

Copyrights and Public Art: Considerations for Local Governments

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In a little over a month from the time of writing this article (October 2021), the Copyright Claims Board (“CCB”) is set to be operational. The new governmental alternative dispute resolution body is to handle small claims actions regarding copyright disputes. This CCB may very likely be a common venue for governmental attorneys navigating the

murky waters of copyright disputes as they relate to public art.

This is potentially an occurrence that will increase over the years as there is a general push for more public art in towns, cities, and counties. While the CCB may lead to increased copyright disputes, it may very well provide a cheaper and more efficient alternative to traditional federal

litigation which can be extremely time-consuming, expensive, and intensely unpredictable due to the intangible nature of copyrights and art generally. Art is a fluid market with varying expert opinions which range the gamut and change over time. The advent of new technologies, such as Non-Fungible Tokens

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Chair’s Report

By Amanda Coffey



Let’s talk about the future!

I’ve always been a bit of a Star Trek nerd, so when I think about “the future” my mind immediately warps forward several

centuries to a time when humanity enjoys global peace and prosperity, and our best and bravest travel the galaxy in interstellar ships (boldly

going where no one has gone before, of course). I love the exciting technology (*warp drives! teleportation! holodecks with the safety off!*), but it’s the indefatigably hopeful optimism of the show that makes it a favorite. That, and the teamwork. I’m a sucker for teamwork.

Luckily, I don’t have to travel far into a fictional future to find an amazing community of diverse people who, together, can accomplish any task: your Executive Council is that team. Their tireless hard work, dedication, and commitment make them

a touchstone of teamwork and—in conjunction with our amazing Section committee and CLE program chairs—they keep the Section running. This Section year has been all about looking forward. The Executive

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CHAIR'S REPORT

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Council is implementing new programs, exploring new ideas, and developing strategies to ensure the Section can continue to provide the consistently excellent services you have come to expect, while also evolving to new heights of service.

As you know, this year we implemented our [CCLGL Diversity Fellowship Program](#), to encourage diversity in Section membership and leadership, and to help assist attorneys who have a financial need with attending Section events. We hope this exciting program will, along with other initiatives, support the Section's overarching goal of promoting diversity and

inclusion now and in all future years.

Additionally, we have adopted our new [Mission and Vision Statements](#), and a [Strategic Plan](#), to guide the Section's goals and objectives over the next 1, 3, and 5 year periods. These are our roadmaps (or, to stick to a theme, star charts) into the future. I hope you'll take a moment to read them, if you haven't yet had the opportunity.

Last but not least, we've enhanced our [Sponsorship](#) program to include new sponsorship tiers and benefits, which we anticipate will allow us to augment and increase our CLE offerings in the future. *(And now for a flagrant plug: Go where no sponsors have gone before and be one of our first sponsors under the new program!*

Reach out to our Sponsorship Committee; they'd love to hear from you!

If you want to have a hand in shaping the future of the Section, there are lots of ways to get involved. Check out the "[Get Involved](#)" page on our website for more details.

I'm continuously impressed by the amazing work being done by your Section leadership, and for the extraordinarily positive, respectful, inclusive, and helpful culture of the entire Section. Thank you for that! The future of the Section is looking very bright, indeed.

All that's left to say is *(I know you were waiting for it): "Beam me up, Scotty!"*



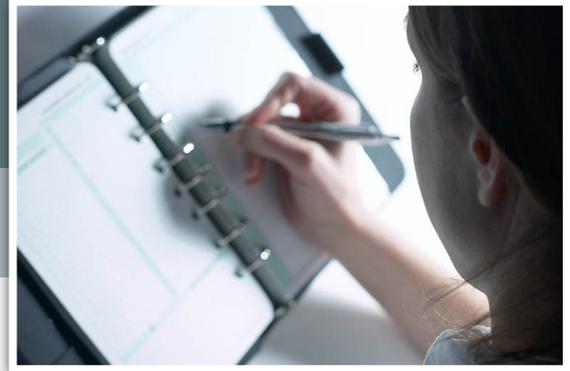
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SAVE THE DATES



JANUARY 27, 2022

(Virtual)

3:00 p.m.

