

VARA After Büchel:

The Right to Display Unfinished Works of Visual Art

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In September 2007, what had begun two years earlier as an optimistic and innovative relationship between a museum with a reputation for supporting unique points of view and an artist with an inspired vision (and an obsession with details) finally ended in shambles when a Massachusetts federal district court ruled that the Massachusetts Museum of Contemporary Art (“*Mass MoCA*”) had the right to exhibit Christoph Büchel’s (“*Büchel*”) unfinished installation entitled *Training Ground for Democracy* (the “*Installation*”), without Büchel’s consent and in spite of his vociferous objections.

Judge Michael A. Ponsor ruled from the bench¹ and issued a declaratory judgment that nothing in the Visual Artists Rights Act of 1990² (“*VARA*”) prohibits Mass MoCA from exhibiting the *Installation*, provided that Mass MoCA (1) refrains from including any references to Büchel in any signage related to the *Installation* and (2) includes a disclaimer that the *Installation* constitutes “an unfinished project that does not carry out the installation’s original intent.”³ In particular, the court held that although *VARA* might in some circumstances protect an unfinished work of art, *VARA* does not apply to the *Installation* as an unfinished work based on particular factual findings (discussed more fully below).⁴ The court further held that even if *VARA* covered the *Installation*, Mass MoCA’s exhibition of the *Installation* as a work-in-progress (with appropriate disclaimers and signage as described above) would not run afoul of an artist’s right under *VARA* to “prevent any intentional distortion, mutilation, or other modification” of a work of visual art which could be prejudicial to his honor or reputation.⁵

After an overview of the scope of legal protection afforded to moral rights in the United States and a summary of the statutory elements of *VARA*, this paper will critically examine the *Büchel* decision, informed by *VARA*’s legislative history and relevant legal precedent, with respect to the applicability of *VARA* to unfinished works of visual art. In addition, this paper

will identify best practices useful for museums intending to embark on any similar creative collaboration with an artist.

I. Moral Rights and VARA's Statutory Framework

Independent of an author's economic and property interests in his work of art, moral rights, or *droit moral*, are rights with respect to a work of art that are personal to its creator even after the work of art has "entered the stream of public commerce."⁶ These rights are founded on the principle that a work of art is an extension of the artist's personality and reputation and, as a manifestation of the artist himself, is deserving of preservation and protection.⁷ By safeguarding an artist's control over the creative process as well as the integrity of the work of art itself, society demonstrates the value with which it imbues its cultural spokespersons, thereby further incentivizing others to invest their respective individualities in other works.⁸

Although not uniformly recognized as enforceable legal rights in all countries, three key rights comprise the lion's share of an artist's ideal bundle of moral rights: (1) attribution; (2) integrity; and (3) disclosure.⁹ Attribution encompasses an artist's right to (a) be recognized as the author of his work of art, (b) prevent another person from taking credit for his work of art and (c) prevent the misattribution of the artist as the author of another person's work of art.¹⁰ Integrity safeguards a work of art against unauthorized modification even after a work has been transferred by the artist to a third party.¹¹ Finally, the right of disclosure, which is particularly relevant in light of the court's findings in the *Büchel* case (discussed in Part III below), gives the artist the right to decide if and when a work of art is finished and suitable for public display; the artist cannot be compelled to disclose his work against his will.¹²

From this broader survey of the relevant moral rights, it is important to identify which of these rights are available to artists working in the United States and the mechanism by which

artists might enforce said rights. The first step to codifying moral rights was Article 6bis of the Berne Convention for the Protection of Artistic and Literary Works (the “*Berne Convention*”),¹³ an international copyright treaty providing reciprocal copyright protection amongst all signatories thereto. The Berne Convention recognized the rights of attribution and integrity¹⁴ for the life of the artist (at a minimum),¹⁵ while leaving the mechanics of enforcement to individual member countries.¹⁶ Effective as of March 1, 1989, the United States acceded to the Berne Convention with the enactment of the Berne Convention Implementation Act,¹⁷ which demonstrated a single-minded devotion to making as few changes to the United States’ existing copyright laws as possible.¹⁸ It was not until two years later that Congress passed VARA,¹⁹ which more comprehensively implemented the tenets of the Berne Convention.

