



# CITY COUNCIL AGENDA REPORT



**DEPARTMENT:** Community Services

**MEETING DATE:** February 3, 2004

**PREPARED BY:** April L. Soash,  
Director of Community Services

**AGENDA LOCATION:** I-1

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**TITLE** Art in Public Places, and Formation of Monrovia Endowment for the Arts, Introduction and First Reading of Ordinance No 2004-03

**OBJECTIVE:** To provide City Council with an overview of an Art in Public Places ordinance that would assess a one percent fee on commercial projects over \$1 Million. These fees would be put into a fund to support Art in Public Places and the formation of a non-profit, Monrovia Endowment for the Arts.

**BACKGROUND** On February 25, 2003, a policy was adopted to bring art into public places throughout Monrovia. This policy was established to provide an effective mechanism for determining the appropriateness and method of placement of artwork on the property of the City of Monrovia. The policy established criteria and procedures for review and selection of artwork. This was done to expand the opportunities for Monrovia residents and visitors to experience art in public places and create a more visually pleasing community.

The Arts Advisory Committee is comprised of a liaison from each of the following City Commissions, Community Services, Historic Preservation, the Library Board, the Monrovia Old Town Advisory Board and one community member, Vicki Novell. The city staff assigned to the Arts Advisory Committee is the Parks Division Manager and the Director of Community Services. This committee worked on the development of the policy and procedures for Art in Public Places and worked to find donors to place the first piece of public art, the Mark Twain bronze, in Library Park, which took place March 29, 2003.

Currently, the Arts Advisory Committee is working on developing a catalogue of pre-selected artwork consisting of bronze works of art for potential donors to choose from, determining appropriate locations in the Old Town area for future placement of art and trying to raise donations for the public art program.

**ANALYSIS:** Recognizing, if the City wishes to acquire more quality pieces of art like the Mark Twain bronze, private donations may not meet the desire to expand this program. Mayor Pro Tem Joe Garcia, brought information to the City Manager about other communities that raise funds for public art through local ordinances. The examples of ordinances from other communities require some residential developments and commercial developments over a certain valuation amount (the valuation of a project is based on data set forth by the International Conference of Building Officials). The developments are required by the ordinance to allocate 1% to 2% of the total valuation of the project to public art. City staff has further researched this information and worked

with the Arts Advisory Committee to develop an ordinance for Monrovia that will establish a budget for public art rather than relying solely on donations

In developing the ordinance (Attachment A) staff studied the information from other cities, consulted with the City Attorney and considered what type of development projects are in the future for Monrovia. Staff tried to provide a wide variety of options as presented in the ordinance prepared by the City Attorney. The concept of the ordinance is to establish a wide array of public art in Monrovia by collecting funds from development projects, financial and/or art donations and art incorporated in major development projects.

The survey lists twenty-five cities in the State of California that have ordinances in place for art in public places. Most of the cities are requiring 1% of the valuation of a project, but the valuation amount varies from no limits, to projects with a minimum requirement of \$250,000 (Attachment B). The ordinance outlines the proposed public artwork requirement for Monrovia. The information provided in this report summarizes the ordinance.

The ordinance outlines the "Art in Public Places" fund and what it can be used for,

- 1 Design, acquisition, installation, improvement, maintenance and insurance of public artwork displayed on city property. Public artwork acquired with money from the Art in Public Places fund shall be the property of the city.
- 2 Offering of performing arts programs on city property for the community.
- 3 Offering of art education programs on city property for the community, provided, however, that not more than 5% of the fund's annual budget shall be used for this purpose.

The "in lieu" art fee is 1% of the project cost paid by developers based on the following,

- 1 Residential development projects involving five or more dwelling units and having a project cost in excess of \$1 Million.
- 2 Commercial, industrial, office or other non-residential development projects having a project cost in excess of \$1 Million.

Development projects that would be exempt from the public artwork requirement are government buildings, low and moderate-income housing developments, tenant improvements on existing buildings and reconstruction of buildings that have been damaged by fire, flood, wind, earthquake or other calamity.

