# Puerto Rico District Court Deems Artwork Advertisements and Not Protected by VARA

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In *Rivera v. Mendez and Co.*,[1] plaintiff asserted claims for copyright infringement under the Copyright Act,[2] and moral rights violations under the Visual Artists Rights Act[3] ("VARA") and Puerto Rico Intellectual Property Act[4] ("PRIPA"). Defendants' motion to dismiss plaintiff's moral rights claims was granted by the U.S. District Court for the District of Puerto Rico. The plaintiff's copyright infringement claims remain under consideration.

**FACTS**

Plaintiff is a painter and visual artist.[5] Defendants were the organizers, marketers, producers, and sponsors of the annual Puerto Rico Heineken JazzFest.[6] In 1998, plaintiff and defendants formed an agreement in which plaintiff would produce artwork each year to brand and promote the JazzFest.[7] From 1999 to 2009, plaintiff created and licensed artwork to defendants for marketing in various ways, such as in posters, and on bus shelters and backdrops.[8] Under the agreement, defendants were not permitted to make unauthorized derivative works or compilations of the artwork.[9] Also, defendants were required to license a new piece of artwork for the JazzFest each year.[10] At the end of each JazzFest, the license for the artwork used that year expired.[11]

Before the 2010 JazzFest, plaintiff attended a meeting in which he was informed by one of the defendants that he was being replaced with another artist.[12] At that meeting, plaintiff told the defendant that none the previously licensed works were to be used at

future JazzFest events.[13] Nevertheless, for the 2010 JazzFest, "[d]efendants, without obtaining a license, willfully reproduced, displayed, and distributed copies of [p]laintiff's works for the label and corporate identity[,] . . . [and] . . . created derivative works and compilations which were used to produce marketing pieces and merchandise."[14]

**COURT'S ANALYSIS**

VARA was enacted in 1990 to protect artists' "moral rights," defined as "rights of a spiritual, noneconomic and personal nature that exist independently of an artist's copyright in his or her work and spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved."[15] Only a "work of visual art," defined as "a painting, drawing, print, or sculpture, existing in a single copy or in a limited edition of 200 copies that are signed and consecutively numbered by the author," is protected.[16] Specifically excluded, among other items, are posters, advertising or promotional materials, and merchandising items.[17]

VARA states, in pertinent part, that the author of a work of visual art

> (1) shall have the right (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
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> (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
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> (3) subject to the limitations set

> forth in section 113(d), shall have the right (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.[18]

Like VARA, PRIPA excludes advertising-related works from protection: "[T]hose works created for the purpose of advertising entities or promoting goods or services shall not enjoy protection by copyright."[19]

In dismissing the plaintiff's moral rights claims, the court compared the present matter to the factually analogous case of *Berrios Nogueras v. Home Depot*.[20] In *Berrios Nogueras*, the plaintiff claimed moral rights violations under VARA when the defendant displayed his work in its stores in Puerto Rico "in the form of promotional brochures and posters, while failing to attribute authorship."[21] There, the court dismissed plaintiff's VARA claims simply because advertising or promotional materials are not protected, even though the defendant acted without authorization.[22] In the present case, for the same reason, the court found that, although the offending reproductions may have been unauthorized, VARA and PRIPA offer no protection because the original works were created to advertise and promote the JazzFests.[23] Hence, the court granted defendants' motion to dismiss the violation of moral rights claims.

**AUTHOR'S DICTUM**

This decision turned on the exclusion of advertising and promotional works from the definition of a "work of visual art," pursuant to 17 U.S.C. § 101. Why, then, did the court even bother to set forth in the opinion the somewhat lengthy three paragraphs of the

VARA statute—17 U.S.C. § 106A(a)(1), (2), and (3)? Perhaps the court, although it did not analyze the provisions, or even mention them further, felt that an examination of the VARA claim would not be complete without at least setting down what is the heart of the statute. Interesting, though.

1. *Rivera v. Mendez and Co.*, No. 11-1530(GAG), 2011 WL 3439247 (D.P.R. Aug. 5, 2011).
2. 17 U.S.C. § 101 *et seq*.
3. 17 U.S.C. § 106A.
4. P.R. Laws Ann. tit. 31, § 1401 *et seq*.
5. *Id*. at *1.
6. *Id*.
7. *Id*.
8. *Id*. at *1, *2.
9. *Id*. at *1.
10. *Id*.
11. *Id*.
12. *Id*. at *2.
13. *Id*.
14. *Id*.
15. *Rivera* at *2 (quoting *Mass. Museum of Contemporary Art Found., Inc., v. Biichel*, 593 F.3d 38, 49 (1st Cir. 2010), quoting, in turn, *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (internal quotation marks omitted)).
16. *Id*. (quoting 17 U.S.C. § 101 (internal quotation marks omitted)).
17. *Id*.
18. *Id*. at *3 (quoting 17 U.S.C. § 106A(a) (internal quotation marks omitted)).
19. *Id*. (quoting P.R. Laws Ann. tit. 31, § 1401e (internal quotation marks omitted)).
20. 330 F. Supp. 2d 48 (D.P.R. 2004).
21. *Rivera* at *3.
22. *Id*.
23. *Id*. at *4.

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