

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA

MOLLY MASON,  Plaintiff,  v.  KIRKWOOD COMMUNITY COLLEGE,  Defendant.	<b>CIVIL ACTION</b>  <b>NO:</b>
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**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION  
FOR A TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

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## **I. INTRODUCTION.**

This Memorandum of Law is submitted by Plaintiff, Molly Mason (“Plaintiff”), in support of her Motion for a Temporary Restraining Order and Preliminary Injunction to enjoin Defendant, Kirkwood Community College (“Defendant”) from taking, and failing to take, any actions that destroy, distort, mutilate, and/or modify Plaintiff’s work of art in violation of the Visual Artists Rights Act of 1990, 17 U.S.C. Section 106A *et seq* under the United States Copyright Act (“VARA”) and copyright law. Plaintiff also seeks to recover her attorney fees, costs, and monetary damages in this action.

Mason is the author of a work of visual art consisting of two sculptures in stainless steel and kiln-formed glass with an integrated water feature, titled “Before the Sun Speaks” (the “Work”). The Work is located at 7725 Kirkwood Boulevard SW, Cedar Rapids, IA in the Defendant’s hotel and conference center complex (the “Conference Center”).

## **II. STATEMENT OF THE FACTS.**

### **A. The History of the Work.**

In 2000, Mason was contacted by Mary Kayt Conrad, then Defendant’s Dean of Humanities and Arts (“Conrad”). (Declaration of Molly Mason (“Mason Decl.”) at paragraph 11). She, and other members of Defendant’s Art Acquisition Committee (“Committee”) indicated that they had admired Plaintiff’s sculptures for years and were interested in having her create a work for Defendant. *Id.* In August 2000, Plaintiff met with the Committee to discuss sculptural concepts. After that meeting, Conrad reported to Plaintiff that the Committee was impressed with her work and wanted to have her create a sculpture for Defendant. *Id.*

In 2006, Plaintiff and the Committee began discussing terms for the creation of an artwork at Defendant’s campus, with the Committee expressing an interest in the artwork

integrating a water feature. (Mason Decl. ¶12). They agreed upon a budget of \$80,000 for the artwork and Plaintiff commenced with the design process in June of that year. *Id.* The artwork was to be placed in the to be constructed Conference Center. *Id.*

The Committee expressed a strong desire for the artwork to incorporate a water feature, and Plaintiff's final approved design addressed this desire to their enthusiastic and explicit satisfaction, combining sculptures and an integrated water feature collectively as one work of visual art. *Id.* The two stainless steel sculpture components of the Work were installed at the Conference Center on October 26, 2008. (Mason Decl. ¶14). The kiln-formed glass components were installed in January 2009. *Id.* Plaintiff's Work has been incorporated in and made part of the Conference Center in such a way that removing it, or any part thereof from the Conference Center would cause its destruction, distortion, mutilation, and/or modification.

#### **B. Defendant's Planned Removal of the Work.**

On or about June 25, 2020, Plaintiff became aware that Defendant had taken actions to intentionally distort, mutilate, or modify the Work, with the result that the water feature component of the Work had been shut off and the jets and lights had been covered with a great deal of plant material and potting soil, and resulting decaying plant matter. (Mason Decl. ¶18). *See, e.g.*, Exhibits 59-64 to the Complaint.

The insertion of plant material began between March 25, 2018 and April 1, 2018, with the volume of plants being increased over time and the water feature eventually being shut off between May 20, 2018 and August 29, 2018. *Id. See, e.g.*, Exhibits 58, 59, 62, and 64 to the Complaint. The Work has remained in this distorted, mutilated, or modified state from that time until at least February 20, 2021. *See, e.g.*, Exhibits 65-73 to the Complaint.

On or about June 30, 2020, Plaintiff called Dr. Lori Sundberg (“Sundberg”), who indicated that she did not know when the work had been modified, but that it had been in that state since at least July 31, 2018, when she started as the President of Defendant. (Mason Decl. ¶19). Approximately two weeks later, in July 2020, Sundberg called Plaintiff and advised her that she had consulted counsel, who had told her that she could not provide any documents to Plaintiff regarding the Work. (Mason Decl. ¶20).

