

Public Art Task Force Recommendations to the Mayor

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TASK FORCE MEMBERS

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The Public Art Task force met on a number of occasions from November, 2007 through February, 2008. It considered many items to assist the City of Knoxville in working toward establishing a Public Art Program to guide and manage art installations and maintenance in public places. The Task Force looked at models from other cities, including Nashville and Chattanooga, who have adopted public art programs. It recommended to the city that no additional installations will be permitted on public property until the program can be effectively implemented.

- The Task Force's recommendation is to establish a Public Art Committee through ordinance. Attached are suggested draft guidelines for the creation of such a committee.

Prior to the possible creation and subsequent appointment of the members of the Public Art Committee the Task Force recommends the following:

- The City of Knoxville take steps to remove all objects that were placed on public right of way or other public space through temporary programs that have expired. The owners of such objects shall be given 30 days notice to remove such items.
- The City of Knoxville, through the Office of Special Events, shall approve any temporary displays of art on public space. All objects must be removed at the end of the temporary program.

City of Knoxville Public Art Committee Suggested Draft Guidelines

Introduction

The following public art guidelines outline the policies the City of Knoxville Public Art Committee will follow to administer a public art program on behalf of the City of Knoxville. The Guidelines also include the ability to receive donations of cash and/or tangible art to fund or place public art in Knoxville.

Purpose and Goals

The purpose of the public art program is to enhance the reputation of the community, contribute to the civic environment, and enrich the lives of citizens and visitors through the involvement of professional artists to integrate public artwork throughout the City of Knoxville.

The City of Knoxville's public art program is committed to the highest artistic standards in form and content and the broadest involvement of artists. Specifically, the public art program seeks to:

1. Use public art as a means to further the community's sense of spirit and pride;
2. Contribute to cultural tourism through public art;
3. Promote distinctive and diverse artwork that will create a sense of place and contribute to the visual character and texture of the community;
4. Integrate public art concepts, artwork, and artists into community and neighborhood planning processes;
5. Encourage early collaboration on projects among artists, architects, landscape architects, engineers and other design professionals;
6. Enrich the individual's experience of public spaces;
7. Advance citizen understanding of public artwork and its civic role;
8. Engage citizens in the public art process in meaningful and responsive ways;
9. Stimulate public dialogue about issues raised by public art;
10. Foster collective memory and give meaning to place by recalling local and regional history;
11. Give visual expression to local values and cultural diversity;
12. Ensure that public artwork is accessible to all individuals including those with special needs.
13. Enhance the visibility and stature of Knoxville in local, regional, national and international arenas

Goals for Public Art Committee

1. Develop a plan of potential locations for public art throughout the City of Knoxville;
2. Create an inventory of local public artworks;

3. Establish policies for collection management, maintenance, and conservation. (took out extra space after management)
4. Pursue possible sources of funding for public art

Makeup and Duties of the Public Art Committee

1. **Definition.** The City of Knoxville establishes the Public Art Committee (PAC) as a standing committee to oversee the public art program. With City of Knoxville approval, the PAC directs the selection, commissioning, placement, maintenance, relocation, and deaccessioning of artwork acquired through the public art program, and recommends revisions to the Public Art Guidelines.
2. **Appointment.** The Mayor of the City of Knoxville with the advice of the City Council, appoints Public Art Committee members. Members are appointed to a three-year term (initially staggered one, two and three years) and can be reappointed for one consecutive three-year term with each member serving no more than six consecutive years. In addition to voting members, designated City staff members will serve as ex-officio, non-voting members of the PAC.
3. **Composition.** The PAC will have a total of seven members: one who serves as committee chair, and six community members. At least two committee members will be visual artists, and will serve alternate terms. Other members include individuals with specific professional expertise in public art or the visual arts such as contemporary arts curator, museum director, or professor of art or art history and design professionals such as architects, landscape architects, or urban planners. At least one member will be a City Councilperson appointed by the chair of the City Council.
4. **Responsibilities.** The PAC will:
 - a) Review project briefings organized by City staff that describe the public art project, the social and physical context of the site, the project timeline and funding;
 - b) Initiate public forums where appropriate for determining thematic approaches and location options for public art;
 - c) Determine recruitment strategy to establish a pool of artists for each project that it supports;
 - d) Review periodically and recommend to the City changes to Public Art Guidelines, and other public art policies and procedures;
 - e) Review the inventory of public art, including assessing the status of maintenance, and prepare recommendations as to location, relocation, and deaccessioning of public art;
 - f) Compile a list of potential sites for public art projects
 - g) Develop criteria for selection panelists to be chosen for each project undertaken

