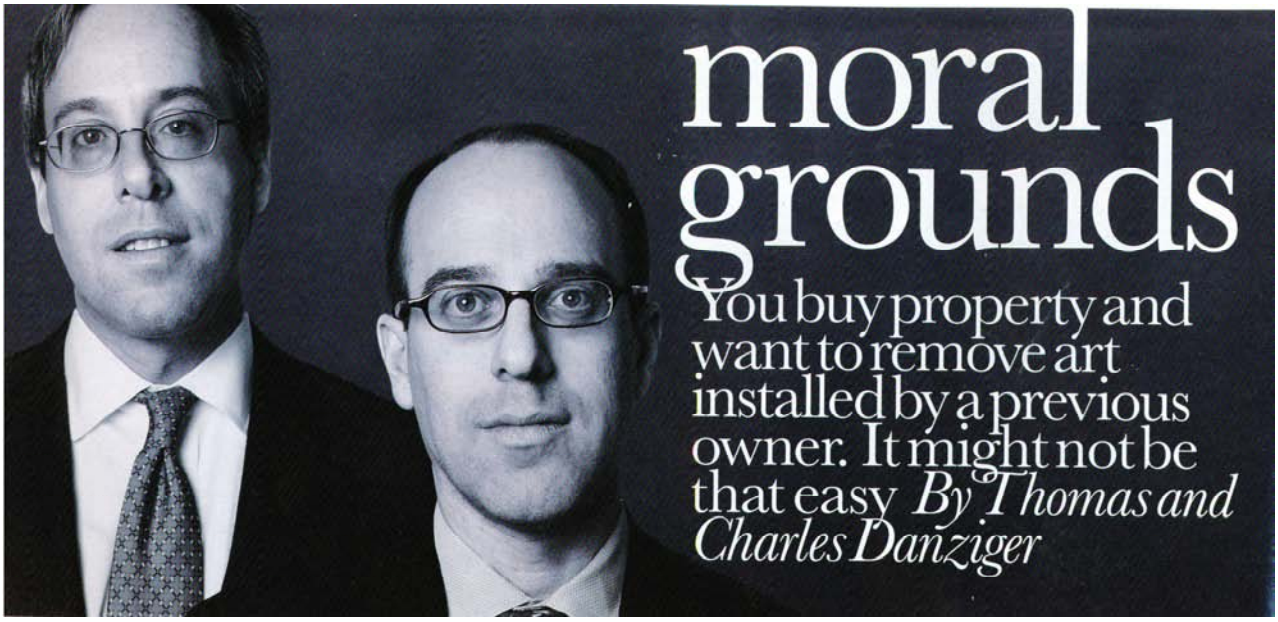

By Thomas & Charles Danziger

Ars longa, vita brevis. As one of our clients discovered, that is not always a good thing.

Heather was the proud new owner of a beautiful country house. The only wrinkle was that the previous owner had commissioned an up-and-coming artist to decorate it in the style of a Roman villa, and Heather's taste ran more to I.M. Pei than I, Claudius. "No matter," she said cheerfully. "I'll simply rip out every awful piece of 'art' in the place."

The artist got wind of Heather's plans and directed his lawyer to stop her. That's where we came in.

"I own this property, so can't I do with it what I want?" Heather asked when we visited her home for a consultation.

"Not necessarily," we explained, "since you might be violating the artist's droit moral or moral right."

The concept is based on a longstanding notion that artists imbue their creations with their own personality and that they retain rights of "attribution" and "integrity" even after their works are sold. A corollary to this principle is that injury to art constitutes injury to an artist's reputation.

Moral rights were incorporated into U.S. federal law through the Visual Artists Rights Act of 1990 (VARA), which allows visual artists "to prevent any intentional distortion, mutilation, or other modification" of a work that "would be prejudicial to his or her honor or reputation," and allows the artist "to prevent any destruction of a work of recognized stature."

"Do you consider this junk 'works of recognized stature'?" Heather asked indignantly.

Maybe we didn't, but the law might—especially since VARA fails to define "recognized stature." We told Heather about the 1994 federal case *Carter v. Helmsley-Spear*, in which three sculptors tried to prevent the owners of a commercial building in New York from modifying or destroying their sculptures in the lobby. The district court said that the determination of "recognized stature" should be based on the opinion of "art experts, the art community or

society in general." In finding that the art fit this category, the judge gave greater weight to the testimony of witnesses for the sculptors than to the defendants' expert witness, the art critic Hilton Kramer. "In Mr. Kramer's opinion," the judge wrote, "no artist has a reputation in the art world unless Mr. Kramer is familiar with writings about that artist. I find this to be an unpersuasive basis for determining whether alteration of the work would adversely affect plaintiffs' honor or reputation."

