including the copyrights.

While United States copyright law is based on economic incentives, other countries, such as France, Italy, and Germany, have a natural-rights conception of copyright law, whereby an artist has inherent, or natural rights in a work because that work is an extension of the creator's personality. This natural-rights theory of copyrights is the basis of the moral rights that emerged during the French Revolution and developed as an independent legal doctrine in the late nineteenth century. As exemplified in French law, a moral right is "an exclusive incorporeal property right [of the] author of an intellectual work . . . , by the mere fact of its creation" (France, Law of March 11, 1957). Under French law, as in many countries, moral rights are recognized concurrently with economic rights but remain separate and distinct.

These moral rights are the centerpiece of VARA. Although VARA granted new rights to Americans, some of which Europeans have recognized for over one hundred years, these American moral rights have been grafted onto the economic conception of copyrights and are not recognized as inherent natural rights. In the United States, they are only creatures of statutes, and therefore, they are limited to what is set forth in the statute.

### **History of the Passage of VARA**

Adoption of moral rights in the United States was ultimately a result of the United States' signing of the Berne Convention for the Protection of Literary and Artistic Works in 1988. The Berne Convention, established in 1886 in Berne, Switzerland, is the oldest multilateral copyright treaty and is administered by the world intellectual property organization (WIPO), an agency within the United Nations. Article 6(bis) of the Berne Convention recognizes the moral rights of attribution and integrity.

This provision states, “[an] author shall have the right to claim authorship of the work [right of attribution] and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honor or reputation [the right of integrity]” (Berne Convention, 1978). This provision provides a more narrowly defined scope of moral rights than the laws of some of the signatory countries.

Moral rights under the Berne Convention are recognized independently of the artist's economic rights, and they continue to remain with the artist even after the transfer of the economic rights—for example, the sale of a work of art.

Despite acceptance of the Berne provisions by many countries, the United States did not sign the Berne Convention until 1988 (effective March 1, 1989). The refusal to become a signatory was due largely to disagreement over the acknowledgment of moral rights. The United States took the position that it had developed alternative solutions to granting the moral rights, because it did not want to recognize them directly.

Let us back up: the primary motivation for the United States to sign the Berne Convention arose from increasing pressures of the growing world economy to develop a more active stance on international intellectual property enforcement, particularly with the thriving piracy of United States copyrighted products. It was believed that signing the Berne Convention would provide greater protection than that which could be obtained through the alternatives that the United States had previously pursued.

Another motivation for the United States to join the Berne Convention was to strengthen the credibility of the U.S. position in trade negotiations for the General Agreement on Tariffs and Trade (GATT) and to forward the goal to formulate an intellectual property code within GATT.

We did sign Berne in 1988, but realizing that a stalemate on moral rights could hold up the adoption of the Berne Convention and consequently impact the GATT negotiations adversely, Congress dropped the issue of moral rights and did not pass VARA for another couple of years.

### **“Work of Visual Art” under VARA**

In Europe, moral rights are recognized for most creations in many different artistic disciplines, but these rights under U.S. law are restricted solely to a “work of visual art.” As defined in VARA, a “work of visual art” is:

1. A painting, drawing, print, or sculpture, existing in a single copy or in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author, or, in the case of sculpture, in multiple cast, carved, or fabricated sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
2. A still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author.” VARA expressly excludes “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture, or other audiovisual work, book, magazine, newspaper, periodical,

database, electronic information service, electronic publication, or similar publication.”

Nor does it recognize mixed media if the media include any of the expressly excluded items.

Please note that even if a work falls within the definition of a “work of visual art,” VARA does not apply if the work is not subject to copyright protection under the Copyright Act of 1976 or is a work made for hire (VARA). Further, these federal rights do not apply to reproductions of the work, and mere reproductions of the work do not violate either the right of integrity or the right of attribution, although unauthorized reproductions may violate copyright law.

Unlike copyright law, VARA protects only the art of living artists. VARA protects conservators of works of visual art from liability for distortion, mutilation, modification, or destruction if the work is properly performed—that is, if there has been no gross negligence by the conservator.

## **CAPA**

The California Art Preservation Act can be found in California’s civil code under “products of the mind, preservation of works of art, §987.”

Although this statute was passed in 1979, it was not until May 1, 1991, that the California Court of Appeals (in the case of *Botello v. Shell Oil Co.*) said, “in this case we are asked to decide a single issue of statutory interpretation: whether a mural is a ‘painting’ within the meaning of the California Art Preservation Act” (*Calif. Civ. Code, §987*).