During this conversation, Plaintiff volunteered to work with other professionals to repair the damage that had been done to the Work, stating that she would only request reimbursement for the costs incurred in achieving such repair work, but Sundberg refused the offer. *Id.* Sundberg stated to Plaintiff that Defendant could do anything it wanted with the Work, because it owned it. *Id.*

During that call, Sundberg advised Plaintiff that she had three (3) options with respect to the Work. (Mason Decl. ¶21). First, Defendant could remove the dedication plaque on the Work that identified Plaintiff as the artist. *Id.* Second, Plaintiff could come to Defendant and remove the Work, at her own expense, within a ninety (90) day period *Id.* Third, Defendant could maintain the Work, as modified, without the water feature and instead, with planters and soil. *Id.*

On August 29, 2020, Sundberg e-mailed Plaintiff and requested that she “Cease and Desist” from contacting anyone at Defendant regarding the Work. (Mason Decl. ¶24). *See, e.g.,* Exhibit 76 to the Complaint. Sundberg presented two (2) options to Plaintiff, indicating that if she was “forced,” she would issue a ninety (90) day removal of the Work, at Plaintiff’s expense. *Id.* According to Sundberg, if the Work was not so removed, Defendant would remove it and, if Plaintiff wanted the Work, she would need to reimburse Defendant for the removal. *Id.* Sundberg’s second option was for Plaintiff to tell her what plants she wanted in the Work and, if

they were reasonably priced, Defendant would “comply.” *Id.* Sundberg stated “[t]he only person authorized to settle this dispute is me.”

Mason retained counsel in this matter and authorized communication on her behalf with Kirkwood. On December 23, 2020, counsel for Plaintiff received Defendant’s 90-day removal notice from counsel for Defendant. (Mason Decl. ¶26). *See, e.g.*, Exhibit 78 to the Complaint.

Given the limits on travel and logistics, as well as the personal risk of travel to Plaintiff during the Covid-19 pandemic, removal of the Work by Plaintiff is not possible. Moreover, Plaintiff is opposed to the removal of the Work by any party. (Mason Decl. ¶37).

### **C. Plaintiff’s Decision to Seek Declaratory Judgment Against Defendant.**

Plaintiff works as a professional artist. (Mason Decl. ¶4). Plaintiff has filed this declaratory judgment action under VARA to preserve her Work. (Mason Decl. ¶27).

### **D. The Risk of Imminent Harm to Plaintiff’s Work from Defendant’s Activities.**

Defendant has failed to maintain the Work. (Mason Decl. ¶31). The actions of Defendant and/or its employees, contractors, and/or agents have already modified, distorted, mutilated, and/or destroyed the Work. (Mason Decl. ¶32). All of these actions have caused irreparable harm to the Plaintiff. *Id.*

In addition to the damage already caused by Defendant, it has also stated on numerous occasions that it can, and will, remove the Work. In the case of the Work, such a removal will damage, modify, distort, mutilate, and/or destroy the Work.

## **III. ARGUMENT.**

Plaintiff’s claim for relief based on VARA, set forth in Section 106A of the Copyright Act. The passage of VARA into law established protection of artists’ “moral rights.” *See, Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 313 (S.D.N.Y. 1994) (“*Carter I*”), *aff’d in part*,

*vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995). The concept of moral rights derives from *le droit moral*, a French intellectual property right that protects non-economic interests of artists, performers, and writers.

The generally relevant Section of VARA provides that:

(a) the author of a work of visual art--(1) shall have the right--(A) to claim authorship of that work and (B) prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent use of his or her name as the author of a work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation and (3) subject to the limitations set forth in 113(d), shall have the right--(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature and any intentional or grossly negligent destruction of that work is a violation of that right.”

Section 106(a)(3)(A)-(B).

**A. Plaintiff’s Work is a “Work of Visual Art” Under VARA.**

Section 101 of the Copyright Act defines a “work of visual art” as a “...painting, drawing, prints, or sculpture, existing in a single copy...” Section 101. Plaintiff’s Work is a unique and original sculpture that exists in a single copy, and clearly satisfies the definition of a “work of visual art” under VARA.

