FRANKFURT KURNIT KLEIN & SELZ PC

Nicole Hyland
(212) 826-5552
nhyland@fkks.com

One Artist Suggests Melting Down the Paterno Statue. Is it Legal?

On Sunday July 22, 2012 Penn State University removed the famed bronze statue of Joe Paterno, which was located outside its football stadium, one day before the NCAA announced a slate of severe sanctions against the university arising from its role in the Sandusky child molestation scandal. A few days later, news reports emerged that sculptor Larry Nowlan suggested the statue be melted down and recycled into a "healing memorial" for victims of child abuse.[1] While this proposal may have both spiritual and artistic merit, there is one problem: Nowlan is not the sculptor who created the Paterno statue. That distinction belongs to Angelo Di Maria[2] who created the clay model for the statue from a photograph he took of Paterno at a football game, as well as artists Wilfer Buitrago and Yesid Gomez[3] who worked with Di Maria to construct the final bronze statue. Both Di Maria and Buitrago have expressed regret and some ambivalence about the statue's removal. According to Buitrago, it "felt like the piece is leaving the gallery . . . . The show is over." Describing his reaction to learning of the statue's removal, Di Maria said:

> I turned on the TV and felt a deep sorrow in my heart. . . . When that happened, all the emotions surged up. It's part of me. It's like someone is taking off an arm or a leg . . . I remembered the love and passion and excitement of making the statue. I think it was the crowning glory of my career. That is the biggest one, bigger than life, as they say.[4]

It is unclear whether anyone at Penn State is seriously considering Nowlan's suggestion to melt down the statue. But, if the university wanted to do so, would it be legal? The answer lies in the application of the Visual Artists Rights Act ("VARA") a federal law enacted in 1990 to protect certain "moral" rights of artists, beyond those protected by copyright. As courts

[1] http://philadelphia.cbslocal.com/2012/07/27/prominent-sculptor-calls-for-paterno-statue-to-be-recycled-into-memorial/?hpt=us_bn7
[2] http://www.cnn.com/2012/07/18/us/pennsylvania-paterno-sculptor/index.html
[3] http://lancasteronline.com/article/local/693138_Artist-involved-in-making-Paterno-statue-discusses-emotions-as-work-is-removed.html
[4] http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20120730/NEWS90/120739993/-1/NEWS

interpreting VARA have explained, the purpose of the statute is to protect "'rights of a spiritual, non-economic 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.'" *Massachusetts Museum Of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 49 (1st Cir. 2010) (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) ("*Carter II*")).

Whether the university is free to destroy the Paterno Sculpture turns on several key questions:

First: Is the Paterno statue "a work of visual art" under VARA?

VARA's protections apply only to "works of visual art," a narrower category than those protected by copyright law. The definition of "works of visual arts" includes sculptures "existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author." 17 U.S.C. § 101. VARA's definition of "works of visual arts" contains a list of excluded works, including "applied art," defined as "two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects." *Carter v. Helmsley–Spear, Inc.*, 861 F. Supp. 303, 315 ("*Carter I*") *aff'd in part, vacated in part, rev'd in part,* 71 F.3d 77 (2d Cir. 1995).

Courts are to use "common sense and generally accepted standards of the artistic community" in determining whether something is "a work of visual art." *Carter II*, 71 F.3d at 84 (sculpture in building lobby qualifies as work of visual art under VARA). *Carter II* involved three sculptors, John Carter, John Swing, and John Veronis, Jr., who sought to prevent the owners of a building in Queens, New York from removing a large integrated "walk through" sculpture in the lobby of the building. Although the defendants argued the sculpture was "applied art" due to its various functional elements, the Second Circuit disagreed and concluded that it was a work of visual art. *Id.* at 85; *see also Pavia v. 1120 Ave. of the Americas Associates*, 901 F. Supp. 620, 628 (S.D.N.Y. 1995) (sculpture in hotel lobby "meets the statutory definition of 'work of visual art'").