City of Knoxville staff will manage the public art program and facilitate communication among the City, PAC and selection panels;

Artwork Considered

The following may be considered in implementing the City's Public Art Program:

1. Sculpture: Free standing, wall supported or suspended, kinetic, electronic or mechanical in material or combination of materials;
2. Murals or portable paintings: In any materials or variety of materials, with or without collage or the addition of nontraditional materials or means;
3. Earthworks, neon, glass, mosaics, photographs, prints, calligraphy, any combination of forms of media, including sound, film, holographic, and video systems, hybrids of any media and new genres;
4. Standardized fixtures such as grates, street lights, signage, and other design enhancements, as are rendered by an artist for unique or limited editions;
5. Artwork created through an Artist in Residency program;
6. Restoration or replication of original decorative ornament and public art as part of the rehabilitation of historic, cultural and architectural landmarks; and
7. Similar amenities as determined by the PAC

The selection panel will apply the following criteria when selecting artists, considering acquisitions or siting artwork. The PAC and selection panel may recommend rejection of all submissions if none are considered satisfactory and a new pool of artists may be established.

1. Artistic Merit - The inherent quality and excellence of a proposed artwork together with the strength of the artist's concept and design capabilities are the program's highest priorities.
2. Context - Artwork must be compatible in scale, material, form, and content with their surroundings. When serving a functional purpose, artworks may establish focal points; modify, enhance, or define specific spaces; establish identity or address specific issues of civic design. Consideration should also be given to the architectural, historical, geographical and social/cultural context of the site or community, as well as the way people may interact with the artwork
3. Relevant experience - Experience and professional record of the artist(s) should provide convincing evidence of ability to successfully complete the project as proposed.
4. Technical feasibility - An artist must exhibit a successful track record of construction and installation of artwork or show that an appropriate professional has examined the proposed artwork and confirmed feasibility of construction and installation.
5. Budget - An artist's proposal should provide a budget adequate to cover all costs for the design, fabrication, insurance, transportation, storage, and installation of the proposed artwork, plus reasonable unforeseen circumstances. Artists should have a history of completing projects within budget.
6. Diversity - Artwork will be sought from artists of diverse ethnic and cultural identities and from local, regional, national, and international artists. The PAC encourages applications from artists working in both established and experimental art forms.
7. Fabrication and installation schedules - The artist's proposal should include a project timeline that incorporates design review, fabrication, delivery and installation in accordance with project schedule. The artist should have a history of completing projects on time.

Gift Proposals

A potential donor of artwork will consult with City of Knoxville staff, then submit a written proposal or letter of intent to the City for review by the PAC. Whenever possible the donor will present the actual artwork for approval.

Maintenance and Conservation

Prior to acceptance of new artwork by the City, the artist will submit in writing a routine maintenance plan for the department having oversight responsibility, and provide appropriate training where necessary.

1. Routine maintenance of permanently installed artwork will be the responsibility of the department having oversight and will be done according to artist's maintenance plan;
2. Maintenance will be guaranteed by the artist against all defects of material and workmanship for a minimum of one year following installation or according to the artist's contract;
3. The artist will have the opportunity to comment on, and participate in, all repairs and restorations that are made during his/her lifetime;
4. On an annual basis, the Public Art Committee or City staff will track routine maintenance activities on artwork acquired through the public art program.
5. The department with oversight will be responsible for keeping City staff informed about changes in the condition of the artwork and the site;
6. Responsible departments will not clean or repair artwork beyond what is specified in the artist's maintenance plan without the prior written authorization of the City staff or PAC;
7. Any proposed public art project requiring operation or maintenance expenses shall include a maintenance plan with estimates of annual operating and maintenance expense and be submitted for prior approval.