The public artwork requirement can be satisfied through one of three actions, donating public artwork to the city, installing public artwork on private property, or paying an in lieu art fee (1% of the project cost). If the value of the artwork used to fulfill the requirement is less than the amount of the in lieu art fee then the difference shall be paid to the city and deposited into the Art in Public Places fund. For the donation or installation of public artwork an application must be filed with the Director of Community Services prior to the issuance of a grading or building permit for the development project. The application shall include an appraisal by an independent, qualified art appraiser or evidence of the artwork value satisfactory to the director.

An application would be required if the proposed artwork is not listed in the city's public artwork catalogue and the following information would need to be provided, preliminary sketches, photographs, models or other documentation that describes the nature of the artwork and the resume of the artwork's creator.

If, the application is for donation the application must include a written statement from the artwork's creator waiving such person's rights under the Visual Artists Rights Act of 1990 (Attachment C) A waiver of the Visual Rights Act of 1990 would give the city ownership of the piece of art and complete control of the future of the piece of art

When the application is for installation the city must be provided with preliminary plans of the artwork showing it's compatibility to the development project and adjacent parcels as well as the surrounding neighborhood and how the artwork will be accessible to the public The director may request any other information to assist in the evaluation of the application

Staff recommends establishing a non-profit board (the Monrovia Endowment for the Arts) to review each application and they will make a recommendation to the City Council If the application is for donation, then the Monrovia Endowment for the Arts shall be an advisory body and the City Council shall make the final decision If the application is for installation, then the Monrovia Endowment for the Arts shall make the decision and its decision shall be final unless appealed to the City Council The Monrovia Endowment for the Arts or City Council may accept or reject any proposed public artwork based on its aesthetic judgment Notwithstanding the preceding, if the proposed public artwork is listed in the City's public artwork catalogue, then the director may approve the application

Another way to raise funds is through the Monrovia Endowment for the Arts as the non-profit organization that can accept donations for Art in Public Places This non-profit will help expand the possibilities for Art in Public Places in Monrovia beyond the ordinance Mr Blaine Fetter has agreed to be one of the founding board members of Monrovia Endowment for the Arts Staff and the City Attorney will take the necessary steps to form the Monrovia Endowment for the Arts and the City Council will make the appointments

**FISCAL IMPACT:** Here are some samples of projects completed in Monrovia and what the valuation would be based on data set forth by the International Conference of Building Official

<i>Project</i>	<i>Approximate Sq Ft</i>	<i>Valuation</i>	<i>1% to Public Art Fund</i>
Home Depot	135,000	\$6,000,000	\$60,000
Comp USA/Office Depot	Combined 54,000	\$2,500,000	\$25,000
34 Unit PUD	70,000	\$5,000,000	\$50,000

**RECOMMENDATION** Staff recommends that City Council approve the proposed Art in Public Places Ordinance No 2004-03 and the formation of a non-profit Monrovia Endowment for the Arts

**COUNCIL ACTION REQUIRED:** If the City Council concurs, the appropriate action would be a motion to introduce and waive further reading, and 2 A motion to read by title only Ordinance No 2004-03, an ordinance of the City Council of the City of Monrovia adding Chapter 15 44 to the Monrovia Municipal Code relating to Art in Public Places and the formation of a non-profit, Monrovia Endowment for the Arts, to raise funds for Art in Public Places in Monrovia

ORDINANCE NO 2004-3

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MONROVIA ADDING CHAPTER 15.44 TO THE MONROVIA MUNICIPAL CODE RELATING TO ART IN PUBLIC PLACES

THE CITY COUNCIL OF THE CITY OF MONROVIA, CALIFORNIA does ordain as follows

SECTION 1. The City Council finds and declares that

A Public artwork enhances the quality of life for individuals living in, working in and visiting Monrovia

B As development and re-development of real property within Monrovia continues, urbanization of the community results and the opportunity for creation of public artwork is diminished

C The California Supreme Court has ruled that municipalities can require developers either to include public artwork in their development projects or to pay an "in lieu" fee *Ehrlich v City of Culver City*, 12 Cal 4th 854 (1996)