VARA has a limited applicability, covering only “works of visual art,” defined as a painting, drawing, print or sculpture, or a still photographic image produced for exhibit purposes only, in each case either existing in a single copy or a limited edition of 200 or fewer that are consecutively numbered and signed (or otherwise identified) by the author.²⁰ Excluded from this definition are a number of statutorily specified works, including technical drawings, applied art, motion picture or other audiovisual works, books and periodicals, databases, merchandising items, advertising materials, and works made for hire.²¹ With respect to those covered works of visual art, VARA protects the rights of attribution and integrity, and with respect to works of visual art determined to be “recognized stature,”²² the right to prevent destruction.²³ The latter right is not relevant to the *Büchel* case, and will not be addressed in any further detail herein.

In regards to the right of attribution, the author of a work of visual art has the right to (a) claim authorship of that work, (b) prevent the use of his name as the author of any such work which he did not create and (c) prevent the use of his 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 honor or reputation.²⁴ The right of integrity preserves an author's right to prevent any intentional distortion, mutilation or other modification of a work of visual art which would be prejudicial to his honor or reputation.²⁵ The scant guidance that Congress has provided regarding what actions might constitute a distortion is an enumeration of a few exceptions that would *not* result in a violation of VARA, which include modifications resulting from (i) the passage of time or the inherent nature of the materials, or (ii) unless caused by gross negligence, the conservation, or public presentation, including lighting and placement, of the work.²⁶ The rights protected by VARA may only be enforced by the author of a work of visual art and (with a limited exception)²⁷ endure for the life of the author.²⁸ The author has the right to waive his VARA rights in a signed written instrument that specifically identifies the work at issue and the uses thereof to which the waiver applies.²⁹

II. *The Büchel Decision*

Based on facts reported in *The Boston Globe*,³⁰ *The Los Angeles Times*,³¹ and *The New York Times*,³² and those gleaned from the filings made by the parties with the federal district court in Massachusetts,³³ in 2005, Büchel and Mass MoCA embarked on the creation of a large-scale work of art to be housed in Mass MoCA's "Building 5," which is a unique, football field-sized exhibition space. The materials anticipated to be part of the Installation included no less than a movie theater, a smashed police car, a mobile home and a two-story house, to name just a few of the items on Büchel's shopping list. Depending on one's source of information, the genesis of the dispute is either an exorbitant budget overrun and a difficult and demanding artist unwilling to live up to the expectations of the arrangement by abandoning the project,³⁴ or an institution that placed a higher priority on funds expended than artistic vision and, in the absence

of the artist's direction, took steps to complete the Installation on its own.³⁵ In truth, it is more likely that a failure of a meeting of the minds back in 2005 sounded the death knell for the collaboration before any work had even commenced (discussed in Part III below).

Büchel and Mass MoCA never executed a comprehensive written agreement formalizing the project plan and budget, so when costs began to reach astronomical heights (almost double the \$160,000 originally discussed) in the first few months of 2007, Mass MoCA attempted to put its foot down—but it had no clear accord to which it could point and say, “But, we agreed.”³⁶ Once Mass MoCA refused to continue to pay additional costs, Büchel refused to return to the site to complete the Installation until certain financial, material and resource demands could be met.³⁷ With its facility effectively held hostage by the dispute (the Installation had been scheduled to open to the public in December 2006), and with no end in sight, Mass MoCA began looking at its options, endeavoring to find a way forward – with or without Büchel.

In May 2007, Mass MoCA filed a motion for a declaratory judgment with the federal district court in Massachusetts that it had the right to publicly exhibit the materials and partial construction constituting the unfinished Installation; Büchel countersued, alleging, among other claims, that Mass MoCA's actions violated his rights under VARA, and requesting an injunction to stop the museum from publicly displaying the unfinished Installation.³⁸ As noted above, the court issued a declaratory judgment that VARA does not prohibit Mass MoCA from exhibiting the Installation. That judgment was contingent on Mass MoCA's use of a disclaimer in any such display that explicitly states, at a minimum, that the Installation constitutes “an unfinished project that does not carry out the Installation's original intent.”³⁹ The court gave Büchel the right to propose additional language to be included in the disclaimer, and further prohibited any references to Büchel in any signage for the display (other than in respect of the disclaimer).