Resiting and Deaccessioning

The City of Knoxville will retain the right to resite or deaccession any artwork in accordance with Visual Artists Rights Act of 1990 (appendix). While the intent of acquisition is for long-term public display, circumstances and/or conditions may arise that make it prudent for the City, on behalf of the public interest, to remove an artwork from public display. The Public Art Committee will recommend to the City that a specific artwork be resited or deaccessioned only if one or more of the following criteria are met:

1. The site is being eliminated;
2. The site is being altered such that the artwork is no longer compatible with the site;
3. The security of the artwork can no longer be reasonably guaranteed at its current site;
4. The artwork has become a danger to public safety;
5. The cost of maintaining or updating the artwork's operating technology is cost prohibitive;
6. Significant adverse reaction to the artwork from the community has continued for an extended period (at least ten years).

Once the PAC has determined that an artwork meets one or more of the above criteria and with the approval of the City, the PAC and City staff a good faith attempt will be made to discuss resiting with the artist. If the artist does not agree to the proposed resiting, he/ she will have the right to prevent the use of his/her name as the author of the artwork or to buy back the work as addressed in the artist contract.

Review and Amendment

These guidelines are subject to periodic review and revision by the Public Art Committee and subsequent approval by the City Council.

Definitions

1. Accessioning. The procedure used to accept and record an artwork as part of the collection.
2. Acquisition. The accession of an artwork into the City's public art collection, whether by commission, purchase, gift or other means.
3. Artist. A person who has established a reputation of artistic excellence in the visual, design, performing or literary arts, as judged by peers, through a record of exhibitions, public commissions, sale of works and/or educational attainment.
4. Artwork. Original visual art produced by professional artists, using a variety of media; can be free standing, integrated into architecture, functional, non-functional, temporary or permanent.
5. Deaccessioning. The procedure followed to remove an artwork from the public art collection.
6. Local artist. An artist who has lived or worked within the Knoxville Metropolitan Statistical Area for five (5) or more years of such artist's career.
7. PAC. Public Art Committee, a standing committee of the City of Knoxville responsible for making recommendations to the City of Knoxville about the implementation of the public art program.
8. Public art. Artwork that is accessible to the public and created through a public process that considers the social and physical context of the site and addresses the goals of the public art program.
9. Public art collection. Artwork on public land or in public facilities owned by The City of Knoxville.
10. Public art program. A program of the City of Knoxville established by the public art ordinance and governed by the Public Art Guidelines.
11. Public art project. The creation and management of public artwork in accordance with the Public Art Guidelines.
12. Temporary public art program. A program that last up to twelve months.

Appendix

From Monty Python to Leona Helmsley: A Guide to the Visual Artists Rights Act by Cynthia Esworthy, NEA Office of General Counsel, JD Washington & Lee Law School 1997

Source: www.arts.endow.gov/artforms/Manage/VARA.html

You are a sculptor. On commission, you create a bronze frieze for a city park. A year later, you discover that the center of the frieze has been covered by a copy of the city seal. Can you force the city to remove the seal?

You have just purchased an office building. In the central lobby there is a large, permanently fixed sculpture that you find aesthetically displeasing. Can you remove it?

You are a well-known painter. You discover that a company that has purchased one of your canvasses is advertising one inch square portions of it so that buyers can "own an original painting" by you. Can you stop them?

You are an airport. You commission a giant mobile, specifically designed for the interior of your central terminal. You would like to relocate the mobile to the front exterior entrance of the terminal, which will require weatherproofing, removal of the motor and rendering the mobile stationary, and repainting it to match the color scheme. Can the artist prevent the move or modifications?

You are a photographer. You discover that a limited edition triptych you created and sold has been separated into three pieces for resale. Can you require that the piece be sold as a whole?

You are a county arts agency. You commission a mural for the side of a county building.

You later discover that a state law requires you to build a handicapped access ramp blocking the lower part of the mural. Can you paint over the lower part of the mural?

You are a printmaker. A collector has just sold one of your prints for 100 times the original cost. Are you entitled to a royalty on the sale?