Executive Council Meeting

FEBRUARY 25, 2022

(In person and webcast)

**Sunshine Law, Public Records and Ethics for Public Employees
and Public Officers**

Rosen Plaza

Orlando

APRIL 20-22, 2022

(Virtual Only)

City, County and Local Government Certification Review 2022

MAY 5-8, 2022

City, County and Local Government Law Section – Annual Meeting

- 1) May 5, 2022 – Land Use
- 2) May 5, 2022 – Executive Council Meeting
- 3) May 6 & 7, 2022 – 45th Annual Local Government Law in Florida
- 4) May 8, 2022 – COVID 19 – Round Robin Discussion

JUNE 22-25, 2022

Executive Council Meeting

(TBD – in conjunction with The Florida Bar Convention)

COPYRIGHTS AND PUBLIC ART

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(“NFTS”) and display options has pushed the market into a sort of hyperdrive in recent times.

Accordingly, while the analytical framework for copyright issues has remained fairly stable the changing market makes it extremely difficult to predict outcomes generally in copyright disputes.

The CCB, at least in theory, appears to offer an alternative for artists and governments who may otherwise be priced out of pursuing their rights through a cheaper, quicker, and potentially more efficient dispute resolution venue.

Basics of the Copyright Claims Board

The CCB is the result of the Copyright Alternative in Small-Claims Enforcement Act of 2019, known as the CASE Act, signed into law on December 27, 2020, as part of the Covid Relief Bill.

Rulemaking for the new tribunal is well underway and the CCB officers have been announced.¹ However, it is as of now unclear if the CCB will be in a position to receive claims or if the deadline will be extended to June of 2022 if good cause is shown.²

Regardless of when the CCB is

up and operational, it will surely have a major impact on copyright disputes which arise for the majority of copyright holders. The CCB is an alternative dispute resolution program designed to handle copyright claims up to \$30,000.00, not to exceed \$15,000 per work infringed (excluding attorney fees and costs) for registered claims and up to \$15,000.00, not to exceed \$7,500.00 per work infringed (excluding attorney fees and costs) for untimely registered claims.

It should be noted that as is true of traditional Copyright lawsuits: a claim or counterclaim alleging infringement cannot be asserted until the legal or beneficial owner of the copyright files a completed registration that has been issued or not refused. As the CCB is designed to be more accessible to those who may not be familiar with the registration requirement or who may have been priced out of the registration, an expedited registration process has been designed and is supposed to be implemented with the creation of the board. The application for registration can be filed simultaneously with the CCB claim which is different from traditional copyright claims.³

The CCB is purely voluntary and the respondent can opt-out of the process within 60 days of receipt of the notice. The filing of a CCB claim tolls the time to file a lawsuit in federal court.

Basics of Copyrights

As is likely ingrained into many attorneys’ minds from their intellectual property class in law school copyright protection applies to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device.”⁴

There are generally 8 categories of copyrightable works: (1) literary works; (2) musical works including any accompanying words; (3) dramatic works including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

A subtle nuance to copyright analysis that is often overlooked by those not familiar is that copyrights protect the work itself and its unique tangible expression but do not protect the underlying ideas.

From a practical perspective, this can get extremely complicated as it relates to art generally and public art more specifically. The fact that art and copyright analysis lend themselves to subjective opinions, often disguised as alleged objective ones,

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only complicates matters when it comes to assessing cost-benefit analysis of deciding when and how to pursue copyright claims whether through litigation or alternative means.

The basic concept that needs to be understood to begin the analysis of a copyright issue is simple: the copyright in the work is created immediately upon completion of the work and, unless an exception applies, the ownership immediately vests in the creator or joint creators of the work.⁵

No additional steps are required.

This should generally be the starting point of analysis: who made the work? Was there a written contract? Do exceptions apply? Etc.