Within one week after the favorable court decision, Mass MoCA elected to dismantle the unfinished Installation and has no current plans to mount an exhibit in connection therewith.⁴⁰

Büchel appealed the decision in September 2007, but that appeal was voluntarily dismissed by a First Circuit federal court in February 2008.⁴¹

Focusing solely on the two issues actually resolved by the Massachusetts federal district court during the summary judgment motion hearing held on September 21, 2007 (the court reserved all other issues for a memorandum to be issued at a later date), it is important to consider the effect of those holdings on future VARA claims.

A. Applicability of VARA to Protect Unfinished Works of Visual Art

Although recognizing that VARA does not *per se* exclude unfinished works from its scope of protection, the court held that VARA did not protect the Installation in light of its highly collaborative nature and the considerable role the court deemed that Mass MoCA played in the creative process. In particular, the court emphasized (1) the large and complex nature of the Installation, (2) the high degree of detail and lengthy collaboration between Büchel and Mass MoCA, creating an “evolving organic construct that was the product of the intent, intelligence, [and] vision of persons other than Mr. Büchel,” (3) Mass MoCA’s financial responsibility for virtually all materials and a majority of the installation work, (4) Büchel’s decision to abandon the project, leaving it inside a Mass MoCA facility and (5) Mass MoCA’s willingness to utilize disclaimers and make clear the Installation is an unfinished work.⁴² The court likened the relationship to a co-authorship, the force of which analogy, despite the court’s acknowledgment that the arrangement would not have satisfied the legal definition of a “joint work,” implicitly seems to have outweighed, in the court’s view, any personal reputation rights retained by Büchel in respect of the Installation.⁴³

In light of the text of VARA (and corresponding legislative history), relevant case law, and policy considerations, one might question whether this intensively fact-based decision would be affirmed by an appellate court or followed by other courts. Although the statutory definition of “work of visual art” does not specifically reference works-in-progress, the broader definition of “created” (which is applicable to all works covered by the Copyright Act of 1976, as amended⁴⁴ (the “*Copyright Act*”) generally (including VARA)) provides that a work that is prepared over a period of time is “created” when “the portion of it that has been fixed at any particular time constitutes the work as of that time.”⁴⁵ Similarly, if a work “has been prepared in different versions, each version constitutes a separate work.”⁴⁶ The Copyright Act offers protection to these draft and preparatory works as “original works of authorship *fixed* in any tangible medium of expression”⁴⁷ (emphasis added), as distinguished from a “hypothetical future work.”⁴⁸ At least one legal analyst has proposed that the unfinished Installation may be best characterized as merely “a phase of the assembly process,” and thus not independently copyrightable as a “fixed” work of art.⁴⁹ One should query, however, whether it is more logical to describe the unfinished Installation as a draft version of the work, already imbued with the artist’s expression, rather than a “step” that would have been erased upon completion of the final work. The court agreed that the Installation as it existed in September 2007 was very clearly not simply a collection of objects strewn haphazardly across a gallery floor awaiting the touch of a creative spark.⁵⁰ Preparatory works generally do not express all of the details that make up a finished work; why should the fact that the Installation was incomplete bar the work-in-progress from warranting copyright protection in its own right?

Existing case law, although limited, further supports the protection of unfinished works under VARA. In particular, a federal district court in New York found that a clay statue sculpted

in preparation for a final bronze statue was deemed a work of visual art even though the statue was never intended to be the final work.⁵¹ That court held that a work that would otherwise qualify for protection should not be excluded solely because it is part of a larger project; its status as an “impermanent or intermediate stage” is irrelevant.⁵² The preliminary work of painters (*e.g.*, drawings and sketches) are covered by VARA, and certain photographic preparatory works (such as studies, photographs, prints and negatives) are also protected,⁵³ so a comparable interpretation of works of installation sculpture seems appropriate.