The facts in the Botello case were that in 1980 Shell Oil hired artists to paint a large mural to be owned by Shell Oil. The mural was entitled *Filling Up on Ancient Energies*, with themes of Hispanic culture, depictions of dinosaurs, Mayan deities, motor vehicles, and other things. The mural was twelve hundred square feet and listed the artists’ names and addresses on the surface, which earned the artists a considerable amount of favorable publicity.

In 1988, Shell authorized destruction of the wall to make room for a parking lot, and all but 120 square feet were destroyed with no attempt to notify the artists. The trial judge accepted the

defendant's theory of statutory construction, which was that murals were not paintings as defined by CAPA and granted summary judgment for the defendant. The appeals court reviewed the CAPA and went to §987(h)(1), regarding art that cannot be removed from the building without damage to the art or to the building. In such a case, the artist is deemed to have waived his or her rights under the CAPA, unless there is an express reservation of rights in a written recorded instrument. If the art can be removed without such damage (and here both parties agreed that it could), the owner must comply with the notification procedures. The court also turned to *Webster's Third New International Dictionary* and found that the definition of a mural is "a painting or other work applied to and made integral with a wall surface." The court then concluded, as a matter of law, that "mural" is a subset of "painting."

### **Contrasting VARA and CAPA**

A comparison of VARA and CAPA relevant to our discussions of murals shows the following differences:

The California statute covers "fine art," which it describes as "an original painting, sculpture, drawing, or an original work of art in glass of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser." It does not cover multiples. VARA covers multiples with certain stipulations.

The CAPA phrase "of recognized quality" may parallel the later adopted language in VARA of "a work of recognized stature." In a dispute that is litigated under state law, the judge or jury will decide if the art is "of recognized quality." A court may find that there may well be a difference between art of recognized quality and art of recognized stature. To me, quality has to do with the work, and stature has to do with the work's reputation.

VARA mandates that if the building owner wishes to alter or tear down the structure on which the work of art has been placed, the owner must contact the artist in writing and allow the artist ninety days to remove it, at the artist's expense. CAPA sets forth the same ninety-day period.

Under the California law, if the mural cannot be removed without damage, the owner can proceed to destroy it without notice.

Under the California law, if the artist muralist and the owner enter into a written contract signed by both parties and recorded in the appropriate county recorder's office, then the owner must make a good-faith attempt to notify the artist or the artist's heirs. VARA prescribes that the artist should register his or her current address with the Copyright Office of the Library of Congress in order to guarantee notification.

Some federal courts have insisted that expert testimony be given in order to prove that the work of art, not the artist, is of recognized stature. However, at least one federal judge admitted into evidence newspaper articles and reviews about the work of art and concluded that expert testimony was unnecessary. This was important because expert testimony is very expensive. Under CAPA, the test, as you will recall, is that the art is of recognized quality. The statute calls for expert testimony in order for a court to make that determination.

As to the moral right of attribution, which is codified in both VARA and the California statute—as with the interpretation of the law regarding stature versus quality—there is different specific language regarding attribution which could result in different outcomes if a case is litigated. We will come back to these comparisons, but first, under the supremacy clause of the U.S. Constitution, state law must yield to conflicting federal law. Therefore, in an area in which Congress may validly legislate, if Congress explicitly provides that a state law is invalid or if Congress implies such a result by enacting a contradictory statute, the state law is rendered unenforceable.

In enacting VARA, Congress explicitly provided for the preemption of certain state laws as set forth in the statute. It is likely that certain artists, such as glass artists who are unable to sue under VARA, may use CAPA.

Please note that an artist may make a viable claim even if a major portion of CAPA is preempted, because of the legal doctrine of severability, which California recognized in an

unrelated case. That is, that part of the law that conflicts or overlaps with the federal law can be severed from the statute, and the remaining part of the state statute can be applied.

Also, VARA does not preempt actions brought under the California statute with respect to works created prior to June 1, 1990, the effective date of VARA, to which the artist no longer holds title.

The major area where CAPA may be found to be enforceable relates to the period after the artist's death. While during the artist's life the validity of the California statute is mostly suspended (because the federal law preempts the California law), upon the artist's death and for the next fifty years thereafter, the California statute is probably valid and enforceable by the beneficiaries, devisees, or personal representative of the deceased artist. The result may very well be that a dead artist in California has greater rights under CAPA than a living artist.