D Establishment of the Art in Public Places program set forth in this Ordinance will promote the general welfare by ensuring that public artwork is generated in conjunction with private development projects that contribute to urbanization of the community

SECTION 2. Title 15 of the Monrovia Municipal Code is hereby amended by adding a new Chapter 15 44 to read as follows

Chapter 15.44

ART IN PUBLIC PLACES

15 44 010 Title

This chapter shall be known as the "Art in Public Places Ordinance "

15 44 020 Definitions

For the purposes of this chapter, the following words and phrases shall have the following meanings

A "Appropriately maintained" means maintained in conformance with the city's public artwork maintenance policy

B "Artwork" means an original creation of physical art by an established artist Artwork includes without limitation a fountain, mobile, mosaic, mural, painting, sculpture or tapestry An artwork may be realized through such mediums as bronze, ceramic tile, concrete, stained glass, steel or wood An artwork shall not include objects that are mass-produced with a standard design

C "Artwork value" means the cost of the following (as applicable) in connection with an artwork design, acquisition, construction, and installation Artwork value shall not include utility and maintenance costs related to the operation and preservation of an artwork

D "Committee" means the art in public places committee established by the city council

E "Commission" means the community services commission

F "Development project" means a construction or modification of a building

G "Director" means the director of community services or such person's designee

H "Established artist" means a professional artist who derives his or her income primarily from working as an artist, and whose prominence is recognized by art journals, art books or art gallery reputation Established artist shall not include an architect, design consultant or landscaping consultant retained for the design and construction of the subject development project

I "In lieu art fee" means a fee in the amount of 1% of the project cost

J "Project cost" means the total building permit valuation of new construction of a development project, excluding the land value, as indicated on the building permit issued by the city for the project

K "Public artwork" means an artwork that is either (i) donated to the city for display on city property, or (ii) installed on private property in a publicly accessible location

L "Public artwork requirement" means the requirement, imposed by this chapter, of providing a public artwork or paying the in lieu art fee

M "Publicly accessible" means located on an area open to the general public and clearly visible from an adjacent public property such as a sidewalk or street

2 Commercial, industrial, office or other non-residential development projects having a project cost in excess of \$1 Million

B The following development projects shall be exempt from the public artwork requirement

1 Government agency development projects

2 Reconstruction of buildings that have been damaged by fire, flood, wind, earthquake or other calamity

3 Low and moderate income housing developments constructed pursuant to a disposition and development agreement with the Monrovia Redevelopment Agency

4 Tenant improvements to existing structures

15 44 060 Satisfaction of public artwork requirement

A The public art requirement shall be satisfied by completing one of the following actions in accordance with this chapter

1 Donating a public artwork to the city

2 Installing a public artwork on private property

3 Paying an in lieu art fee

4 Construction of on-site improvements pursuant to a disposition and development agreement with the Monrovia Redevelopment Agency

B If the artwork value of a public artwork used to satisfy the public artwork requirement is less than the amount of the in lieu art fee that otherwise would be applicable to the development project, then the difference shall be paid to the city and deposited in the art in public places fund

15 44 070 Procedure for donation or installation of public artwork

A An application for donation of a public artwork to the city, or for installation of a public artwork on private property, shall be filed with the director prior to the issuance of a grading or building permit for the development project. The application shall be made on a city-provided form and shall contain

1 An appraisal by an independent, qualified art appraiser or other evidence of the artwork value satisfactory to the director

2 If the proposed public artwork is not listed in the city's public artwork catalogue, then the application shall include the following

a Preliminary sketches, photographs, models or other documentation of sufficient descriptive clarity to indicate the nature of the artwork

b The resume of the artwork's creator

3 If the application is for donation, then the application shall include the following

a A city attorney-approved written statement executed by the artwork's creator waiving such person's rights under the Visual Artists Rights Act of 1990 (17 U S C 101 et seq ), California Civil Code Section 1542 and equivalent laws

4 If the application is for installation, then the application shall include the following

a Preliminary plans of sufficient descriptive clarity to indicate the compatibility of the artwork with the development project, adjacent parcels and the surrounding neighborhood

b A written statement explaining how the artwork will be publicly accessible

5 Any other information requested by the director to enable reasonable evaluation of the application including review by the City's Risk Manager