Again, although these cases address the applicability of VARA with respect to a *finished* work that happens to be an intermediate step in a larger process to a final work, rather than a work-in-progress that is itself a version of the final work, it would be illogical to draw a distinction between these two categories of “unfinished” works. Why should a photographic negative or a pencil sketch—both works of art that are “finished” in their own right, but that likely would not be complete and accurate representations of the artist’s vision for the final works for which they were prepared—be any more deserving of protection than an unfinished work that is *actually* a version of the finished work of art? In fact, a sketch or a negative might even be disposed of by the artist when the final product is complete. Not so with a work-in-progress; it is, in and of itself, a fixed version of the finished work.

Legislative history further advises courts to apply “common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.”⁵⁴ Thus, if the Mass MoCA director himself says he knows of “no other unfinished work this century that is better as an unfinished work,”⁵⁵ and even Judge Ponsor himself was “extraordinarily moved by this piece of art,”⁵⁶ should the protection of this monumental work-in-progress under VARA be thwarted by the mere fact that Büchel was

supported in his endeavor by Mass MoCA? The court agreed that Büchel was the sole author of the Installation, so how can it be implied that Büchel surrendered any of his personal rights in the Installation when he accepted funding and logistical assistance (intended to be provided at his direction and with his approval)? All of the court's factors enumerated above do not change the fact that Büchel's "professional and personal identity is embodied in each work" he creates.⁵⁷

B. Whether Unauthorized Display of an Unfinished Work Constitutes Distortion

With respect to the second issue on which the court ruled, the court held that even if VARA covered the Installation, Mass MoCA's exhibition of the Installation as a work-in-progress (with appropriate disclaimers and signage as described above) would not run afoul of an artist's right of integrity under VARA.⁵⁸ Exhibiting a work "by saying exactly what it is and claiming nothing other than what is in fact true" was not deemed to be an actionable distortion.⁵⁹

There are attractive arguments on both sides of this question. In support of the court's decision, neither VARA nor the Berne Convention incorporate the right of disclosure (as it is described in Part I above), so it is true that Büchel does not have the explicit right under VARA to decide if and when a work of art is finished and suitable for public display. Thus, rather than ask the court to read into VARA a right of disclosure (which would have been much more easily dismissible), Büchel's counsel advanced a broad reading of the right of integrity to include not only protection against physical acts of modification, but protection against misrepresentation as well. As noted by Büchel's counsel, "distortion" is defined in the common language to include giving a "false or misleading account of" or misrepresenting.⁶⁰ So, if a museum displays a work of art (1) that the artist does not endorse as finished, (2) that is different from what the artist intended to display and (3) over the express and repeated objections of the artist, one should

query whether that display effectuates a “false or misleading account,” and an effective distortion, of that artist’s work that would be prejudicial to his reputation.⁶¹

To date, courts and scholars in the United States have focused on the “acts of alteration,” rather than the “subsequent display”⁶² as the basis for VARA violations. Indeed, the court’s clear opinion in *Büchel* was that so long as there is an appropriate disclaimer (that might even in fact state the veracity of each of the three aforementioned elements), no reputational harm befalls the artist and the display is not barred by VARA. However, as noted by a few art critics as well as Büchel’s counsel,⁶³ forced display of an unfinished work, regardless of what the sign on the front door of the gallery says, by definition is not a true representation of that work, and thereby prejudicial to the artist’s honor, to the same extent as though someone had come along after the Installation was complete and rearranged all of the pieces in the gallery. In either case (whether unfinished or finished but altered against the artist’s wishes), would it be possible to convince a viewer to divorce the artist’s reputation from that work of art, especially in a highly publicized situation such as this? Perhaps the court is again implicitly relying on the money and time Mass MoCA dedicated to this project to give Mass MoCA what amounts to an equitable ownership interest in the unfinished Installation,⁶⁴ discounting Büchel’s vision and the efforts he has dedicated to the project, and elevating Mass MoCA’s logistical support to the work of a co-author.

The arguments raised by Büchel’s counsel are novel in the United States, and a review of the court’s final written opinion on this issue will likely help to further elucidate these issues. For now, an artist looking to safeguard his works-in-progress from premature display should take care to include that right in a written contract with his patron collaborator.