**B. Plaintiff’s Work is a Work of Recognized Stature Under VARA.**

As set forth in the act, VARA protects works of visual art of a “recognized stature.” *Carter I* created a test for “recognized stature” which was adopted by the Seventh Circuit in *Martin v. City of Indianapolis*, 982 F.Supp. 625, *aff’d*, 192 F.3d 608 (7<sup>th</sup> Cir. 1999) (“*Martin*”). That case provides in relevant part:

- (1) that the visual art in question has “stature,” *i.e.*, is viewed as meritorious, and
- (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross section of society. In making this showing,



plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.

*Martin* at 612.

The court in *Martin* determined that letters and newspaper articles were sufficient to establish that the work involved in that case was a work of “recognized stature.” *Martin*, 192 F.3d at 610.

Three articles on the Work were published in the Cedar Rapids Gazette in 2009, written by that paper’s art and culture critic of 27 years at that point, David Rasdal. *See, e.g.*, Exhibits 25-27 to the Complaint. The Work was formally unveiled and introduced on November 6, 2009, with that event and the Work featured in a documentary video.

The Work is featured in an internationally-distributed book on the New York City gallery, SoHo20: SoHo20 Gallery 1973-2013: Celebrating 40 Years of Supporting Women in the Arts, by Jenn Dierdorf and Francine LeClercq. *See, e.g.*, Exhibit 28 to the Complaint. The Work is further featured online by The International Sculpture Center, the most prominent sculpture-focused organization in the world. *See, e.g.*, Exhibit 29 to the Complaint. The Work is also included in the Public Art Archive, a forty-year old organization developed by the Western States Arts Foundation. *See, e.g.*, Exhibit 30 to the Complaint.

The Work is also promoted by Defendant on its website, on the “Art on Campus” page, at the top of the “Hotel Artwork Page,” in numerous images on The Hotel website, as well as in countless images that Kirkwood features on its social media pages for The Hotel and Kirkwood on Facebook and Google Maps. *See, e.g.*, Exhibits 31-48 to the Complaint. Additionally, there are well over 130 images of the Work posted by the general public on social media sites such as Instagram. *See, e.g.*, Exhibits 49-58 to the Complaint. These articles, inclusions, and promotions of the Work are sufficient to establish that it is a work of recognized stature under VARA.

**C. Plaintiff's Work Does Not Fall Within VARA Exceptions.**

**i. Plaintiff's Work is Not a Work for Hire.**

Section 101 of the Copyright Act provides two definitions of a "work made for hire." The first defines it as a "...work prepared by an employee within the scope of his or her employment..." Section 101. Plaintiff was never an employee of Defendant, therefore this definition does not apply.

The second definition requires that "...the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire." Section 101. Plaintiff and Defendant never entered into such an agreement, therefore this definition also does not apply.

**ii. Plaintiff Did Not Sign a VARA Waiver.**

Where a work of visual art has been incorporated into or made a part of a building, as is the case with this Work, and its removal will cause the destruction, distortion, mutilation, or other modification of the work, removal is prohibited absent certain conditions. Defendant cannot proceed with the complete removal of the Work, or force Plaintiff to remove the Work, as it cannot "...be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3)..." Section 113(d)(2).

If Defendant proceeds with removal of the Work, it will further violate Plaintiff's rights under VARA, unless she either consented to the installation of the Work into the Conference Center before VARA's effective date of June 1, 1991, or the right has been waived through the execution of a written waiver that is signed by both Plaintiff and Defendant. That waiver must specifically identify the Work and uses of that Work to which the waiver applies and must specify "...that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal..." Section 113(d)(1)(B).

Plaintiff did not consent to the installation of the Work before June 1, 1991 and no written waiver was executed by her and Defendant. Accordingly, regardless of the 90-day notice, Defendant cannot remove the Work without Plaintiff's consent, and if it proceeds with that removal, it will be a further violation of Plaintiff's rights under VARA.

