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Destruction or Restoration? Sculptor Claims a Violation of Moral Right

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In July, sculptor David Ascalon filed suit with the U.S. district court in Pennsylvania, against the Jewish Federation of Greater Harrisburg ("Federation") for violation of the Visual Artists Rights Act of 1990 ("VARA"). With true artistic flair, Ascalon alleges the Federation turned his Holocaust memorial sculpture into a "mutilation and bastardization of the artwork and its purpose."

In Ascalons's original proposal to the Federation, the Artist explained his deliberate choice of materials for his proposed main sculpture: Stainless Steel, Cor-ten Steel, Jerusalem Stone Pavers, and Black Granite. The purposefully ugly, oxidized and rusty Cor-ten Steel was to represent the barbed wire fence used by the Nazis, which symbolically encased the stainless steel, representing the Jewish spirit. In 2003, the Federation contacted Ascalon to advise him that the serpentine shaped Core-ten Steel showed signs of wear. Ascalon alleged that the Cor-ten metal was designed to show rust and wear as the express purpose of his design, but offered to replace the spiraling barbed-wire shaped ring with "U.S. Steel Cor-Ten," provided the Federation reimbursed the cost of materials. In 2004 in an abrupt turn of events, Ascalon received a "cease and desist" letter from the Federation, demanding Ascalon stop referencing the Memorial as his work. To add insult to injury, the Federation then, allegedly, asked another individual David Grindle to replace the Cor-ten Steel barbed wire ring with a stainless steel replica. Further, Ascalon's name, in essence "his signature," was removed from the base of the sculpture and replaced with "Restored by David Grindle 2006." In his lawsuit, Ascalon alleges the Federation's violation of VARA and seeks injunctive relief, actual or statutory damages, and attorney's fees.

VARA was enacted in 1990 and codified as Section 106A of the Copyright Act of 1976 (17 U.S.C. § 106A.), to provide additional and independent protections for author's moral rights, beyond economic rights. Section 106A(a)(3)(A) provides that the author of a visual art has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation." Section 106A(a)(3)(B) provides that the author has the right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." Ascalon alleges that his Holocaust Memorial is a widely recognized stature, and therefore the Federation's conduct (failure to maintain the original work properly, "restoration" of the work, and elimination of his name) constitutes intentional or grossly negligent destruction.

Although the Federation has not filed its answer yet, several issues may arise during the scope of litigation. The Federation will argue that under Section 106A(c)(2), modification of a work of visual art for the purpose of conservation is not a “mutilation.” However, Ascalon will point to the exception where conservation is a “mutilation” if it constitutes “gross negligence.” Since the Federation intended to restore the sculpture as a result of the metal's inherent nature and reaction to the elements, the modification of the work might not be considered an "intentional destruction." As for gross negligence, Pennsylvania courts have used the definition of "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference." (Hunter v. Squirrel Hill Assocs., 413 F. Supp. 2d 517, 519 (E.D. Pa. 2005).) Ascalon will therefore argue that the Federation’s conduct grossly deviated from the reasonable standard of care by failing to properly maintain the original structure, hiring another sculpture to restore the Memorial, replacing the original “dark” Cor-Ten metal meant to represent the “oppression, decay and misery” with “light” stainless steel, and removing Ascalon's name from the Memorial.

Second, VARA does not protect the original author of a "work made for hire," i.e. a work prepared by an employee within the scope of his or her employment. (17 U.S.C. §§ 101, 201(b).) Since an employer is deemed to become an "author" in the case of a work made for hire, Ascalon could lose his cause of action. The statutory term "employee within the scope of employment" is determined in light of "the hiring party's right to

control the manner and means by which the product is accomplished" under the common law of agency. (Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751.) The parties would argue whether Ascalon was in control of the creation of his work and whether the Federation's involvement was limited.

Finally, if Ascalon prevailed, the question remains as to his remedies. Under the Copyright Act, all remedies are available, save for remedies for criminal infringement under Section 506, for the infringement of VARA (17 U.S.C. §§ 501(a), 506(f)). In addition to injunctive relief which would provide Ascalon with the right to restore his sculpture to its original form and his name to the Memorial, Ascalon seeks actual and/or statutory damages. Because of the difficulty Ascalon may face in proving actual damages or any profit of the Federation as the result of the infringement, he might select statutory damages. Under Section 504(c)(1), a court may award statutory damages between a minimum of $750 and maximum $30,000, and can award up to $150,000 if the plaintiff can prove that the defendant's infringement was willful. In the artist-friendly decision *Martin v. City of Indianapolis* where the City completely demolished the artist's sculpture, the court awarded the maximum amount ($20,000 as of 1998) and attorney's fees. (4 F. Supp. 2d 808 (S.D. Ind. 1998), aff'd, 192 F.3d 608 (7th Cir. 1998).)