III. A Few Best Practices for Collaborative Relationships between Museums and Artists

Although Mass MoCA prevailed in court, public opinion about its behavior has been harsh from many corners of the art world, so it would behoove organizations that support artists in the creation of visual works of art to establish standard policies that strike a balance between the artist's creative freedom and the museum's rightful interest in maintaining control over its investment.

As a general matter, establishing transparent policies is of the utmost importance with respect to any and all museum activities and aids a museum in fulfilling its duty of care with respect to its core functions. Although collaborative partnerships such as the arrangement explored in this paper are often one-of-a-kind and do not lend themselves very well to fitting into a template relationship, museum staff who will play a role in effectuating such a partnership would benefit from talking amongst themselves to determine internally how far they are willing to stretch for a big-ticket installation. Given that the field of organizations looking to establish these partnerships is relatively small, benchmarking sessions with those entities might also assist in the preparation of standard policies that recognize and address VARA (as applicable), which polices would be available to potential artist-collaborators as a starting point for discussions.

In spite of Judge Ponsor's chiding of the parties for not formalizing their relationship, Mass MoCA's director Joe Thompson has repeatedly asserted since the court's decision that the *Büchel* experience was "not going to affect the way that Mass MoCA approaches its artists," and further that he was no more likely to "start developing production contracts."⁶⁵ A disdain for details and the potential "over-lawyering" of a creative endeavor should not outweigh the comfort and clarity contracts can provide, particularly for parties that find themselves in a strained relationship down the road. Learning from Mass MoCA's mistakes, museums

contemplating expensive, high risk ventures should have a comprehensive memorandum of understanding with each collaborator that at the very least includes agreement on: (1) the budget (*e.g.*, who is responsible for fundraising and budget management, how is the artist paid); (2) the timeline (*e.g.*, a list of deadlines, milestones and deliverables from each party); (3) the materials (*e.g.*, a complete list of what is required, allocation of responsibility as to purchasing, storage, insurance and transportation); (4) the change order process (*e.g.*, how to handle additional object requests and budget modifications during the installation process); and (5) the relationship between the artist and the museum (*e.g.*, facilities access, security clearance and use of museum employees). Even just a baseline framework of each party's expectations should alleviate many disputes.

If a museum identifies a specific action it desires to take in connection with a work of visual art that is the subject of a collaborative relationship that might run afoul of VARA without a waiver from the artist (*e.g.*, conducting a behind-the-scenes tour of the work during installation), rather than include that waiver in the more general agreement that defines the overall working relationship, the museum should consider executing a separate and specific written instrument to ensure the waiver satisfies all statutory requirements.⁶⁶ Asking an artist to waive his moral rights should not be done lightly and museum personnel should seriously consider what they need from the artist before making that request.

Endnotes

¹ A written opinion has yet to be published as of March 31, 2008. All references to the court's decision are taken from a transcript of the summary judgment motion hearing in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Christoph Büchel*, No. 3:07-30089-MAP (D. Mass. Sept. 21, 2007) (the "Transcript"). The Transcript was provided to the author by Donn Zaretsky, Esq., of John Silberman Associates P.C., of counsel for Büchel in the matter.

² 17 U.S.C. § 106A.

³ Transcript 67-68.

⁴ Transcript 70.

⁵ Transcript 71-72. VARA, 17 U.S.C. § 106A(a)(3)(A).

⁶ Lerner, Ralph E. and Judith Bresler. *Art Law*. Vol. 2. 3rd ed. New York: PLI, 2005. 1253.

⁷ Lerner and Bresler 1252.

⁸ Liemer, Susan P. "Understanding Artists' Moral Rights: A Primer." *B.U. Pub. Int. L.J.* 7 (1998): 41, 45. ("By eliminating certain choices, such as waiving a particular right in exchange for monetary gain, the society values the creative contribution. Thus, the law relieves the artist of certain pressure to make compromises that may affect her art. She is freer to create, knowing certain protections will always be there for her.")

⁹ The right to withdraw a work of art after public disclosure and the right to resale royalties (*droit de suite*), whereby for a limited period of time, the artist receives a pecuniary benefit from the resale of his work, are also moral rights but are not directly relevant to this paper.