Why am I making this comparison? Because of the importance of the doctrine of preemption. To summarize: VARA is part of the currently applicable copyright law, the Copyright Act of 1976, which provides that the common law or statutes of any state that create legal or equitable rights that are *equivalent* to any of the exclusive rights within the general scope of copyright in works of authorship and that are fixed in a tangible medium of expression and come within the subject matter of copyright, whether created before or after January 1, 1978, and whether published or unpublished, are preempted—that is, these rights are overridden by the Copyright Act of 1976. On the one hand, states are prevented from passing enforceable laws that give works of art protection that is equivalent to what they get under federal copyright law. VARA explicitly states that rights or remedies under the common law or statutes of any state are not preempted with respect to:

1. subject matter that does not come within the subject matter of copyright as defined in the statutes, including works of authorship not fixed in any tangible medium of expression, such as performance;
2. lawsuits commenced for actions taking place before January 1, 1978; and

3. activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright.

So, for a state law to avoid preemption under federal copyright law based on equivalency of protected rights, it must contain an extra element that not only distinguishes the claim from a claim in copyright but also changes the law so that the claim is qualitatively different from a copyright infringement claim (*U.S. Code Annotated* §§106 and 301[a]). Another way of describing preemption is *Black's Law Dictionary* definition: "the principle (derived from the supremacy clause) that a Federal law can supersede or supplant any inconsistent state law or regulation." The reason I am explaining preemption so carefully is that if VARA preempts the California Art Preservation Act concerning the particular harm to a mural, then an artist can sue only under VARA, and the artist would therefore be limited by the statutory constraints of a VARA claim.

To clarify, let us go back to the two basic rights in VARA, the right of attribution and the right of integrity. Attribution is to claim or disclaim work as his or her own that has been distorted, mutilated, or otherwise modified, such that it would be prejudicial to his or her honor or reputation. The second right, a more important one here, is the right of integrity. Under this right, an artist may prevent or claim damages for (1) any intentional distortion, mutilation, or other modification of the artist's work that would be prejudicial to his or her honor or reputation, and (2) any intentional or grossly negligent destruction of a work of recognized stature.

So what is it that constitutes distortion, mutilation, or other modification of a work of art? VARA states that no work is distorted, mutilated, modified, or destroyed if the damage is the result of conservation (and we'll get back to that issue) or the result of public presentation and placement, unless intentional or caused by gross negligence, or the result of the natural deterioration of the work of visual art.

First, let's look at VARA from the point of view of the muralist. What of site-specific art?

There is a difficult case from New York, *English v. BFC&R 11th Street LLC et al.*, 1997 WL 746444 (SDNY 1997), where an exterior mural was created without the property owner's

knowledge or permission and then was completely obscured by a new brick wall. The court held that this was not a destruction because the mural itself remained intact, even if, in fact, it was not visible. The *English* opinion was probably motivated by legitimate urban development issues. Under VARA, art that was incorporated into a building before 1990 (or after 1990 with a property waiver signed by the artist) and that cannot be removed without damaging or destroying the work is not protected. I have pointed out that if the art can be removed and the building owner wishes to remove it, under VARA, he or she must make a diligent good-faith effort, in writing, to notify the artist, who then has ninety days to remove the work or pay for its removal. If the artist complies, then title to the work rests with the artist. Therefore, if the artist is to be protected, it is imperative for the artist to have a signed contract that sets forth the terms of the commission and recites the artist's address and probably his or her attorney's or agent's address. The artist should then record his or her address with the Library of Congress and, if in California, record the commission contract with the appropriate county register.

### **New Cases**

There are two reported federal cases of note that I want to tell you about. They are *Martin v. City of Indianapolis* and *Flack v. Friends of Queen Catherine (FQC)*.

In the *Martin* case, the City of Indianapolis bulldozed a large outdoor sculpture created by Martin, which was located on city land.

The Seventh Circuit, which sits in Chicago, held that the destruction was not willful (although it was clearly intentional), because the city was unaware of the law. The hopeful part of that court's decision is that it found that proving an element of VARA concerning "recognized stature" did not mean that experts had to testify about the artist's standing. This holding is different from the Second Circuit New York case *Carter v. Helmsley-Spear*, which contemplated the calling of experts. The Seventh Circuit, although not one of the two circuits that lawyers usually look to on intellectual property issues, held that newspaper articles and magazine articles about the work of art are enough "to prove recognized stature."

In the Martin case, the Court of Appeals for the Seventh Circuit let stand the award of attorneys' fees of over \$100,000 but did not give the artist the over-\$100,000 statutory damages that he would have been entitled to if it were found that the destruction was willful.