It is this fact that makes contracts with artists for public art projects so important for governments. It is essential the copyrights, and ownership or other property interests in those exclusive rights, are established as clearly as can be at the outset of the public art project.

A common misconception is that the transfer of the ownership of the material object transfers the ownership rights for the exclusive rights as well. This is not the case.

It is codified in the Copyright Act that the transfer of ownership of a copyright or any exclusive right does not transfer unless there is an agreement and does not inherently transfer with the object. An example is if a city purchases a painting from an artist, the city is not automatically receiving the copyrights as a result of the purchase of the physical object.⁶

The exclusive rights in copyrighted works include: being able to reproduce the copyrighted work in copies or phonorecords; being able to prepare derivative works based on

copyrighted works (think a t-shirt, bumper sticker, etc.); distributing copies of phonorecords based on the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other AV works, to perform the copyrighted work publicly; and in the case of sound recordings, to perform the copyrighted work publicly through digital audio transmission.⁷

Accordingly, government attorneys need to be cognizant of several factors in a proposed public art project which could affect the analysis of how copyright issues may be triggered in the future and be clear in the contract whether the government or the artist maintains the exclusive rights in the copyrighted work.

Options for Addressing Copyright Ownership in Public Art Contracts

If a public artwork gains notoriety or becomes a tourist attraction and a potentially substantial source of income for artists, disputes can arise if those exclusive rights are implicated. This can be difficult to predict 5, 10, 20 years down the road. Copyrights last the life of the author plus seventy years so the author or the estate can hypothetically raise issues many years after the completion of the project.

Accordingly, certain general protections can be included in contracts with artists when governments commission a public art project to attempt to make it as clear as possible the government owns the exclusive rights or is given a royalty-free general and commercial license to the exclusive rights.

Of course, interesting and novel claims in court can be asserted but being aware of the obligations at the

outset places all parties on notice of the intent at the time of execution of the contract before the completion of the work.

17 U.S.C. 201(b) provides for an exception to the general ownership rule called a “work made for hire” which permits an employer or other person for whom the work is prepared to be considered the author and initial owner of the work.⁸

A work made for hire is a work prepared by an employee in the scope of their employment or works specifically commissioned as a contribution to a collective work; as a part of a motion picture; other audio-visual work; a translation; as a supplementary work; as a compilation; as an instructional text; as a test or answer for a test; or an atlas if agreed to by the parties in writing.

As is apparent, many public works commissioned would not fall neatly into these categories. Yet, even if work does appear to fall into the category, determining whether something is work made for hire is a fact-specific inquiry.⁹

Accordingly, any contract for a public art piece should incorporate an assignment of the exclusive rights for the piece to the local government if that is the intention of the parties. Additionally, a good practice is to also include language describing the work as a work made for hire as well as additional language providing for an irrevocable, royalty-free license for the work and assignment of any rights the artist may have in the alternative. This can be done in an abundance of caution to transfer all rights in the work.

Again, establishing this at the outset through communications with the artist can allow the parties to properly document their intentions as it relates to copyrights and avoid unforeseen disputes as time moves on.

The Visual Artists Rights Act

Another potential pitfall for future public art disputes for governments deals with moral rights granted under the Visual Artists Rights Act of 1990 (“VARA”) which is an extremely

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unique law as it relates to the United States' handling of art-related statutes and regulations.

VARA, which is a part of the Copyright Code, is unique as it was the first widespread federal copyright legislation granting what is known as "moral rights" protections to certain artworks in the United States.¹⁰

VARA generally grants artists two primary rights: (1) the of attribution to a work to claim or deny authorship (this includes following material unapproved alterations of the work); and (2) the right to prevent the intentional distortion, mutilation, or other modification of the work that is harmful to the artist's honor or reputation and to prevent any destruction of work of recognized stature or any intentional or grossly negligent destruction of that work.¹¹ There are specific exceptions to be aware of.¹²

The term "recognized stature" is not defined in VARA and, due to the amorphous nature of the term, could lead to significant litigation as it is not an issue that has been addressed extensively in court decisions although there has been some consistency in the limited case selection regarding the analysis of "recognized stature".¹³

VARA does not apply to all categories of copyrightable works but specifically to "visual works of art". The Copyright Act defines works of visual art like paintings, drawings, prints sculptures, and photographs existing as a single copy, less than 200 copy editions which are signed and consecutively numbered by the author.¹⁴

The rights granted under VARA cannot be transferred and only vest with the author or co-authors. However, the rights can be waived.