¹⁰ Liemer 49 ("[T]he right of attribution helps ensure the artist's name is attributed to all her work and her work only. She may feel encouraged to take more risks and explore further who she is as an artist and what she wants to say artistically, because she knows the recognition or reputation she gains will reflect her own endeavors.")

¹¹ Liemer 50 ("The artist retains artistic control over her own creative expression. She also retains control over the creative process, since that process, once completed, cannot be restarted without her permission.") Carver, Katherine J. and Bruno Chalifour. "The Visual Artists Rights Act of 1990." *Afterimage*. 31.4 (Jan/Feb 2004): 4 ("This right is derived from the idea that the work represents an expression of the author's personality, and that any alteration would injure the reputation of the artist.")

¹² Liemer 53 ("[I]t ensures that the association of the artist to the art accurately reflects what happened during the creative process.")

¹³ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, and all acts, protocols and revisions thereto.

¹⁴ Article 6bis paragraph 1 of the Berne Convention states, "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

¹⁵ Article 6bis paragraph 2 of the Berne Convention states, "The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained."

¹⁶ Article 6bis paragraph 3 of the Berne Convention states, "The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

¹⁷ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

¹⁸ Sherman, Robert J. "Note: The Visual Artists Rights Act of 1990: American Artists Burned Again." *Cardozo Law Review*. (Dec. 1995): 402 ("The Berne Convention Implementation Act ... took as its overriding philosophy the so-called "minimalist approach." This meant that whenever Congress determined that a part of United States copyright law was in direct conflict with the Berne Convention, the law would be amended. However, the needed amendments would not attempt to create absolute harmony with the Berne Convention.")

¹⁹ 17 U.S.C.A. § 106A.

²⁰ 17 U.S.C.A. § 101.

²¹ 17 U.S.C.A. § 101.

²² 17 U.S.C.A. § 106A(a).

²³ Any intentional or grossly negligent destruction of a work of recognized stature is also a violation of that right. 17 U.S.C.A. § 106A(a)(3)(B). As applied to the removal of a work of visual art that was incorporated into a building, the right to prevent destruction is further circumscribed by (1) an exception for works installed prior to the effective date of VARA (*i.e.*, June 1, 1991), (2) an exception for works covered by a written waiver that specifies that installation of the work may subject the work to destruction or other modification by reason of its removal and (3) a process by which a building owner may remove a work of visual art that can be removed without destruction thereof. 17 U.S.C.A. § 113(d).

²⁴ 17 U.S.C.A. § 106A(a)(1), (2).

²⁵ 17 U.S.C.A. § 106A(a)(3)(A).

²⁶ 17 U.S.C.A. § 106A(c)(1), (2). Note that the passage of time exception (1) does not apply to VARA claims of action based on destruction of a work of recognized stature and (2) does not have a gross negligence carve-out.

²⁷ VARA rights with respect to works of visual art created prior to the effective date of VARA (*i.e.*, June 1, 1991), but whose title had not, as of that date, been transferred from the author, extend beyond the life of the author for an additional 50 years. 17 U.S.C.A. § 106A(d)(2).

²⁸ 17 U.S.C.A. § 106A(b), (d)(1). In the case of joint works, both authors are co-owners of the rights conferred by VARA and those rights will endure until the end of the life of the last surviving author. 17 U.S.C.A. § 106A(b), (d)(3).

²⁹ 17 U.S.C.A. § 106A(e)(1). Note that in the case of a joint work, a waiver by one author automatically waives the VARA rights of all other co-authors.

³⁰ Edgers, Geoff. "Behind doors, a world unseen." *The Boston Globe*. 28 March 2007.

<http://www.boston.com/ae/theater_arts/articles/2007/03/28/behind_doors_a_world_unseen/> (19 November 2007);

Edgers, Geoff. "Mass MoCA to dismantle unseen exhibit." *The Boston Globe*. 26 September 2007

<http://www.boston.com/ae/theater_arts/articles/2007/09/25/mass_moca_to_dismantle_disputed_show/>(19

November 2007); Edgers, Geoff. "Dismantled." *The Boston Globe*. 21 October 2007.

<http://www.boston.com/ae/theater_arts/articles/2007/10/21/dismantled/> (19 November 2007).

