

Copyright Corrida: Weighing in on the VARA Rights of “Charging Bull” and “Fearless Girl”

By Irina Tarsis

I. Introduction: Guerrilla Antics

Long before the CowParade¹ came to the Big Apple in 2000, another bovine had already become a prominent fixture in New York City. Inspired by the 1987 stock market crash, it was an homage by an Italian-born American artist, Arturo Di Modica, to his new country. In 1989, Di Modica placed his now iconic bronze sculpture of a bull in front of the New York Stock Exchange buildings at the intersection of Wall and Broad Streets as a gift to New Yorkers, a symbol of the “strength and power of the American people.” Di Modica reportedly spent over \$350,000 of his own money and three years of his life to create the three-and-a-half ton bronze, which he installed surreptitiously without permission from the city.² The first installation was short lived; the police removed the work to a storage facility in Queens. Later, it returned to the Financial District, renamed “Charging Bull” (hereinafter, the “Bull”) and lawfully installed in a prominent location in Bowling Green Park. Today the Bull stands facing north on special pavers demarcating the boundaries of the artwork, a “unique embodiment of the power and vigor of New York’s and the nation’s financial markets”³ and a reference to the “bull market” that Di Modica was conjuring for New York after the financial crisis.

Fast forward to 2017: Di Modica’s internationally renowned “Bull” indisputably has become a work of recognized stature, having appeared in countless guidebooks and textbooks, not to mention tourist photographs, souvenirs, and films about New York. It is displayed “under the auspices of the New York City’s Department of Parks and Recreation.”⁴ While ownership of the Bull is unclear, intellectual property rights in the work remain with the artist. Di Modica registered it with the U.S. Copyright office in 1998.⁵ However, although registration is a prerequisite to most copyright infringement actions, it is not a prerequisite for the type of action Di Modica threatened recently over the Bull.⁶

On March 8, 2017, another bronze statue, this one weighing only about 250 pounds, made an appearance in vicinity of the Bull. Resting on the same cobblestones, it depicted a pre-teen—“Fearless Girl”—facing and leaning toward the Bull, posed with her hands on her hips. Standing in the path of a charging bull is fraught with danger; even experienced matadors risk being gored to death. The face-off between two bronzes is not a matter of life and death, but it is a standoff between public and private interest, a juxtaposition of past and present, a mixing of messages and a tug of war between commerce and expression.

“Fearless Girl” (hereinafter, “Girl”) was created by Delaware-based artist Kristen Visbal, reportedly on commission from the investment firm State Street Global Advisors (SSGA),⁷ with a role attributed to the advertising agency McCann New York.⁸ Visbal first learned of the project on November 30, 2016. Apparently McCann needed a female sculptor who worked in bronze to create a sculpture of a child. The work needed to be done quickly for temporary installation in time for International Women’s Day. After producing almost a dozen preliminary drawings, Visbal began sculpting Girl around December 29, 2016. SSGA has said that the work, which it owns,⁹ was meant to celebrate “the power of women in leadership and the potential of the next generation of women leaders.”¹⁰ It was intended to interact with Bull, and the juxtaposition of the two works has arguably dramatically changed Bull’s message. Girl stands close enough to lock gazes with Bull and issues a challenge: “I am here, what are you going to do about it?!”

On August 12, 2017, Di Modica, now in his seventies, held an emotional press conference during which he explained that his sculpture stands for “freedom in the world, peace, strength, power, and love” and stated his belief that Girl changed this meaning by making Bull symbolize something negative.¹¹ The standoff raises the question of what legal protection is available to the two artists whose bronzes have locked gazes near Bowling Green.

II. Authorization to Display Works of Art in Public Places

In order to install anything semi-permanently or permanently, such as a work of art, in New York City, the owner of the work or its agent must apply for and obtain a license from the New York City Department of Parks and Recreations Services. The process for determining how authorization is granted to works of art in public spaces, where the works of art interact with one another, is unclear. While it is also unclear whose idea it was to commission and install Girl so as to incorporate Bull into an ensemble composition, it is undisputed that Girl was installed with permission from the city.

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The initial duration of the license issued for *Girl* by the New York City Department of Parks and Recreation was only four days.¹² However, the license has been extended until International Women’s Day in 2018. Typically, the Department, which encourages “the creation and installation of temporary public art in parks throughout the five boroughs,” reviews proposed projects to determine whether any given piece of temporary art “may be displayed in prominent flagship parks, neighborhood parks and playgrounds, and traffic islands.”¹³ Temporary installations typically last from two weeks to one year. The controversy concerning Di Modica’s copyright rights in *Bull*, discussed below, could have an effect on state or municipal authorization for display of artwork in public spaces.

