

ART LAW FOR COLLECTORS: WHAT DID YOU BUY?

Imagine you just bought a painting that was completed last year by an emerging Texas artist. And as long as you're just imagining, let's say it's a life-size oil painting of Miley Cyrus as a cowgirl, inspired by Andy Warhol's "*Cowboy*" *Elvis*. Aside from the enjoyment of owning such a unique work, what did you get and what can you do with it? The answer is, not as much as you might think.

Buying art is not like buying other things. When you buy a hammer, for example, you are free to take a picture of it and post the picture on Facebook. You can use the hammer as a prop in ads for your law firm. You can paint the handle purple. You can even destroy it if you wish. When you buy a work of art, however, you might not be able to do any of these things. Indeed, you have to be much more careful when you buy art because your rights in the work may be limited. For example, copyright law, laws protecting rights of publicity, and a statute called the Visual Artists Rights Act, or VARA, restrict what you are allowed to do with *Cowgirl Miley*, even after you've paid for it and taken it home with you.

Copyright

If you buy a painting that was made after 1978, the odds are high that all you will own is a canvas and some paint; you will not have any rights in the image that is displayed in the painting. In legal terms, you will not own the copyright in the work. This is important because it limits what you are allowed to do with your painting.

Copyright is a monopoly right authorized by the United States Constitution, which states that Congress has the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress exercised this power by enacting the Copyright Act. The Copyright Act grants copyrights to authors of "original works of authorship," including "pictorial, graphic, and sculptural works." Authors—in our case, artists—thus have the exclusive right to make copies, prepare derivative works, distribute copies, and display their works publicly. No one but the artist is allowed to do any of these things without the artist's permission. Further, a work is automatically protected by copyright from the moment it is created; neither registration in the Copyright Office nor marking is required for copyright protection (though both are useful and recommended).

1978 marked an important turning point in the history of copyright law in the United States. Before that, when an artist sold a work, the buyer received not only the work, but also the copyright in the work. This changed in 1978. Now, when a work is sold, the artist retains the copyright unless there is a signed agreement explicitly granting it to the buyer.

Which brings us back to *Cowgirl Miley*. If the artist retained her copyright, which is highly likely, you can hang the painting in your home or office, you can put it in storage, and you can loan it or sell it to someone else. In other words, you are free (with certain exceptions discussed below) to dispose of the physical object as you see fit. Your rights in the image displayed on that object, however, are quite limited. You may not, for instance, photograph *Miley* and post the photo on Facebook or place it on your website, as this would violate the artist's exclusive right to copy and display the work. Likewise, putting a copy of the painting in your holiday newsletter would

violate the artist's distribution right. And you certainly cannot use it to decorate merchandise for sale, such as T-shirts or posters. If you do any of these things without the artist's written permission, you are infringing the copyright and can be forced to destroy any of the copies and compelled to pay money damages to the artist.

But what if you had commissioned the artist to make the painting for you? Would that make a difference? No. Unless the artist is your employee and the painting was done as part of her job—think a cartoonist working for Disney—the copyright belongs to the artist. Just because it was your idea to portray Miley as a cowgirl doesn't mean you get the copyright in the artist's expression of that idea.

Right of Publicity

Now let's assume the artist sold you the copyright to *Cowgirl Miley* along with the physical painting and that you have the right to make and distribute copies of it. Does this new fact mean you can use the image to decorate a line of products for your casual-apparel business?

Unfortunately for you, the answer is still no. Although you could include a copy of the painting in your holiday newsletter, the flesh-and-blood Miley Cyrus has an exclusive right—called the right of publicity—to exploit her identity for commercial purposes, which prevents you from using her image for profit.

Although the laws vary in detail from state-to-state, the right of publicity generally prevents people from using someone's name, image, or likeness for commercial gain without permission. In Texas, for example, it is illegal to exploit the value or benefit of another person's identity for profit. In fact, the right of publicity survives a person's death. Under the Texas Property Code, it is illegal to use someone's "name, voice, signature, photograph, or likeness" to sell products or services without permission for fifty years after he or she dies.

Significantly, in many states, including Texas, there is an exception to the right of publicity that allows the production of "single and original works of fine art." While this is a bit ambiguous—does the exception apply to single works of fine art and original works of fine art, or only to works of fine art that are both single and original?—it likely means that our artist did not violate Texas law by painting and selling *Cowgirl Miley*. It is equally likely, however, that using copies of the image to decorate products for sale to the public would be a violation, subjecting you to potential liability for monetary damages if you were to expand your business to include a *Cowgirl Miley* line of apparel.

VARA

Finally, your rights in *Cowgirl Miley* may be further restricted by the federal Visual Artists Rights Act, or VARA. VARA is a statute that protects paintings, drawings, prints, sculpture, and limited-edition photographs by granting artists certain so-called "moral rights." These rights include, among others, the right to prevent the intentional modification of a work that would harm the artist's honor or reputation and, if a work is of "recognized stature," the right to prevent its intentional destruction, regardless of any harm to the artist's honor or reputation. For works created on or after June 1, 1991, when the statute took effect, the rights endure for the life of the artist, unless explicitly waived in writing.

How does this apply to *Cowgirl Miley*? First, because it is a painting, *Cowgirl Miley* is a protected work. Thus, as long as the artist lives, you may not modify it in a way that harms her honor or reputation. You would risk violating the statute, for example, by cutting away part of the painting to make it fit better on your wall or in a gallery. If doing this would harm the artist’s professional reputation, you could be found liable and forced to pay her monetary damages. Also, if *Cowgirl Miley* is deemed to be a work of “recognized stature”—i.e., if it is perceived as meritorious by members of the art world or some other cross-section of society—you may not destroy it. As you can tell, the impact of VARA on your rights depends on the unique facts of each case. What might harm one artist’s reputation might have no impact on another’s, and a work’s “stature” may change over time. In any event, the safest course of action would be to respect the artist’s work and avoid modifying or destroying *Cowgirl Miley* if at all possible.