What rights does an artist have once the work is sold? Until 1990, with rare exceptions - such as Monty Python, which won a lawsuit preventing broadcast of edited programs - artists in the United States had virtually no power to protect their work from mutilation, misattribution, or destruction. For example, in 1966, Maryland commissioned William Smith to create nine murals highlighting the state's history, subsequently installed but altered the central panel, and then refused to remove his name from the piece. He had no recourse. In 1980, the Bank of Tokyo commissioned and then removed Isamu Noguchi's 1,600 pound sculpture, Shinto, from its Manhattan lobby, sliced it into pieces, and warehoused it, without notifying the artist. He had no recourse. In 1979, the General Services Administration commissioned and then, after office workers complained about it, removed Richard Serra's Tilted Arc, a site-specific sculpture bisecting Manhattan's Foley Square. He had no recourse.

With the 1990 passage of the Visual Artists Rights Act (VARA), protecting the moral rights of attribution and integrity, the successors of Smith, Noguchi, or Serra have a far greater ability to protect against similar threats to their work. But, as three artists who spent several years creating a massive sculptural installation learned after Helmsley-Spear purchased the building, these rights are not absolute: the Supreme Court recently ruled that VARA does not prevent the removal and destruction of their work. VARA applies only to a restricted category of visual artworks, extends only limited rights, and is subject to loopholes, exclusions, and waiver provisions that substantially erode its powers.

What are moral rights? Property ownership does not necessarily convey absolute rights over the thing bought. Real estate ownership, for example, is restricted by zoning legislation. Preservation legislation recognizes society's interest in preserving its architectural treasures, despite private ownership. Similarly, moral rights legislation recognizes that art ownership is not an absolute property right.

The term moral right itself comes from the French *le droit moral*, an 18th century French concept referring to rights of a non-economic but spiritual or personal nature, existing independently of an artist's copyright. Such rights are based on what the court in *Carter v. Helmsley-Spear, Inc.* explained as "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."

Moral rights include (1) disclosure or divulgation, which allows the artist to determine when a work is complete and may be displayed; (2) paternity or attribution, which allows an artist to protect the identification of his name with his own work, and to disclaim it when applied to another's; (3) the right of withdrawal, which permits the artist to modify or withdraw a work following publication; and (4) integrity, which allows the artist to prevent his work from being displayed in an altered, distorted, or mutilated form.

Works covered by VARA

VARA covers only limited, fine art categories of "works of visual art": paintings, sculptures, drawings, prints, still photographs produced for exhibition. Within this group, only single copies or signed and numbered limited editions of 200 or less are actually protected. VARA does not apply to any of the following: works made for hire, posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or container, nor does it cover any work not subject to general copyright protection.

Rights conferred by VARA

Of the moral rights panoply conferred by other nations, VARA recognizes only attribution and integrity as legal causes of action. Attribution includes the rights to claim authorship of a work, to prevent attachment of an artist's name to a work which he did not create, and, where there has been a subsequent distortion, mutilation, or modification of the work prejudicial to the artist's honor or reputation, the right to disclaim authorship and to prevent identification of the artist's name with the work. Congress did not define the term prejudicial to one's honor or reputation,

but the House Report on VARA advised focusing on "the artistic or professional honor or reputation of the individual as embodied in the work that is protected. While no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation."

The court in *Carter v. Helmsley-Spear*, one of the few cases filed under VARA, relied on expert testimony, focusing on "good name, public esteem, or reputation in the artistic community." The right of integrity gives the artist the right to prevent any intentional distortion, mutilation or other modification of his work prejudicial to his honor or reputation. Where the work is of recognized stature, the right of integrity further includes the right to prevent any intentional or grossly negligent destruction of the work. Again, Congress left the definition of recognized stature open, so the courts will have the responsibility of fashioning an explanation on a case-by-case basis.

Exceptions to VARA coverage

Congress was careful to delineate several exceptions. For example, natural modifications resulting from aging or the inherent nature or quality of the materials used do not constitute statutory modification, distortion or mutilation. Similarly, modification resulting from conservation or public presentation involving lighting and placement is not a prohibited modification unless caused by gross negligence. So, for example, while some natural fading is unavoidable for textiles, excessive fading of especially fragile materials caused by overexposure to direct sunlight could trigger the statute. Similarly, the natural melting of an ice sculpture falls into the inherent nature exception and would not trigger the statute, but loss could be prohibited separately by contract.

The rights to claim or disclaim authorship of a work and to prevent the use of one's name on a distorted, mutilated, or modified work prejudicial to one's honor or reputation do not apply to a reproduction, depiction, portrayal, or other use of a work of visual art outside the statute's limited protected class. Nor do they constitute a mutilation.