³¹ Lieberman, Paul. "Guess which is bigger: the art or the argument?" *The Los Angeles Times*. 13 August 2007.

LexisNexis Academic.

<http://www.lexisnexis.com.proxygw.wrlc.org/us/lacademic/results/docview/docview.do?risb=21_T2525499325&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T2525499328&cisb=22_T2525499327&treeMax=true&treeWidth=0&csi=306910&docNo=1> (19 November 2007).

³² Kennedy, Randy. "The Show Will Go On, but the Art Will Be Shielded." *The New York Times*. 22 May 2007.

<<http://www.nytimes.com/2007/05/22/arts/design/22muse.html?ei=5090&en=a7b9cd24bb8427ec&ex=1337486400&partner=rssuserland&emc=rss&pagewanted=all>> (19 November 2007); Smith, Roberta. "Is It Art Yet? And Who Decides?" *The New York Times*. 16 September 2007.

<<http://www.nytimes.com/2007/09/16/arts/design/16robe.html?pagewanted=all>> (19 November 2007); Kennedy,

Randy. "Museum Can Show Disputed Artwork, Judge Rules." *The New York Times*. 22 September 2007.

<<http://www.nytimes.com/2007/09/22/arts/design/22moca.html>> (19 November 2007).

³³ Memorandum of Law in Support of Defendant Christoph Büchel's Motion for Summary Judgment, No. 3:07-30089-MAP (D. Mass. Aug. 31, 2007) ("*Büchel Motion*"); Plaintiff Mass MoCA's Memorandum of Law in Support of its Motion for Summary Judgment, No. 3:07-30089-MAP (D. Mass. Aug. 31, 2007) ("*MassMoCA Motion*").

³⁴ "FAQ re: Training Ground." *Mass MoCA Blog*. 18 September 2007. <<http://blog.massmoca.org/?p=43>> (19 November 2007).

³⁵ Edgers, Geoff. "Dismantled." *The Boston Globe*. 21 October 2007.

<http://www.boston.com/ae/theater_arts/articles/2007/10/21/dismantled/> (19 November 2007). It is also worth

noting that early in 2007, without Büchel's permission, Mass MoCA officials permitted a group of visiting museum directors and curators, as well as the Mayor of North Adams and the Governor of Massachusetts, to tour the in-progress Installation. Edgers, Geoff. "Behind doors, a world unseen." *The Boston Globe*. 28 March 2007.

<http://www.boston.com/ae/theater_arts/articles/2007/03/28/behind_doors_a_world_unseen/> (19 November 2007).

In May 2007, again without Büchel's consent, Mass MoCA shielded objects with tarps to allow access through the Installation to a temporary exhibit inside Building 5 titled "Made at Mass MoCA," which also displayed installation photos and a survey of articles (most favorable to Mass MoCA) recounting the dispute. Kennedy, Randy. "The Show Will Go On, but the Art Will Be Shielded." *The New York Times*. 22 May 2007.

<<http://www.nytimes.com/2007/05/22/arts/design/22muse.html?ei=5090&en=a7b9cd24bb8427ec&ex=1337486400&partner=rssuserland&emc=rss&pagewanted=all>> (19 November 2007).