The second case is a much more troubling case for conservators and for groups, including museums, that hire conservators: it is the case of *Flack v. FQC and Tallix*.

The plaintiff in this case was the well-known artist Audrey Flack. The defendant was the commissioning agency, the FQC and the foundry, Tallix. In this case, there were three VARA claims, in addition to a §101 copyright claim, a Lanham claim, and a N.Y. State breach of contract and tort claim. I am going to discuss the VARA claim only.

The facts were that the FQC, after whom Queens, New York, was named, held an international competition for a statue of Queen Catherine, and Audrey Flack won. The facts seem to be endemic to all large public projects. Flack was commissioned to design and then supervise the casting of a thirty-five-foot bronze sculpture of Queen Catherine. As in all the competitions I have personally witnessed, there was a dispute about remuneration, but that is not an explicit issue here.

Flack began work. One year later, FQC entered into an agreement with Tallix. Flack was not a signatory but was expressly named as the artist commissioned to design and to advise on the fabrication of the statue and on its installation on city land in a prominent place.

Tallix was to produce in bronze: a twenty-two-inch maquette, a forty-four-inch maquette, a ten-foot maquette, and then a final thirty-five-foot sculpture.

In 1996–97, the artist began work on the face, hands, body, ornaments, lace collar, and skirt. On November 8, 1997, FQC approved the design and authorized casting, but then Queen Catherine was found to be politically incorrect because she and her family allegedly made money from the slave trade. As a consequence, the borough president withdrew the prominent site.

Tallix stopped work and terminated its agreement with FQC, but in January 1999, FQC and Tallix made a new agreement, leaving Flack out of the casting and completion part of the

project. In March 1999, Flack learned that new molds were required because the maquette of the queen's head was left outdoors in Tallix's garbage dump and was damaged.

Flack offered to resculpt the face, for additional money, but instead, Tallix hired David Simon, one of Flack's sculpture assistants, to do the resculpture.

Flack asserted that Simon lacked skill and was not trained in conservation, with a resulting distortion and mutilation of the head.

In August 1999, FQC told Tallix to go ahead and cast the Simon head. Flack brought suit, and in September 1999, Flack's temporary restraining order was granted.

Court asked: Is it a work of visual art under VARA?

Court answered: The fact that what was mutilated was only her head did not defeat the VARA claim. Even if only the head were mutilated, VARA could be applied. Even though it was a maquette and not the final work of art, it was still entitled to VARA protection. The court looked to the artistic community, where models, such as clay sculptures, are considered works of art in their own right. In the case of murals, corresponding works would be the preliminary drawings or the preliminary paintings for a mural.

What about the statutory exclusion of conservation?

What is really important here is that the court held that the hiring of Simon to resculpt was perhaps the most important violation of VARA. The defendant, FQC, had responded that Simon was hired to repair and not to modify the face and that, therefore, the work on the face was conservation. Remember, when properly done, conservation is specifically exempt from VARA unless there is willful misconduct or gross negligence.

The court went on to say that the complaint contained sufficient allegation that, if proven, could support an inference that the hiring of Simon was grossly negligent, because Simon was not a conservator—he was a sculptor's assistant.

This holding is very important, because it means that an institution can violate VARA if it hires an untrained or incompetent conservator.

There were other legal issues in the case, but the important one is that at least one trial court in New York believes that a VARA claim may be successful if the conservator is not qualified.

For the conservators in the audience, after review of the federal and state protections for artists and the case law, I have the following suggestions:

You need to be very careful if the artist is living. I advise all conservators, if at all possible, to get written permission from living artists to do the conservation. I know that this may be very difficult or sometimes impossible. Under VARA, a conservator may be liable to an artist for the intentional or grossly negligent destruction of a work of recognized stature. There has not, to my knowledge, been a suit filed under VARA against a conservator, *but it will happen*. Conservators have been successfully sued for ruining works of art under other provisions of the law, such as simple common-law breach of contract, but those damages may not rise to the level of statutory damages or carry attorneys' fees.

A working definition of gross negligence is "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages." Examples of gross negligence could be: doing conservation while drunk or on drugs, or not testing to see if there is a coating on a mural before applying a treatment, when the test is readily available and inexpensive.

A prudent practice is always to adhere to the American Institute of Conservation (AIC) code of ethics and guidelines for practice, which create an ethical obligation for conservators and set out the accepted standard of care for the profession. If followed, the guidelines will help shield the conservator from legal liability. For example, the code requires documentation for any and all actions of conservation.