For the waiver to be effective under VARA there must be a writing where the author expressly agrees to the waiver, signs the document which specifically identifies the work, and

the uses of that work.¹⁵

Accordingly, governments need to incorporate waivers into the public art contracts to avoid disputes in the future and provide flexibility for governments regarding modifying, moving, or removing the public work.

Potential Applicability of the CCB for Copyright Disputes for Governments

As highlighted in this article, there are many different aspects of copyrights that require detailed fact-specific analysis when disputes arise. Due to the contextual and subjective nature of art, the analysis lends itself to subjective interpretations regardless of intent based on opinions of artistic merit, perceived level of acceptance within the community, and other factors.

These issues can be mitigated through effective discussions with the artist before the project moves forward and by including all basic waivers and assignments of exclusive rights to give legal authority to the government to make decisions regarding the public art.¹⁶

Nevertheless, disputes will likely arise particularly as new technologies such as Non-Fungible Tokens, augmented reality displays, and other advancements continue to be produced. As the technology improves new and additional questions develop the likelihood of disputes regarding public art between governments and the artist will increase.

Many governments won't have extensive budgets to maintain lengthy, expensive, and often unpredictable copyright trials. The same goes for artists. Additionally, many public art projects will likely fall below the threshold for CCB jurisdiction.

Thus the CCB potentially will offer an additional, cheaper, and less combative dispute resolution option for governments to utilize. While the CCB is optional and the respondent can opt out of the proceedings, the incentive of a cheaper faster option can help resolve more issues that would otherwise not get resolved due to the prohibitive nature of a trial.

Endnotes:

1 *Copyright Office Announces Appointments of Copyright Claims Board Officers*, News Net Issue No. 906, <https://www.copyright.gov/newsnet/2021/906.html> (July 20, 2021)

2 *Copyright Small Claims and the Copyright Claims Board*, <https://www.copyright.gov/about/small-claims/>

3 *Copyright Office Proposes Small Claims Expedited Registration Procedures and FOIA Conforming Amendment*, <https://www.copyright.gov/rule-making/case-act-implementation/expedited-registration/>

4 17 U.S.C 102

5 17 U.S.C. 201(a) "[c]opyright in a work protected under this title vests initially in the author or authors of the work. [t]he authors of a joint work are co-owners of the copyright in the work.

6 17 U.S.C 202 "...[t]ransfer of ownership of any material object including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor in the absence of an agreement, does transfer of ownership of a copyright or any of exclusive rights under a copyright convey property rights in any material object."

7 17 U.S.C. 106

8 17 U.S.C. 201(b) "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared for purposes of this title, and, unless the parties have expressly agreed in a written instrument signed by them, owns, all the rights comprised in the copyright."

9 ?

10 Some states have their own copyright or art-related legislation

11 17 U.S.C 106(A)(a)-(b)

12 17 U.S.C. 106(A)(c)

13 Some courts have adopted essentially a two-tiered showing to determine if the visual art qualifies: (1) the visual art in question has stature or is viewed as meritorious; and (2) the stature is recognized by experts, other members of the artistic community, or by some cross-section of society. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (SD New York 1994). See also *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp 2d 89 (Dist. Court, D. Massachusetts 2003). E.g. *Castillo v. G&M Realty, L.P.*, 950 F.3d 155 (2d Cir.2020) "[w]e conclude that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community."

14 17 U.S.C. 101

15 17 U.S.C.106(A)(e)1

16 Just because the proper precautions are taken and legal authority regarding all decision making for public art is transferred to the government the government attorneys should still be cognizant of social and public opinions as it relates to decisions regarding public art.



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