III. Visual Artists Rights Act

Under the Copyright Act, in addition to their economic rights, artists have some limited protection of their “moral rights” under the Visual Artists Rights Act of 1990 (VARA), codified in section 106A of the Copyright Act. VARA narrowly incorporates the moral rights provision of Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works, which deals with moral rights such as the right to object to certain modifications and other derogatory actions toward artistic works.¹⁴ VARA protects “works of visual art,” which are defined in section 101 of the Copyright Act to include “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.”¹⁵ The definition excludes site-specific works on the theory that location may not be an integral part of the work, and the rights of property owners are implicated.¹⁶

The passage of VARA came on the heels of the controversy surrounding the removal of Richard Serra’s site-specific sculpture “*Tilted Arc*,” which was commissioned by the United States General Services Administration Arts in Architecture program in 1979. It was a solid 120-foot long curved steel wall that bifurcated Foley Federal Plaza in lower Manhattan. The sculpture ultimately was removed on the ground that it disrupted the public space. The removal prompted Serra to sue, claiming that the removal was tantamount to destruction of his work. Serra lost that battle,¹⁷ but his plight may have paved the way for the passage of VARA, which was signed into law the year after the Second Circuit rejected his claim.

VARA reflects a reluctant incorporation of moral rights into the U.S. property right-focused legal system. It purports to protect sculptures and other visual artworks from being intentionally destroyed, distorted, or modified in a way that would prejudice the author’s honor or re-

putation. Specifically, section 106A(a)(3) provides that the author of work of visual art has 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.¹⁸

Notably, the statute does not expressly require that the distortion or modification involve physical alteration of the work. Indeed, a physical distortion is much harder to bring about than a contextual or metaphysical one. Among the questions raised by the placement of *Girl* is whether it infringes Di Modica’s rights under VARA. Or is Visbal’s work merely commenting permissibly on *Bull* in a manner akin to fair use?

Di Modica’s rights fall within the scope of VARA because he held the rights to *Bull* when VARA went into effect in 1990. He believes the message he incorporated into *Bull* is negatively affected. But does the message and placement of Visbal’s *Girl* in a way that distorts the message of *Bull* give rise to a 106A claim? The answer seems to be no because there is no physical damage¹⁹ being done to *Bull*, and merely placing *Girl* in a way that affects the perception of *Bull* does not violate VARA. Moreover, section 106A may excuse SSGA’s incorporation of the *Bull* into its “SHE” marketing campaign because under section 106A(c)(3), no portrayal of a work of art can be characterized as a destruction, distortion, mutilation or other modification. Thus, Di Modica cannot prevent *Bull* from being portrayed in a negative light by SSGA or anybody else.

According to SSGA, *Girl* was meant to “send a message” about workplace gender diversity and to encourage companies to recruit women to their boards. In fact, it was a publicity stunt by an investment firm that has managed the SPDR SSGA Gender Diversity Index ETF on the NASDAQ with the ticker symbol “SHE.” The plaque installed at *Girl*’s feet reads “Know the power of women in leadership. SHE makes a difference.” According to a video on SSGA’s website, *Girl* was placed “in a spot that made her impossible to ignore.” The video juxtaposes images of the artist working in her studio, sketching, molding and tooling clay, and casting and chiseling bronze statue with quotes such as “Studies show companies with women in leadership perform better than those without” and “This International Women’s Day, we created a symbol of female leadership for today and tomorrow . . . and put her somewhere no one could ignore.” SSGA thus has admitted that the location of *Girl* was carefully chosen, but it (coily or shrewdly) makes no reference on its website to Di Modica or *Bull*. (Of course, if it did, it potentially would be guilty of copyright infringement.) *Girl* is depicted looking into

the distance, but the informed viewer knows where her gaze is fixed. The website states that the “bronze statue of a confident young ‘Fearless Girl’ was installed in the heart of New York City’s financial district,”²⁰ but this suggests a location at the intersection of Wall Street and Broad Street or near the Federal Reserve Bank of New York on Liberty Street, or in Times Square near the NASDAQ Market Site that lists SSGA Gender Diversity Index ETF SHE shares—not the actual site near Di Modica’s Bull.

In April 2017 Di Modica reportedly threatened to bring a copyright claim based on the placement of Girl. He was not alone in objecting to how his message had been usurped—and the popularity of Bull harnessed—for marketing purposes. Academics, lawyers, and journalists commented on the dispute and on whether Di Modica had a viable legal claim.²¹ For example, a Boston-based art lawyer, Nicholas O’Donnell, wrote that “the elements of VARA rights are not implicated by the installation of ‘The Fearless Girl’ because nothing has actually happened to ‘Charging Bull,’” and “none of the arguments [Di Modica] advances would bestow on him the kind of right to be asked first that he proposes.”²²

Although Di Modica has not filed a lawsuit as of August 2017, this author believes that while Bull can continue to succeed as a work of art without Girl and could be moved elsewhere in the Financial District without harming Di Modica’s reputation, the message of Girl would be greatly diminished if she and Bull were to be separated (whether by court order or otherwise). The license granted to Girl is due to expire in the winter of 2018. However, like the temporary permit originally bestowed on Bull, which became permanent, it is possible that Girl also will not be temporary. If she is removed, however, Bull will do just fine on its own (as it did before), whereas Girl will have relatively little to say for herself in isolation.

