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ARTS & ENTERTAINMENT

# When Creator and Owner Clash

By DANIEL GRANT  
Updated Aug. 31, 2010 12:01 a.m. ET

David Ascalon, an Israeli-born sculptor living in Cherry Hill, N.J., who had lost his grandparents and other family members to the Nazis, was perhaps an obvious choice to create a Holocaust memorial in Harrisburg, Pa. His design—a stainless-steel Star of David base from which arises a series of shiny stainless-steel poles, seemingly bound up by a dark, rusty-looking metal "spiral serpent" that resembles barbed wire—was selected in 1993 by the Jewish Federation of Greater Harrisburg for a 15-foot-tall sculpture that was placed in a park along the Susquehanna River in 1994, for which he was paid \$35,000. "The stainless steel core represents the Jewish people," Mr. Ascalon said, "because stainless steel has an eternal look." The decayed "serpentine rusting shape," on the other hand, symbolizes the Nazis.

Within 10 years, the Holocaust sculpture needed repairs, because the barbed-wire serpent had become overly rusted. Mr. Ascalon volunteered to do the restoration, asking only to be reimbursed for the costs.

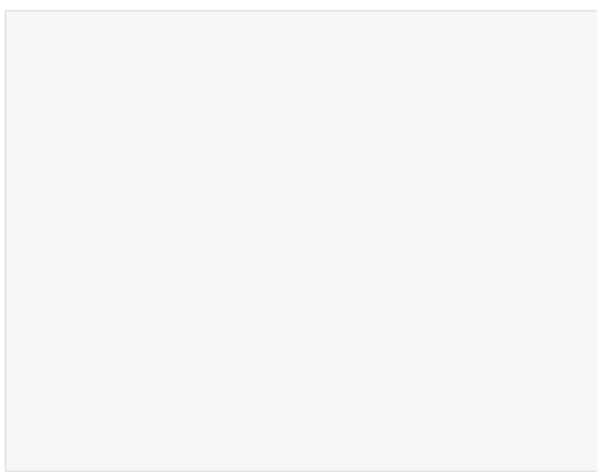
This is where the story gets weird. Mr. Ascalon's request was rejected. Instead, in 2006, the Parks and Recreation Department of Harrisburg chose a restorer who replaced the original barbed-wire motif with a shining stainless steel replica and scratched out Mr. Ascalon's name from the memorial's base, replacing it with his own. What's more, a lawyer for the Jewish Federation demanded that Mr. Ascalon stop claiming to be the memorial's artist. In July, Mr. Ascalon filed a lawsuit in U.S. District Court against the parks department, the Jewish Federation and the restorer for violating his moral rights.

Artists' moral rights have been enshrined in law for 20 years through the Visual Artists Rights Act, or VARA, which was enacted as an amendment to the U.S. Copyright Code in 1990. VARA prevents the owners of artworks of "recognized stature" from destroying or altering them without the artist's approval. The reason: Unapproved alterations or destruction may damage an artist's reputation. The law establishes mechanisms by which an artist may retrieve a work of art that the owner might otherwise destroy, as well as enables an artist to disclaim ownership of a piece that has been altered. Works of art are also narrowly defined as paintings, drawings or sculptures, as well as graphic and photographic prints in limited editions of 200 or fewer copies.

However, other questions have arisen that were not predicted in 1990. Do artists have the right to stake out where that








Enlarge Image  
David Ascalon's Holocaust memorial sculpture before its modification. *Eric Ascalon*




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artwork will be permanently placed? Can artists claim that whatever they make and identify as art has to be treated accordingly? If a damaged artwork undergoes restoration and the artist doesn't like how it was done, can the artist claim the work was "destroyed"?

Back in 1990, it seemed as though the issue was making sure that collectors didn't intentionally damage or destroy significant works that they owned. Those kinds of problems rarely happen, although Mr. Ascalon's Holocaust memorial raises the question of whether making something better actually makes it worse. More often, courtroom judges must reach decisions in cases not necessarily envisioned by lawmakers. Take, for instance, the VARA lawsuit by Swiss installation artist Christoph Buchel against the Massachusetts Museum of Contemporary Art in North Adams.



Detail, after the modification. *Eric Ascalon*

Mr. Buchel had been commissioned by MassMoCA to create a new, giant work to be titled "Training Ground for Democracy." The museum agreed to buy and haul in the things he wanted in the assemblage (including a movie theater, a mobile home, a carousel, a voting booth, a police car, a bus and an oil tanker), but the list just kept growing. When the museum ran out of money, Mr. Buchel refused to have anything more to do with his installation, filing a lawsuit under VARA in 2007 to prevent MassMoCA from either exhibiting or demolishing the installation. An initial ruling dismissed the suit, claiming the law did not apply to incomplete work, and then another court overturned that decision in January 2010, asserting that unfinished pieces are covered. More litigation is still to come.

To Brooke Oliver, a San Francisco lawyer who has represented artists in moral-rights cases (principally dealing with building owners wanting to do away with murals), "the courts have difficulty in determining what the law protects, because it's not clear what the art is."

Or, is an alteration—even one made in the name of conservation—a form of destruction? Removing the rusted metal and replacing it with more durable steel gave new life to the Ascalon memorial, but it changed the artist's intentions. "This alteration is abhorrent, and runs completely contrary to the core vision of the Memorial, which was based on the notion of creating a striking and stark visual contrast between the Jewish people and their Nazi oppressors," the lawsuit claims.

Another complicated VARA case involved sculptor Audrey Flack. She had been hired in the early 1990s to create a monument in Queens, N.Y., to Queen Catherine of Braganza, for whom that borough was named, but the project generated controversy and was discontinued after the artist had created the bronze casting molds and a 35-foot-tall clay head. Those molds and head sat outside the foundry for several years and became damaged. By the late '90s, however, the nonprofit commissioning group's troubles were resolved and it proceeded with the monument, hiring one of Ms. Flack's assistants, rather than Ms. Flack herself, to resculpt the face. Ms. Flack brought a VARA lawsuit against the group. The case was ultimately settled out of court in the artist's favor. "We were able to get the judge to stretch the statute to include models in what was protected under the law," Barbara Hoffman, Ms. Flack's lawyer, said.

Judges often rule based on precedent, but decisions in this arena are few and almost all in the lower courts, which carry less weight than those at the Appellate or Supreme Court level. The Flack decision did not get to the merits of her lawsuit; a settlement (especially one with a nondisclosure clause) between parties offers no precedent for the next judge.

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Ms. Oliver, the San Francisco lawyer, claims that a major effect of VARA has been to inform prospective buyers of art of "recognized stature" that they cannot do whatever they want with the pieces they purchase, because they, too, may find themselves with legal costs. But perhaps the largest precedent set in the 20 years since the law was enacted has been that a majority of contracts commissioning new artworks now contain clauses in which the artists waive their VARA rights.

*Mr. Grant is the author of "The Business of Being an Artist" (Allworth).*

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