B Each application shall be reviewed initially by the Monrovia Endowment for the Arts, which shall make a recommendation thereon. If the application is for donation, then Monrovia Endowment for the Arts shall be an advisory body and the city council shall be the decisionmaker. The city council's decision on an application for donation shall be final. If the application is for installation, then the Monrovia Endowment for the Arts shall be the decisionmaker and its decision shall be final unless appealed to the city council in accordance with section 2 52 070 of this code. The decisionmaker may accept or reject a proposed public artwork in its absolute discretion based on its aesthetic judgment. Notwithstanding the preceding, if the proposed public artwork is listed in the city's public artwork catalogue, then the director may approve the application ministerially.

C Prior to issuance of a building permit for the development project, a security shall be deposited with the director to guarantee the donation or installation of the approved public artwork. Such security shall be a bond, letter of credit or other form satisfactory to the director and the city attorney. The amount of such security shall be the amount of the in lieu art fee that would be applicable to the development project.

The security shall be released upon the donation or installation of the approved public artwork

D An approved public artwork shall be delivered to the city or installed on private property prior to issuance of an occupancy permit for the development project

E Prior to installing a public artwork on private property to satisfy the public artwork requirement, the property owner shall execute and record with the county recorder a city attorney-approved covenant. Such covenant shall require the property owner and successors thereof to do the following

1 Keep the public artwork appropriately maintained

2 Allow city representatives to enter upon the property upon reasonable written notice to perform necessary repairs to the public artwork at the property owner's expense when the public artwork is not appropriately maintained

3 Indemnify, defend and hold harmless the city, its officers, employees and agents from any claim, demand, damage, liability, loss, cost or expense attributable to the public artwork

#### 15 44 080 Procedure for payment of in lieu art fee

Payment of the in lieu art fee shall be made prior to the issuance of a grading or building permit for the subject development project unless an alternative deadline is approved by the city council

#### 15 44 090 Maintenance of public artwork on private property

Public artwork installed on private property to satisfy the public artwork requirement shall be appropriately maintained and insured by the property owner. The insurance shall be in an amount equal to or greater than the artwork value, and shall provide coverage against loss or damage (including vandalism) of the public artwork

#### 15 44 100 Removal or alteration of public artwork on private property

Public artwork installed on private property to satisfy the public artwork requirement shall not be removed or altered without the prior approval of the city council. In addition to any other applicable penalty, violation of this section may render the property owner liable for payment of the in lieu art fee that would have been applicable to the subject development project, and may result in revocation of the occupancy permit issued for the subject development project. Prior to any imposition of in lieu art fee liability or occupancy permit revocation pursuant to this section, the city shall afford the property owner notice and an opportunity for a hearing "

Section 3 If any sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance The City Council hereby declares that it would have passed this Ordinance and each sentence, clause or phrase thereof irrespective of the fact that any one or more sentences, clauses or phrases be declared unconstitutional or otherwise invalid

Section 4 The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same or a summary thereof to be published and posted in the manner required by law

**INTRODUCED** this 3<sup>rd</sup> day of February, 2004

**SIGNED, APPROVED, AND ADOPTED** this 17<sup>th</sup> day of February, 2004 by the following vote

**AYES:**  
**NOES:**  
**ABSTAIN:**  
**EXCUSED:**

**BY:**

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Rob Hammond, Mayor  
City of Monrovia

**ATTEST:**

**APPROVED AS TO FORM:**

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Linda B Proctor, CMC, City Clerk  
City of Monrovia

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Craig A Steele, City Attorney  
City of Monrovia

I, LINDA B PROCTOR, CMC, City Clerk of the City of Monrovia, California, do hereby certify that the foregoing Ordinance No 2004-03 adding Chapter 15 44 to the Monrovia Municipal Code relating to Art in Public Places was duly adopted and passed at a regular meeting of the City Council on the 17<sup>th</sup> day of February, 2004, by the following vote

**AYES:**  
**NOES:**  
**ABSTAIN:**  
**EXCUSED:**

**ATTEST:**

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Linda B Proctor, CMC, City Clerk