IV. Conclusion

While Di Modica may be contemplating legal action for perceived violation of his moral rights, the images and the commentary that followed the installation of Girl have already generated a healthy amount of discussion about art and law. Similar to the controversy involving the Renoir painting and a kimono dress-up debacle at the Museum of Fine Arts in Boston²³ and protests directed at the painting by (white artist) Dana Schutz of Emmett Till’s open casket that was exhibited in the 2017 Whitney Biennial,²⁴ the symbolism conveyed by art transcends the law, which has a limited role to play in regulating artistic meaning.

At Bowling Green, for example, the positive message imparted by Bull has been co-opted by a financial investment firm and diminished as a positive symbol of American corporate culture. Slipping in the little girl that challenges the iconic work of art can be seen as either a symbol of feminism and changing times or an opportunistic move by a corporation willing to take a calculated risk of copyright infringement for PR purposes. Either way, Di

Modica will not know for sure whether copyright law provides relief unless he files (and pursues) a complaint.

SSGA’s decision to capitalize on Di Modica’s iconic sculpture to promote its financial product, SHE, the SSGA Gender Diversity Index, is arguably more clever—and legally less risky—than appropriation à la Jeff Koons or Richard Prince.²⁵ Instead of copying Bull and using it in (or presenting it as) a new work, SSGA decided to interact with it, casting Girl as a matador. It can be argued that Girl is not taking anything from, or incorporating, Di Modica’s work, but copying is not the only form of taking. If nothing else Girl challenges the negative connotations one may see in Bull, a stand-in for male-dominated financial sector that is unfriendly to female participants.

In May 2017, Alex Gardega, a New York City artist, installed a papier-mâché sculpture on the same Bowling Green meridian.²⁶ Named “Sketchy Dog/Pissing Pug,” the sculpture depicted a small dog, lifting its leg to urinate. The sculpture was installed briefly and without a permit from the city. Despite its brief appearance on the Bowling Green arena, the message was clear: copyright is a spectator sport, and everyone is a critic.

Endnotes

1. CowParade is one of the largest and most successful public art events in the world. CowParade events have been staged in 79 cities worldwide since 1999 including Chicago (1999), New York City (2000). COWPARADE, <http://www.cowparade.com/> (last visited Aug. 7, 2017).
2. Sarah Cascone, Wall Street’s Bronze Bull Celebrates 25th Anniversary, *artnet News* (Dec. 16, 2014), <https://news.artnet.com/art-world/wall-streets-bronze-bull-celebrates-25th-anniversary-198768>; Sarah Cascone, Anti-Capitalist Golden Cow Piñata Sculpture Rains Cash in Brooklyn Cash cow offers capitalist critique and \$1,000, *artnet News* (May 27, 2014), <https://news.artnet.com/exhibitions/anti-capitalist-golden-cow-pinata-sculpture-rains-cash-in-brooklyn-27270>.
3. *Di Modica v. North Fork Bancorporation, Inc, et al.*, 1:06-cv-07210-RJS at 2 (S.D.N.Y. filed Sept. 20, 2006).
4. On his website, Di Modica wrote that “Thanks to then Parks Commissioner Henry Stern, Mayor Ed Koch and Arturo Piccolo of the Bowling Green Association, a permanent home was found for the Charging Bull close by at Bowling Green.” Jill Reilly, *A load of old bull: 25 years on, the incredible Christmas story of the guerrilla gift Wall Street didn’t want—but which became one of NYC’s best-loved mascots anyway*, *DailyMail*, (Dec. 17, 2014), www.dailymail.co.uk/news/article-2878088/The-Christmas-gift-Wall-Street-didn-t-want-famous-bronze-bull-secretly-dropped-guerrilla-artist-middle-night-25-years-ago.html.
5. Certificate of Registration No. VAU-422-325, *see* Complaint, Case No. 1:06-cv-07210-RJS, at 3. Di Modica also holds registered copyright in UAE Bull, Shanghai Bull and the Bund Bulls. According to the Copyright Office Online Catalog, Di Modica has three registrations for visual materials entitled “The Bund Bull” (Registration No. VA0001710960 / 2010-04-07), Shanghai Bull (Registration No. VA0001667717 / 2009-05-04) and UAE Bull (Registration No. VA0001820826 / 2012-05-01), *see* <http://cocatalog.loc.gov>.
6. Section 411(a) of the Copyright Act, 17 U.S.C. § 411(a), expressly exempts actions brought under section 106A from the registration requirement.
7. Founded in 1978, State Street Global Advisors is an investment management division of State Street Corporation, a major world asset manager with more than \$2 trillion in assets.