Consider drawing an analogy between conservators and physicians. By law, physicians have a legal obligation to practice medicine with the same degree of skill and care that is expected of the average physician acting under similar circumstances. Often, in order to meet this standard, a physician is obligated to run tests on the patient before giving treatment or

offering advice. The law imposes a duty under circumstances in which the benefit received by testing outweighs the burden of giving the test. This is especially true when the cost of testing is extremely low and the possible resulting harm is great.

If publicly asked why they run so many tests, doctors will, of course, respond that they use tests to provide the best possible medical services to their patients. If asked in private, they add that they also test to avoid a possible lawsuit. This is not to suggest that doctors do not care about their patients. However, one look at the cost of malpractice insurance suggests that doctors do consider the legal consequences of failing to test. In an increasingly litigious society, preventive medicine is a common and prudent practice.

Arguably, the conservator's restoration of a work is analogous to a health care provider's treatment of the patient. The conservator's goal is to maintain or restore the "good health" of the work by preserving the intent of the artist and to avoid any harm to the work and thereby avoid any legal liability. Before proceeding in a restoration, conservators should fully understand the scope of the restoration and run cost-effective tests that will enable them to fulfill their obligation. Testing provides protection for the work and protection for the conservator. The results of testing will guide conservators in providing their "patients" with professional care while practicing preventive medicine that guards both against harming the patient and against legal liability. Conservators, like doctors, should always be cautious in their attempts to restore their patients to good health and should follow the recommended procedures, as well as the rules and regulations, of their profession.

For instance, AIC guidelines wisely require documentation for any and all actions of conservation. Proper documentation provides professional care for the work and legal proof that the conservator acted with the requisite care—that is, that he or she did not act negligently. Therefore, it is important to document everything done to a work, no matter how slight, and to photograph the work both prior to and after restoration.

Although the AIC code of ethics and guidelines are extensive and require the conservator to maintain a high ethical and professional standard, conservators should not automatically

assume that adhering to them will provide complete protection from liability. Even if a conservator diligently follows the AIC guidelines, a court of law, upon hearing the facts, could require even greater diligence, because the judge or jury will ultimately decide if there was gross negligence.

Conservators, therefore, should continue to actively pursue better and more efficient methods of restoring and conserving art, and this is stated in the AIC guidelines. To ignore or disregard an effective technique of conservation could expose a conservator to liability despite a strict adherence to commonly accepted practices. Above all, if the conservation is to be performed on the work of a living artist, the prudent conservator should obtain that artist's permission. There may also be other circumstances—such as knowledge of a litigious living artist—under which a conservator's best course of action is not to accept a commission to restore a work of art.

An important additional preventive measure would be for all museums and other art purchasers, including property owners, to obtain more comprehensive information at the time of accession. I know that all major museums now regularly collect this information. All commissioning agencies should also collect and keep this information on all the materials used, on how they were used, and on the history of any treatment. The cost of obtaining this information is low, and it would prove invaluable to conservators.

Although moral rights under U.S. law exist for the life of the artist, moral rights in California and other states and other countries extend beyond the artist's life and may vest in the artist's heirs. As a consequence, even if the artist is no longer living—and particularly if the work was created in California or in another country, such as France, Italy, or Germany—the conservator should seek permission from the artist's heirs. While paragraph 6 of the AIC guidelines recommends seeking the consent of the owner, custodian, or authorized agent, frequently the owner of the work is not the artist (AIC guidelines, 1994). I learned during the preparation of this discussion that in Mexico, conservators must get permission to work on the works of certain artists.

## **In Summary**

As is suggested by the AIC code of ethics, a conservator should recognize his or her limitations and use good judgment. Conservators should not commit to the restoration of a work of art unless they have the required skills and knowledge. Given the remedies now available to artists under VARA and CAPA, conservators should not be pressured by deadlines that cannot be met without sacrificing professional standards. Conservators must test thoroughly. Why is VARA scarier than a suit for damages for breach of contract, or even scarier than a CAPA suit? Because statutory damages under VARA for intentional destruction or mutilation are \$150,000.

In the Southern District of New York case of *Flack v. Friends of Queen Catherine*, the district court held that an organization may be held liable for the negligent hiring of an unqualified conservator. Although this is a trial court decision, conservation organizations need to make sure that the conservators that they hire are actually qualified conservators or working under the very close supervision of qualified conservators, because another trial court could raise the theory of intentional or grossly negligent hiring of an incompetent conservator.