The Paterno statue almost certainly qualifies as a "work of visual art" under the statutory definition and case law, because it is a sculpture existing in a single copy. Although VARA does not require single copies to be signed [H.R. Rep. 101-514, 1990 U.S.C.C.A.N. 6915, 6923], the Paterno statue was evidently signed, at least by Di Maria, who described signing his name on the statue as a "big thrill." Accordingly, the Paterno statue passes the first threshold test for VARA protection.

Second: Is the Paterno statue a "work made for hire"?

Even if the statue is a work of visual art, it may nevertheless be excluded from VARA's protection if it is a "work made for hire," defined as: "a work prepared by an employee within the scope of his or her employment." *Id.* § 1012(B); § 101(1). The question of whether Di Maria and his colleagues were "employees" when they created the Paterno statue depends on an intensely fact-based analysis of numerous factors, including: whether the university could control the manner and means by which the statue was created; the requisite skill required; the provision of employee benefits; the tax treatment of the artists; and whether the artists could be assigned additional projects by the university. *See Carter II*, 71 F.3d at 85-86. In *Carter II*, the Second Circuit concluded that the artists were employees, based – in large part – on the fact that the building's management company paid the artists a weekly salary, had the right to assign them additional tasks, paid payroll and social security taxes, provided employee benefits, and contributed to unemployment insurance and workers' compensation funds. *Id.* at 86-87. Thus, the sculpture was deemed "a work made for hire," permitting the building owners to remove it from the lobby. *Id.* at 87-88.

Here, the lack of public information about the relationship between the university and the artists makes it difficult to predict how a court would resolve the "work for hire" question. A variety of articles describe Di Maria and the other artists as having been "commissioned" to create the statue, a term that sheds little light on their employment status. At least one article suggests Di Maria had a lengthy relationship with Penn State and had created other works for the school before the Paterno statue.[5] Although Di Maria discusses the process of creating the statue in several interviews, including this one,[6] he does not discuss his relationship with the university or contractual arrangement in enough detail to reach a conclusion about whether the statue constitutes a "work for hire."

Third: Assuming the Paterno statue is not a "work made for hire," could the university be prevented from destroying it?

Under VARA, the creator of a covered work has the right, within certain limits:

- To prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [the artist's] honor or reputation; and

- To prevent any destruction of a work of recognized stature.

[5] http://espn.go.com/college-football/story/_/id/8183515/joe-paterno-statue-sculptor-wants-decision-wait
[6] http://communities.washingtontimes.com/neighborhood/loris-centiments/2012/jul/26/sculptor-talks-twtc-about-paternos-statue-removal/

17 U.S.C. § 106A(a). Thus, whether the artists could prevent the destruction of the Paterno statute depends on two factual inquiries: (1) would destroying the statue "be prejudicial" to the artists' honor or reputation; or (2) is the Paterno statue a "work of recognized stature"? The artists would most likely rely on the "recognized stature" provision, given the fame – some might say notoriety – of the statue. If they can demonstrate the work is of "recognized stature," they would not have to prove that destroying or modifying it would "be prejudicial" to their honor or reputation," a more difficult obstacle to overcome. Significantly, VARA does not define the term "recognized stature," an omission that commentator William Patry somewhat humorously complains will lead to "further proliferation of one of the cancers of American legal system, the battle of paid experts." 5 Patry on Copyright § 16:25. To establish "recognized stature" plaintiffs must demonstrate that: (1) "the visual art in question has 'stature,' i.e., is viewed as meritorious"; and (2) "this stature is recognized by art experts, other members of the artistic community, or by some cross-section of society." *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir.1999) (citing *Carter I*, 861 F. Supp. at 325).