Congress also made VARA rights subject to 113(d) of the copyright law, which addresses problems arising where the work is part of a building. For example, the right of integrity does not apply if the artist either consented to the installation of the artwork before VARA's trigger date [December 1, 1990], or both the artist and the building owner executed a written agreement on or after the trigger date, specifying that installation of the artwork may subject the work to damage by reason of removal. If the building owner wants to remove an artwork which can be safely removed, the artist's rights apply unless (1) the building owner has made a diligent, good faith but unsuccessful attempt at notification of the artist of his removal intent, or (2) the building owner did provide notice, but the artist either failed to remove the work or to pay for its removal within 90 days after receiving notice. A "diligent, good-faith attempt" involves sending notice by registered mail to the artist at his most recent address as recorded by the Register of Copyrights.

This record is part of a system, established by Congress, which permits an artist whose work is incorporated in a building to record his identity and address, with available update procedures, and similarly permits building owners to record evidence of their efforts to comply. Another exception involves Congress' specification that the VARA rights are wholly independent of the copyright owner's exclusive rights (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based on the copyrighted work; (3) to distribute copies to the public by

sale or other forms of ownership transfer, e.g., barter, or by rental, lease, or lending; and (4) to display the work publicly. While the artist retains VARA rights, these rights transfer to whoever owns the copyright in the artwork.

Congress further provided that VARA rights were subject to 107 fair use limitations on exclusive rights. If the artwork is copyrighted, there are permissible fair use purposes for which the work may be reproduced, and which constitute a defense to infringement, including "criticism, comment, news reporting, teaching, scholarship, or research." In given circumstances, artistic parody may also be a defense subject to the four-factor fair use analysis. The statute sets forth four factors which must be considered in determining whether a use is permissible: the purpose and character of the use, the nature of the copyrighted work itself, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work.

Exercise of rights, including transfer and waiver

VARA restricts the exercise of the rights of attribution and integrity to the author or joint authors of the artwork, regardless of whether he/they hold title either to the copyright or the artwork itself. Thus while both copyright and physical ownership are property rights which may be transferred, moral rights may not be transferred.

Moral rights may, however, be waived. The waiver instrument must be very specific: the creator must consent in a written and signed instrument specifically identifying the artwork, the uses of that work, and with a clause limiting the waiver to both aspects. Where the artwork is created by more than one author, any one creator's waiver binds the group.

Duration

For works created on or after December 1, 1990, (VARA's trigger date) VARA's moral rights are granted for the life of the author, or in the case of a joint work, until the death of the last surviving author. Works created before that date, but still owned by the author on that date, are coextensive with and expire at the same time as the copyright.

Remedies

The legal remedies available for a violation of moral rights are the same as the civil (but not criminal) remedies available for copyright infringement: injunction, impounding, damages, profits or statutory damages, costs and reasonable attorney's fees. Statutory damages range from a \$500 minimum to a \$20,000 maximum, increasing to \$100,000 for willful infringements and decreasing to \$200 for innocent infringements.

Under VARA (unlike copyright infringement), an artist has a cause of action in a federal court even if his artwork is not registered with the Copyright Office. Because the burden of proof on the artist diminishes and the amount of monetary damages could increase if an artwork is registered before an infringement, an artist should register his copyright as soon as possible.

It's important for artists to be aware that, while VARA establishes specific federal causes of action, additional protections are often available under state statutes. In addition, they can negotiate even more expansive rights enforceable by contract. For example, an artist could

negotiate a resale royalty and specify an intent to retain rights of reproduction, even though additional contractual obligations are normally limited to the first sale.

Buyers and art owners should equally understand that VARA does not intrude on the standard protections available to them through contracts to purchase or commission, but in fact allows moral rights waivers. Those entering a commission arrangement can further specify that the work is for hire, which would put the work outside VARA protection, but they must meet the other criteria for that category.

Further Information

The text of the Visual Artists Rights Act can be found in 17 U.S.C. §§ 101 et seq. (www.law.cornell.edu/usc/17/overview.html). Key sections are 101 (definitions), 106 (basic moral rights), and 113 (artworks incorporated into buildings). You can also contact the Copyright Office (lcweb.loc.gov/copyright/) for further information