## **My Conclusion for the Artists**

1. Make no murals without a written agreement with the owner of the wall. Have a lawyer conversant with VARA and CAPA review the agreement, and remember that in Los Angeles, the local law requires the approval of all murals. Illegal murals probably have no legal protection. If you do not have funds for a lawyer, look up a local Volunteer Lawyers for the Arts (VLA) organization and request a free or low-fee lawyer. There are VLAs in virtually all major cities in the United States.
2. Learn from all available sources how to create murals with the longest life span. Request a reversion to the artist of the intellectual property if the mural is altered, mutilated, or destroyed so that you can create it again.
3. If the mural is created in California, reserve the right in your contract to be notified of any planned destruction and reserve the right to attempt to remove the mural in such

- a case. This provision must be in writing, signed by both parties, and recorded in the appropriate county recorder's office.
4. In your contract, state the responsibility of the owner regarding conservation. If the owner is unwilling to commit to conservation, get him or her to commit to permitting you visual inspection and the right to conserve your work or have another conserve your work, and agree to provide the owner with a description of how the wall was primed, how the mural was produced, and what materials were used. Remember, your artwork is not protected by law from normal wear and tear.
  5. If conservation is needed, if feasible, call in conservators, unless you are trained in conservation.

### **My Conclusion for the Property Owners**

1. Have a written agreement with the artist, or artists in case of a joint work, before they begin on any work of art that is to be affixed to your building. You should have counsel conversant with VARA and CAPA and request that the artists have their counsel review the agreement before signing it.
2. Specifically request in the agreement that the artist waive his or her VARA and/or CAPA rights, or specify that the artist is not doing so. Be prepared to compensate for a waiver.
3. Specifically include in the agreement how much, if any, of the conservation of the mural is your responsibility and how much is not. Also include the artist's right to access the mural and to have inspections of the mural.
4. Get a written report from the artist that includes installation shots of the art and all methods and materials used in making the mural, including wall preparation. Get a written report from the artist regarding his or her recommendation for conservation, even if the artist waives any right to claim that you must do the conservation.

5. Specifically agree to terms regarding the circumstances under which the art can or cannot be removed and the procedure for removing it.
6. In California, make sure that the agreement is signed in the appropriate manner and filed in the appropriate county recorder's office. If you sell the property, make sure that the purchaser gets the contract and all the material that the artist supplied. The contract, once on the land records, runs with the land, but the various reports by the artist are not going to be on file with the county.

## Conclusion

I have been very impressed with the materials, artists, and community arts groups that I came to learn about, and the experience has changed my final remarks. I am an admitted fan of the philosopher and critic Arthur C. Danto. In the April 2003 issue of *Artforum*, he has written an article entitled "The Removal of *Tilted Arc*." I know you are all familiar with the history of Richard Serra's *Tilted Arc* in Federal Plaza in New York City.

A truism in my profession is: bad facts make bad law. *Tilted Arc* was an example of bad facts, because—although as a work of art it was aesthetically very important and very important to Richard Serra's reputation—it made many people's lives miserable.

I recognize that a mural cannot physically force a person to walk around it on wet and windy winter days or in unremitting heat, the way *Tilted Arc* did, but a difficult mural can be almost as awful to those who are forced to look at it day after day.

I am so impressed by the artists and the community arts organizations that I have met here in Los Angeles, because they include the community in developing what gets placed on the walls of buildings which will be seen by everyone.

Arthur Danto would urge that before a public work of art is created, the artist should consider that "specific unto a site is the form of life therein, and that form of life is we the people who have to live with the art."

And you do just that.

**Ann M. Garfinkle**

Ann M. Garfinkle has been a practicing attorney since 1968, with an emphasis over the last fifteen years on representing artists, collectors, and galleries. She currently represents the estates of art collector and historian Thurlow E. Tibbs Jr. and painter Morris Louis. She is a trustee of the Maryland Institute College of Art, founder of the Harriet B. Burg Foundation, and former vice president of the board of directors of Pyramid Atlantic. She is also chair of the Art and Museum Committee of the Washington, D.C., Bar Association's Art, Entertainment, and Sports Law section. Among her publications are books on estate planning for artists and collectors. She is admitted to the District of Columbia Bar, the New York State Bar Association, and various federal district courts. She is included in the *Martindale-Hubbell Bar Register of Preeminent Lawyers* and is a frequent writer and lecturer.