**D. Plaintiff is Likely to Suffer Irreparable Harm in the Absence of a Preliminary Injunction.**

Sundberg has stated to Plaintiff that Defendant could do anything it wanted with the Work, because it owned it. (Mason Decl. ¶20). Defendant has repeatedly indicated that it will remove the Work, and on December 23, 2020, counsel for Plaintiff received Defendant's 90-day removal notice from counsel for Defendant. See, e.g., Exhibit 78 to the Complaint. Accordingly, if there is no preliminary injunction in place within ninety (90) days from December 23, 2020, then Defendant can remove the Work and cause further intentional distortion, mutilation, modification or destruction of the Work that would be prejudicial to Plaintiff's honor or reputation.

With respect to ruling on a motion for a preliminary injunction, the Court must consider whether Plaintiff has established that:

- 1) [The Plaintiff has] a substantial likelihood of success on the merits;
- 2) There exists, absent injunctive relief, a significant risk of irreparable harm;
- 3) The balance of hardship tilts in [Plaintiff's] favor; and
- 4) Granting the injunction will not negatively affect the public interest.

*TEC Engineering Corp. v. Budget Molders Supply Inc.*, 82 F.3d 542, 544 (1<sup>st</sup> Cir. 1996).

**i. Plaintiff Has a Substantial Likelihood of Success on the Merits.**

For a preliminary injunction Plaintiff must demonstrate that 1) she is the author of the Work, 2) she has not waived her rights under VARA in writing, 3) her Work is of a recognized

stature, and 4) there is imminent harm of the Work being destroyed if no preliminary injunction is issued. As set forth above and in the Complaint, Plaintiff has established that she is the author of the Work, she has not waived her rights under VARA in writing, the Work is of a recognized stature, and the Defendant has stated its intention to remove, and therefore destroy, distort, mutilate, or otherwise modify, the Work.

**ii. Absent Injunctive Relief There Exists a Significant Risk of Irreparable Harm to the Work.**

A presumption of irreparable harm exists if a plaintiff can show a likelihood of success on the merits. “In the copyright context, irreparable harm is presumed if the copyright holder has shown a likelihood of success.” *Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611 (1<sup>st</sup> Cir. 1988) (“*Concrete Machinery*”).

Defendant’s prior actions of turning off the water feature and installing plants in the Work have already caused damage to it. (Mason Decl. ¶33). In addition, Defendant has stated repeatedly that it will remove the Work, and its issuance of a ninety (90) day removal notice demonstrates an even greater risk of irreparable harm to the Work. (Mason Decl. ¶26 and ¶36).

**iii. The Balance of Hardship Tilts in Favor of Plaintiff.**

The balance of hardship is clearly in favor of the Plaintiff. If Defendant is allowed to remove the Work, it will be destroyed, distorted, mutilated, or otherwise modified, and cause irreparable harm to Plaintiff. The Work continues to be promoted to the public in its original form through print and online sources and it is inextricably associated with Plaintiff and her professional artistic reputation.

Defendant will not suffer similar harm by leaving the Work in place. Doing so simply maintains the status quo with respect to the Work. Moreover, Defendant has consistently advertised the Work on its web site and social media accounts. If anything, leaving the Work in

place will continue to serve as one of the attractions of the Conference Center. At worst for Defendant, if an injunction issues in this action, it will simply be required to leave the Work in place for the pendency of this litigation.

**iv. The Public Interest Favors Issuance of an Injunction.**

A presumption of serving the public interest exists if a plaintiff can show a likelihood of success on the merits. *Concrete Machinery*, 843 F.2d at 612. The Work has been featured prominently on Defendant's web sites; is displayed frequently on social media, both Defendant's and accounts of visitors to the Conference Center; has received considerable media attention that praises it as a significant contribution to the facility and community; and is a work of recognized stature. Given its positive reception and views by the public and media, public interest favors the issuance of a preliminary injunction.

**E. The Equities of the Parties and this Action Support a Small Bond Requirement.**

Plaintiff asserts that equity favors that she, a professional artist, be required to post only a small bond in this action.

**IV. CONCLUSION.**

For the reasons set forth above, Plaintiff requests that this Court enter a temporary restraining order followed by a preliminary injunction, enjoining and restraining Defendant Kirkwood Community College, and its agents, employees, and/or contractors:

1. From taking any action(s), and/or failing to take any action(s) to remove the Work, and therefore destroy, distort, mutilate, or otherwise modify, the Work; and
2. From denying Plaintiff access to the Work for purposes of inspection.

Respectfully submitted,

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