## ART IN PUBLIC PLACES CRITERIA BY CITY

City	Year	Scope	Allocation	Thresholds
Berkeley		<ul style="list-style-type: none"> <li>Recommended in all public places</li> </ul>		
Beverly Hills		<ul style="list-style-type: none"> <li>All projects</li> </ul>	1% or \$150,000	
Brea	1988	<ul style="list-style-type: none"> <li>All projects, private commercial, industrial, and residential of 5 units or more</li> </ul>	1%	\$500,000 minimum project valuation; no maximum valuation criteria
Carlsbad		<ul style="list-style-type: none"> <li>Commercial Projects</li> </ul>	1%	\$500,000 minimum project valuation; no maximum valuation criteria
Cathedral City		<ul style="list-style-type: none"> <li>All commercial, industrial, and mixed use projects &gt;25,000 sq ft</li> <li>All public facilities constructed by the City or Redevelopment Agency</li> </ul>	<ul style="list-style-type: none"> <li>1%</li> <li>If value of piece &lt; 1%, balance paid to fund</li> <li>In lieu payment to fund in amount of 90%</li> </ul>	No limits specified
Chula Vista		<ul style="list-style-type: none"> <li>All projects, including substantial remodel projects</li> </ul>	1%	\$20,000 minimum project valuation; no maximum valuation criteria
Claremont	1997	<ul style="list-style-type: none"> <li>All subdivisions, development projects, and remodeling projects</li> </ul>	1%	\$100,000 minimum project valuation; no maximum valuation criteria
Cupertino		<ul style="list-style-type: none"> <li>Case by case analysis</li> </ul>		
Davis	1973	<ul style="list-style-type: none"> <li>All CIP projects</li> <li>Private developer projects are negotiated at time permit is issued</li> </ul>	<ul style="list-style-type: none"> <li>1% CIP projects</li> <li>2% Redevelopment Agency Projects</li> </ul>	No limits specified
Emeryville	1990	<ul style="list-style-type: none"> <li>All municipal, commercial, and industrial projects</li> </ul>	1%	\$300,000 minimum project valuation; no maximum valuation criteria
Escondido			.15 per square foot	
Fairfield		<ul style="list-style-type: none"> <li>All developments</li> </ul>	1%	No limits specified
Fremont	1987	<ul style="list-style-type: none"> <li>All public buildings and parks</li> <li>Optional for private development</li> <li>Exempt Low or moderate income</li> </ul>	1%	\$500,000 minimum project valuation; no maximum valuation criteria

Palo Alto	1977	<ul style="list-style-type: none"> <li>All municipal projects</li> <li>Planning Commission recommendations for private projects</li> </ul>		No limits specified <i>\$1 mil -</i>
Pasadena	1988	<ul style="list-style-type: none"> <li>Public, private to include commercial, industrial, and mixed use projects over 25,000 square feet</li> <li>Exempt: low and moderate income housing projects, non-profit, social service institutions, adaptive re-use or rehab of existing buildings</li> </ul>	1%	\$500,000 minimum project valuation, no maximum valuation criteria
Pleasanton		<ul style="list-style-type: none"> <li>Commercial</li> </ul>	1.5%	No limits specified
Richmond		<ul style="list-style-type: none"> <li>All developments</li> </ul>	1.5%	\$300,000 minimum project valuation, no maximum valuation criteria
Sacramento	1983	<ul style="list-style-type: none"> <li>Capital improvement projects paid by the City to construct or remodel any building, structure, park, or parking facility within the City limits</li> </ul>	2%	No limits specified
San Diego		<ul style="list-style-type: none"> <li>City departments negotiate in design and building projects</li> </ul>		
San Francisco		<ul style="list-style-type: none"> <li>New construction in downtown area</li> </ul>	1%	No limits specified
San Jose	1994	<ul style="list-style-type: none"> <li>Capital building and Parks construction</li> <li>City and Redevelopment Agency as well as certain Agency assisted private development projects</li> </ul>	2%	\$500,000 minimum project valuation, no maximum valuation criteria
San Luis Obispo	1990	<ul style="list-style-type: none"> <li>All CIP</li> <li>50/50 city match for private development (voluntary)</li> </ul>	1%	No limits specified
San Mateo		<ul style="list-style-type: none"> <li>Strongly encouraged to include</li> </ul>		