As Patry predicted, courts have generally considered the expert testimony in determining whether a work is of "recognized stature," although warring experts are not "inevitable," as one court noted. *Carter I*, 861 F. Supp. at 326. In *Martin*, for example, the court concluded that an outdoor sculpture was a work of "recognized stature," based on newspaper and magazine articles, letters in support of sculpture, and a program from an art show in which sculpture won award. 192 F.3d 608. By comparison, a court concluded that a large sculpture of a swan never viewed by the public or reviewed by art critics was not a work of "recognized stature." *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004). Under these somewhat fluid standards, the Paterno statue – which has been the subject of extensive publicity and commentary – would likely qualify as a work of "recognized stature." Consequently, the artists could prevent the university from destroying the Paterno statue under section 106A(a) of VARA, or be compensated for damages if the statue is destroyed.

All of this assumes the artists did not waive their rights under VARA, something the statute expressly permits, and which is becoming a more prevalent practice – particularly in the area of public art.[7] Again, the news reports provide no clues as to whether the artists who created the Paterno statue waived their VARA rights. In one interview, Di Maria expresses his hope that the statue will be preserved and possibly displayed again in the future, but gives no indication as to whether he would take any legal action to prevent its destruction:

> When things quiet down, if they do quiet down, I hope they don't remove it permanently or destroy it. . . . [Paterno's] legacy should not be completely

[7] http://www.huffingtonpost.com/daniel-grant/the-visual-artists-rights_b_819548.html

> obliterated and thrown out. . . . He was a good man. It wasn't that he was an evil person. He made a mistake.[8]

Another Question: Is merely removing the Paterno statue a violation of VARA?

It could be argued the Paterno statue is a form of "site specific" art, meaning that the location of the work is a "constituent element of the work." *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 95 (D. Mass. 2003) *certified question answered*, 443 Mass. 110, 819 N.E.2d 579 (2004) *and aff'd*, 459 F.3d 128 (1st Cir. 2006). Because the Paterno statue was positioned outside the university's football stadium, the location arguably helps to define the art. Therefore, the argument would go, removing or repositioning the sculpture violates the prohibition against destroying the work as a whole.

Opposition to this argument generally centers around the "public presentation" exception to VARA's destruction rule, which provides that "the modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification" under the rule. 17 U.S.C. § 106A (emphasis added). As one court put it: VARA's objective "is not … to preserve a work of visual art where it is, but rather to preserve the work as it is." *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01-1226, 2003 WL 21403333, at *10 (S.D.N.Y.2003). In Phillips, the First Circuit rejected the "site-specific" argument, holding that VARA offers no protection to "site-specific" art. 288 F. Supp. 2d at 100. The Seventh Circuit, in dicta, has taken a more measured approach, opining that, although removal or repositioning of "site-specific" art may not violate VARA, such art is not categorically excluded from VARA and is still entitled to some protection. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 306 (7th Cir. 2011) cert. denied, 132 S. Ct. 380, 181 L. Ed. 2d 240 (2011).

For now, Di Maria is supporting the decision to remove the statue, although the university evidently did not consult him.[9] But, he is clearly torn – expressing equal parts sorrow at the removal of his work, sympathy for Sandusky's victims, and resignation that the school had no choice but to act. He is also a bit sanguine:

> Personally, I'm 30 times more known now. I don't want to say 'famous.' I don't know what the hell that means . . . You know, I'll probably get tons of works from this . . . That's just life. It's just the way things work.

[8] http://espn.go.com/college-football/story/_/id/8188530/joe-paterno-statue-removed-penn-state-university-beaver-stadium
[9] http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20120730/NEWS90/120739993/-1/NEWS

The removal of the Paterno statue may not lead to litigation, but the situation is a reminder both to artists and those who commission or buy works of visual art to consider the implications of VARA. Parties are well-advised to negotiate in advance how – and for how long – those works will be displayed and who will have the power to determine their ultimate fate.

Originally published on Frankfurt Kurnit's Entertainment Law Matters Blog, Aug. 1, 2012.