8. While there seems to be some confusion about the background of Kristen Visbal she has told the authors that she was the daughter of a Foreign Service diplomat born in Montevideo, Uruguay. Email to author from Kristen Visbal (Aug. 8, 2017); *Kristen Visbal*, Wikipedia, https://en.wikipedia.org/wiki/Kristen_Visbal (last visited Aug. 1, 2017). Margie Fishman, "'Fearless Girl' Artist Shirks Spotlight," USA Today (Apr. 21, 2017), <https://www.usatoday.com/story/money/nation-now/2017/04/21/fearless-girl-artist-shirks-spotlight/100746236/>.
9. According to Visbal, SSGA owns the first and at present only casting of the sculpture. Visbal has the right to make more castings and intends to create a limited edition of the full-sized sculpture. Email to author from Kristen Visbal (Aug. 8, 2017).
10. State Street Global Advisors, Fearless Girl Sends Powerful Message, <https://www.ssga.com/global/en/our-insights/viewpoints/enhancing-gender-diversity-on-boards-emea.html> (last visited Aug. 7, 2017).
11. Mr. Di Modica declined to be interviewed for this article. However, excerpts from his April 2017 press conference are available at <https://www.thestar.com/news/world/2017/04/12/sculptor-of-wall-streets-charging-bull-wants-fearless-girl-statue-removed.html>.
12. Email to author from Kristen Visbal (Aug. 8, 2017). According to the Department's website temporary public outdoor art license can be granted to applicants who submit specific documents and descriptions to the Public Art Coordinator so that a panel made up of the New York City Parks Commissioner or his or her representative and others may review proposals and concerns related to durability, safety, sustainability and other issues. Apparently applicants are encouraged to submit materials at least six months in advance to the installation date; therefore, if the SSGA followed the recommendations, the application was submitted to the Department no later than September 2016. See guidelines here <https://www.nycgovparks.org/art-and-antiquities/temporary-guidelines>.
13. NYC Parks' Art in the Parks Program, <https://www.nycgovparks.org/art-and-antiquities/art-in-the-parks> (last visited Aug. 7, 2017).
14. World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)*, available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726.
15. 17 U.S.C. § 101.
16. See for example, *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006).
17. See *Serra v. US General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988).
18. 17 U.S.C. § 106A.
19. Even imminent threat of physical destruction of a work of art of "recognized stature" is not necessarily enough to achieve VARA protection. See, e.g., *Cohen v. G & M REALTY LP*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013) (involving a building in New York City called 5Pointz on which aerosol mural artists displayed their works between the 1990s and 2013).
20. State Street Global Advisors, Strategy: Fearless Girl Sends Powerful Message, (July 24, 2017) <https://www.ssga.com/global/en/our-insights/viewpoints/enhancing-gender-diversity-on-boards-emea.html>.
21. See, e.g., Nicholas O'Donnell, "Charging Bull" Sculptor Articulates VARA Complaint, but "Fearless Girl" Still Standing Firm, Art Law Report (Apr. 13, 2017), <http://blog.sandw.com/artlawreport/charging-bull-sculptor-articulates-vara-complaint-but-fearless-girl-still-standing-firm>; Nicholas O'Donnell, "Fearless Girl" Sculpture Near Wall Street Prompts Copyright Allegation That Is More Bull than Bear, Art Law Report (Mar. 29, 2017), <http://blog.sandw.com/artlawreport/fearless-girl-sculpture-near-wall-street-prompts-copyright-allegation-that-is-more-bull-than-bear>.
22. O'Donnell, *supra* note 21.
23. See Malcolm Gay, *Kimono controversy erupts anew at MFA panel*, Boston Globe (Feb. 8, 2016) (<https://www.bostonglobe.com/arts/2016/02/08/kimono-controversy-erupts-anew-mfa-panel/olduJEpYVqUyTM3wunRUM/story.html>).
24. Calvin Tomkins, *Why Dana Schutz Painted Emmett Till*, The New Yorker (Apr. 10, 2017), <http://www.newyorker.com/magazine/2017/04/10/why-dana-schutz-painted-emmett-till>.
25. See, e.g., RFI, *Artist Jeff Koons and Centre Pompidou convicted in plagiarism case* (Mar. 2017), available at <http://en.rfi.fr/france/20170309-artist-jeff-koons-and-centre-pompidou-convicted-plagiarism-case>; *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).
26. Valerie Richardson, *Artist makes statement by placing peeing-dog statue next to Wall Street's "Fearless Girl,"* The Washington Times (May 30, 2017) <http://www.washingtontimes.com/news/2017/may/30/artist-makes-statement-placing-peeing-dog-statue-n/>.

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