		<ul style="list-style-type: none"> <li>• Percent to be proposed</li> </ul>		
Santa Clara		<ul style="list-style-type: none"> <li>• Recommend placements and purchase of public art</li> </ul>		
Santa Cruz		<ul style="list-style-type: none"> <li>• All eligible CIP</li> </ul>	2%	No limits specified
Santa Monica		<ul style="list-style-type: none"> <li>• All eligible Enterprise Fund CIP</li> </ul>	1%	No limits specified
Solana Beach	2001	<ul style="list-style-type: none"> <li>• Scope not addressed in policy</li> </ul>	Funding not addressed in policy	
Stockton	2000	<ul style="list-style-type: none"> <li>• Municipal projects</li> </ul>	2%	No limits specified
Sunnyvale	1984	<ul style="list-style-type: none"> <li>• All projects</li> </ul>	1%	
Walnut Creek	1987	<ul style="list-style-type: none"> <li>• CIP and private</li> <li>• Recommendation that CIP budget include a block of funds dedicated to public art in existing parks, gateways, medians, city buildings, and other municipal sites</li> </ul>	<ul style="list-style-type: none"> <li>• 2% for municipal projects</li> <li>• 1% for private &gt; \$200,000</li> <li>• 5% for private &gt; \$5,000-24,999 sq ft</li> </ul>	No limits specified
West Hollywood		<ul style="list-style-type: none"> <li>• New commercial &gt;\$200,000</li> <li>• New residential &gt;2 units/\$200,000</li> <li>• All renovations \$200,000 or more</li> </ul>	1%	<ul style="list-style-type: none"> <li>• New commercial &gt;\$200,000</li> <li>• New residential &gt;2 units/\$200,000</li> <li>• All renovations \$200,000 or more</li> </ul>
Whittier		<ul style="list-style-type: none"> <li>• Commercial or manufacturing &gt; \$250,000</li> </ul>	\$20,000 or 5% (greater)	Commercial or manufacturing > \$250,000
Albuquerque, NM	1978	<ul style="list-style-type: none"> <li>• CIP projects</li> </ul>	1%	No limits specified

\*The California Supreme Court has determined that requiring developers to provide art in an area of a project that is reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the City to impose. The City could impose such a requirement by adoption of an ordinance which imposes the requirement upon developers, sets forth certain definitions and criteria for the art, and provides for the fund's collection and administration (From the Public Art Policy for Cathedral City)

# Visual Art Laws for Artists and Owners

Several federal and state laws protect the rights of visual artists and art owners. The following is only a partial listing. For more details, the City recommends that the artist and/or owner consult a lawyer specializing in visual art and copyright laws.

## I. 1980 California Art Preservation Act

California Civil Code Section 987 et seq. applies to artwork sold or created after 1980. The Civil Code states that no person except the artist can deface, mutilate, alter or destroy a piece of art " ..The physical alteration, or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation and therefore have an interest in protecting their works of fine art against any alteration or destruction."

## II. Visual Artists Rights Act of 1990

The Visual Artists Rights Act of 1990 (VARA) 17 USC Sections 101, 106A, 107, 113, 301, 411, 412, 501, 506, amends copyright law providing new rights for visual artists for artworks sold or created after June 1, 1991. The rights contained in the law extend for the life of the artist. The legislation creates a uniform, national standard for protecting visual artists' rights. It provides a mechanism for the visual artist to claim authorship of a work he or she created, as well as to prevent the use of his or her name on a work he or she did not create. The bill makes clear that this right includes the right to publish a work anonymously or under a pseudonym. The artist also has a right to demand that his or her name be removed from a work in the event of a distortion, mutilation, or other modification of the work to which the artist has not consented, and is prejudicial to his or her honor or reputation. In addition, the Act provides for a legal course of action to allow an artist under specified circumstances to prevent the destruction, distortion, mutilation, or modification of a work of visual art. In any such action, the artist has the burden of establishing that the alteration of the work is harmful to his or her professional honor or reputation.