The concept of moral rights came from the French Revolution, with its intense focus on the rights of the individual. Today the moral rights of artists are recognized in countries such as Australia, Canada, Germany, Japan, Mexico, Morocco, the Netherlands, Nigeria and the U.K.

Heather pointed to a large sculpture affixed to the wall. It depicted Caligula—in the nude.

"This one's removable, so I'll quietly get rid of it," she said.

We cautioned her against doing so. Under VARA, the sculptor could assert his moral rights unless Heather made a "diligent, good faith attempt without success" to notify him of her intended action, or if he "failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal." If the artist paid for the removal, he would get title to the sculpture.

"How about if I simply have my 10-year-old son 'restore' it?" she asked. "I'll give him a hammer and let him go to town."

"Bad idea," we replied. While VARA does permit the modification of works through conservation, it does not allow for unprofessional conservation that amounts to gross negligence.

In a 2001 case, *Flack v. Friends of Queen Catherine*, the court for the Southern District of New York rejected a motion to dismiss an action alleging gross negligence during conservation. The case involved a statue of Queen Catherine of Braganza, the namesake of the New York borough of Queens, which had been commissioned from the sculptor Audrey Flack. Flack sued the group managing the project, claiming that the head of the statue had been placed outdoors in a "garbage dump," where the face had been damaged.

According to Flack, the defendants tried to restore the sculpture by hiring "a mere 'assistant' who was not trained in conservation, was not competent to perform work without [plaintiff's] supervision." The case has since been settled.

Heather next walked us out on the lawn. "What about the mosaic of the Roman orgy on the side of the gazebo?" she asked. "I can't remove it without destroying it."

Fortunately for her, the mosaic was installed in 1990. VARA's restrictions on destroying art incorporated into buildings do not apply if the artist agreed to its installation before the law took effect on June 1, 1991.

Next, Heather led us to an installation created especially for the garden, titled Evening at the Coliseum. It featured marble lions munching on slaves. "Can I hide this work in a dark corner of my basement instead?" she asked. The answer was yes. Immediately, if possible.

VARA does not protect the placement of site-specific sculpture. This was the ruling in the 2003 U.S. District Court case in Boston,

Phillips v. Pembroke Real Estate. The case involved a sculptor, David Phillips, who tried to stop a real estate company from altering a park that he had helped design and from modifying sculptures he had made for the park. Phillips argued that his sculptures were site-specific and moving them "would be like painting over the background of the Mona Lisa." The court rejected his claim under VARA, but ruled in his favor based on Massachusetts state law, which grants broader protections to the artist.

Finally, our client showed us the pièce de résistance: a huge mural of a Roman bacchanalia titled "Caesar's Salad". "Can I whitewash it?" Heather asked in a hopeful tone.

We told her that owners of a building tried doing exactly that (using opaque sealant) to a huge, bright mural painted by Jesus Campusano in San Francisco. The result was a lawsuit brought by the artists' children under VARA, and a $200,000 settlement reached in 1999.

In Mexico last year, artists reportedly sued the country's new museum of Latin American art, the Gelman Collection, for $15 million, claiming that their rights were violated when the supermarket chain that paid for the museum demolished buildings with murals on the site.

"How about if I simply erect another wall right next to the mural?" Heather asked. "That way, no one will be able to see it."

"Legally, that would work," we said. We described *English v. CFC&R East*, a 1997 federal case involving six artists who created murals and sculptures in a New York City community garden and tried to enjoin developers from building on the lot. The judge rejected their assertion that obliterating a visual work from view is equivalent to destroying it, since "this interpretation would effectively allow building owners to inhibit the development of adjoining parcels of land by simply painting a mural on the side of their building."

Trying to be encouraging, we said that under VARA, moral rights last only through the life of the artist.

"But the artist is still in his 30s," Heather replied with a frown. "And he lives in a rent-stabilized apartment."

One bright spot for our client is that artists in the U.S., unlike most countries, can waive their moral rights in a signed document. And given the proper economic incentive, many do just that.

Heather's last question was a philosophical one: "What about the property owner's right to be free from compelled artistic expression— especially in one's own home? How do you balance this basic American right against the French droit moral?"

We spared Heather a lengthy response to this one. Tempus fugit, and we lawyers bill by the hour.