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- ³⁶ Grant, Daniel. "Looking to Repair a Reputation." *The Wall Street Journal*. 4 October 2007. <<http://opinionjournal.com/la/?id=110010689>> (31 March 2008) ("Before Mr. [Joseph] Thompson [director of Mass MoCA] said 'enough' back in January...more than \$300,000 had been spent on Büchel's wish list, almost double the \$160,000 that Thompson had casually mentioned back in the fall of 2006 in a note to the artist about other things, no small sum for a museum with an annual budget of only \$800,000.").
- ³⁷ Grant, Daniel. "Looking to Repair a Reputation." *The Wall Street Journal*. 4 October 2007. <<http://opinionjournal.com/la/?id=110010689>> (31 March 2008).
- ³⁸ Lieberman, Paul. "Guess which is bigger: the art or the argument?" *The Los Angeles Times*. 13 August 2007. LexisNexis Academic. <http://www.lexisnexis.com/proxygw.wrlc.org/us/lacademic/results/docview/docview.do?risb=21_T2525499325&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T2525499328&cisb=22_T2525499327&treeMax=true&treeWidth=0&csi=306910&docNo=1> (19 November 2007).
- ³⁹ Transcript 67-68.
- ⁴⁰ Edgers, Geoff. "Mass MoCA to dismantle unseen exhibit." *The Boston Globe*. 26 September 2007 <http://www.boston.com/ae/theater_arts/articles/2007/09/25/mass_moca_to_dismantle_disputed_show/> (19 November 2007).
- ⁴¹ Judgment as to Notice of Appeal, *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Christoph Büchel*, No. 07-2666 (1st Cir. Feb. 5, 2008).
- ⁴² Transcript 69-71.
- ⁴³ Transcript 70 ("[I]'ve been convinced...that this is not a situation where there's a co-authorship.").
- ⁴⁴ 17 U.S.C. §§ 101-810.
- ⁴⁵ 17 U.S.C. § 101 (cited in Büchel Motion 10-11). Note that a work is fixed when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." *Id.*
- ⁴⁶ 17 U.S.C. § 101.
- ⁴⁷ 17 U.S.C. § 102(a).
- ⁴⁸ Mass MoCA Motion 10-11.
- ⁴⁹ Rutledge, Virginia. "Institutional Critique." *Artforum*. (March 2008). <<http://artforum.com/inrpint/id=10546>> (31 March 2008).
- ⁵⁰ Transcript 5.
- ⁵¹ *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526, 529 (S.D.N.Y. 2001).
- ⁵² *Flack*, 139 F. Supp. 2d at 532.
- ⁵³ *Lilley v. Stout*, 384 F. Supp. 2d 83, 88 (D.D.C. 2005).
- ⁵⁴ H.R. Rep. No. 101-514 (June 1, 1990), reprinted at 1990 U.S.C.C.A.N. 6915 at 6921.
- ⁵⁵ Büchel Motion 7.
- ⁵⁶ Transcript 5.
- ⁵⁷ H.R. Rep. No. 101-514 at 6925.
- ⁵⁸ Transcript 71-72. VARA, 17 U.S.C. § 106A(a)(3)(A).
- ⁵⁹ Transcript 71.
- ⁶⁰ Büchel Motion 11.
- ⁶¹ Büchel Motion 11.
- ⁶² Santilli, Marina. "United States' Moral Rights Developments in European Perspective." *Marq. Intell. Prop. L. Rev.* 1 (1997): 89, 93 ("The right of disclosure does not exist under VARA's formulation..."); Rosenthal Kwall, Roberta. "How Fine Art Fares Post VARA." *Marq. Intell. Prop. L. Rev.* 1 (1997): 1, 28 ("VARA claims arise from improper alterations rather than improper displays"); *Pavia v. 1120 Avenue of the Americas Associates*, 901 F. Supp. 620, 627 (S.D.N.Y. 1995) ("In contrast to the New York statute, which prohibits the improper display of altered works, VARA lays its focus on the acts of alteration themselves, without reference to subsequent display.")
- ⁶³ Smith, Roberta. "Is It Art Yet? And Who Decides?" *The New York Times*. 16 September 2007. <<http://www.nytimes.com/2007/09/16/arts/design/16robe.html?pagewanted=all>> (19 November 2007); Büchel Motion p. 12-14.
- ⁶⁴ Büchel Motion 12 (citing Robert Storr, "No matter how much money may be spent on the creation of a work by an institution on behalf of their public, such sponsorship belongs to the category of patronage and does not buy that institution or its public any degree of ownership of or proprietary rights over the project much less any decision-making authority with respect [to] its readiness for public presentation.").

⁶⁵ Lewis, Jacquelyn. “Newsmaker: Joe Thompson.” *ARTINFO.com*. 27 September 2007.
<<http://www.artinfo.com/articles/story/25709/newsmaker_joe_thompson>> (19 November 2007); Grant, Daniel.
“Looking to Repair a Reputation.” *The Wall Street Journal*. 4 October 2007.
<<http://opinionjournal.com/la/?id=110010689>> (31 March 2008).

⁶⁶ 17 U.S.C. § 106A(e)(1).