### A. Works Covered

The Visual Artists Rights Act of 1990 is limited only to "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 or less. The copies of a limited edition must be signed and consecutively numbered by the artist. In the case of multiple casts, carved or fabricated sculptures, the work must be a limited edition of 200 or less, be consecutively numbered by the artist, and bear the signature or "other identifying mark" of the artist.

The destruction of a work of recognized stature by an intentional act or an act of gross negligence is a violation of the artist's right and would subject the person destroying the work to suit for damages by the artist.

This law states several exceptions to the artist's rights. First, a modification of a work that is a result of the passage of time or the inherent nature of the materials is not actionable. Second, the modification of a work that is the result of conservation or the public presentation of the work including lighting and placement is not actionable unless the modification of the work is caused by gross negligence.

If a work was created prior to the effective date, the rights under the statute apply if title to the work has not been transferred prior to the effective date.

#### **B. Transfer and Waiver**

Only the artist has the rights created by VARA 1990. No rights may be transferred under this Act. Rights may be waived if the artist agrees to waive his/her rights in writing. In the case of a joint work, a waiver made by one artist waives the rights for all artists of the joint work. The transfer of ownership of a copy of a work of visual art does not constitute a waiver of rights.

#### **C. State Law Preemption**

The Visual Artists Rights Act attempts to create a uniform national standard with respect to the rights of integrity and attribution. Therefore, the Act preempts or extinguishes all legal or equitable rights that are equivalent to the rights conferred by the Visual Artists Rights Act. This general rule of preemption is subject to three important exceptions. First, the Act does not preempt rights, which are not equivalent to the rights contained in the bill, for example, California's resale royalty statute would not be preempted by this Act. Second, the statutes, which extend rights beyond the life of the artist, are not preempted by this Act. Finally, this Act does not preempt a cause of action arising from undertakings commenced before the effective date of the statute.

#### **D. Remedy**

Like copyright infringement, an artist who seeks to assert his or her rights under the statute may do so by filing a lawsuit in federal court. An artist may seek an injunction to claim authorship or disclaim false authorship of a work or to prevent distortion, mutilation or destruction of a work as outlined above. If the distortion, mutilation or destruction has already occurred, the artist can sue for damages. The artist can either establish the actual damage to his or her honor or reputation or claim the statutory damages of up to \$10,000. If the artist prevails in court, the judge may also order the defendant to pay the artist's attorney fees.

## E. Removal of Visual Art from Buildings

- 1 If a work of visual art has been incorporated or made part of a building in such a manner that removal of the work would cause the destruction, distortion, mutilation or other modification of that work, the rights shall not apply if the artist consented to the installation of the work in the building before the effective date of the law. In addition, these rights shall not apply if the artist and the building owner have executed a written statement that installation of work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.
- 2 If the owner of building wishes to remove a work from a building and the work can be removed without its destruction, distortion, etc., the artist's rights will apply but there are exceptions. The right will not apply if the owner has notified the artist, in writing, that he or she intends to remove the work, and the artist has failed to respond to the owner's notice that the artist must either remove the work or pay for its removal within ninety days after receiving the owner's written notice. The written notice must be sent by registered mail to the artist at his or her most recent address. If the work is removed at the artist's expense, title to that copy of the work belongs to the artist.
- 3 In order to give the artist the practical opportunity to remove works which have been incorporated into buildings, the Register of Copyrights has established a system of records whereby the artist of work that has been incorporated in or made part of a building can record his or her identity and current address. This system provides the artist with the opportunity to update his/her personal information. In addition, the system provides the owners of buildings with the opportunity to record evidence of their efforts to comply with the law.

## F. Law Codes

A copy of the law can be found: Federal Code, Visual Rights Act of 1990, 17 USC Sections 101, 106A, 107, 113, 301, 411, 412, 501, 506. Materials written above were excerpted from "Congress Passes Visual Artists Rights Act," National Artists Equity, autumn 1990.