

**AB-2902 Fine art: physical alteration or destruction.** (2019-2020)

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CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

**ASSEMBLY BILL**

**NO. 2902**

**Introduced by Assembly Member Kalra**

**February 21, 2020**

An act to amend Sections 987 and 989 of the Civil Code, relating to fine art.

**LEGISLATIVE COUNSEL'S DIGEST**

AB 2902, as introduced, Kalra. Fine art: physical alteration or destruction.

Existing law, the California Art Preservation Act (CAPA), prohibits certain acts relating to the physical alteration or destruction of fine art, defined as an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, other than a work prepared under contract for commercial use by its purchaser, including the intentional defacing, mutilating, altering, or destruction of a work of fine art except by an artist who owns and possesses a work of fine art that the artist has created. Existing law requires a trier of fact regarding the question of whether a work of art is of recognized quality to rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.

This bill would require a trier of fact to additionally rely on the visibility of the work, community recognition awards attributable to the work, and recognition and awards received by the artist of the work.

CAPA provides that if a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties described above, unless expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property and properly recorded, shall be deemed waived. The law also provides that if a work of fine art can be removed from a building without substantial harm to the fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties described above apply unless the owner of the building has provided, or diligently attempted to provide, written notice to the artist or the artist's heir, beneficiary, devisee, or personal representative, and the notified parties have failed to remove the work or pay for its removal within 90 days. CAPA contains a similar provision in the case of a work of fine art that can be removed from a building scheduled for demolition without substantial physical defacement, mutilation, alteration, or destruction of the work, and the owner of the building has notified the owner of the work of fine art of the scheduled demolition or the owner of the building is the owner of the work of fine art, and the owner of the work of fine art elects not to remove the work of fine art.

This bill would additionally include an interested community and a city art commission in the list of required recipients of the written notice described above and would authorize a court to extend the 90-day period within which a noticed party is required to act to remove the art from the building.

CAPA authorizes an organization, defined as a public or private not-for-profit entity or association, in existence at least three years at the time an action is filed under that law, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists, to commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from those acts, subject to certain conditions related to whether a work can be safely removed from a building, which are similar those described above.

This bill would expand the definition of organization to include an entity in existence for at least one year, a major purpose of which is to preserve the cultural or historical integrity of the community.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

### **SECTION 1.** Section 987 of the Civil Code is amended to read:

**987. (a)** The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of ~~cultural~~ *cultural, historical, and artistic* creations.

(b) As used in this section:

(1) "Artist" means the individual or individuals who create a work of fine art.

(2) "Fine art" means an original painting, *mural*, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(3) "Person" means an individual, partnership, corporation, limited liability company, association or other group, however organized.

(4) "Frame" means to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium.

(5) "Restore" means to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards.

(6) "Conserve" means to preserve, or cause to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the fullest extent possible in an unchanging state.

(7) "Commercial use" means fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.

(c) (1) ~~No~~ A person, except an artist who owns and possesses a work of fine art which the artist has created, shall *not* intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

(2) In addition to the prohibitions contained in paragraph (1), ~~no~~ A person who frames, conserves, or restores a work of fine art shall *not* commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term "gross negligence" shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.

(d) The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of ~~his or her~~ *the artist's* work of fine art.

(e) To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(1) Injunctive relief.

(2) Actual damages.

(3) Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive any punitive damages.

(4) Reasonable attorneys' and expert witness fees.

(5) Any other relief which the court deems proper.

(f) In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on ~~the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.~~ *all of the following:*

*(1) The opinions of artists, art dealers, collectors of fine art, and curators of art museums.*

*(2) The opinions of other persons involved with the creation or marketing of fine art.*

*(3) The visibility of the work.*

*(4) Community recognition awards attributable to the work.*

*(5) Recognition and awards received by the artist of the work.*

(g) The rights and duties created under this section:

(1) Shall, with respect to the artist, or if any artist is deceased, ~~his or her~~ *the artist's* heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist.

(2) Shall exist in addition to any other rights and duties which may now or in the future be applicable.

(3) Except as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

(h) (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property and properly recorded, shall be deemed waived. The instrument, if properly recorded, shall be binding on subsequent owners of the building.

(2) If the owner of a building wishes to remove a work of fine art ~~which that~~ *that* is a part of the building but ~~which that~~ *that* can be removed from the building without substantial harm to the fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless ~~the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of his or her intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.~~ *either of the following is true:*

*(A) (i) If the artist is not deceased, the owner has given written notice of the owner's intended action to the artist, the interested community, and the city art commission, if any, and the notified person or entity has failed within 90 days to either remove the work or pay for its removal.*

*(ii) A court may extend the 90-day period described in clause (i).*

*(iii) An owner shall be deemed in compliance with this subparagraph if the owner diligently attempts to notify the parties described in clause (i) but fails through no fault of the owner's.*

*(B) (i) If the artist is deceased, the owner has given written notice of the owner's intended action to the artist's heir, beneficiary, devisee, personal representative, interested community, and the city art commission, if any, and the notified person or entity has failed within 90 days to either remove the work or pay for its removal.*

*(ii) A court may extend the 90-day period described in clause (i).*

*(iii) An owner shall be deemed in compliance with this subparagraph if the owner diligently attempts to notify the parties described in clause (i) but fails through no fault of the owner's.*

(3) If a work of fine art can be removed from a building scheduled for demolition without substantial physical defacement, mutilation, alteration, or destruction of the work, and the owner of the building has notified the owner of the work of fine art of the scheduled demolition or the owner of the building is the owner of the work of fine art, and the owner of the work of fine art elects not to remove the work of fine art, the rights and duties created under this section shall apply, unless ~~the owner of the building has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of the intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.~~ *either of the following is true:*

(A) (i) *If the artist is not deceased, the owner has given written notice of the owner's intended action to the artist, the interested community, and the city art commission, if any, and the notified person or entity has failed within 90 days to either remove the work or pay for its removal.*

(ii) *A court may extend the 90-day period described in clause (i).*

(iii) *An owner shall be deemed in compliance with this subparagraph if the owner diligently attempts to notify the parties described in clause (i) but fails through no fault of the owner's.*

(B) (i) *If the artist is deceased, the owner has given written notice of the owner's intended action to the artist's heir, beneficiary, devisee, personal representative, interested community, and the city art commission, if any, and the notified person or entity has failed within 90 days to either remove the work or pay for its removal.*

(ii) *A court may extend the 90-day period described in clause (i).*

(iii) *An owner shall be deemed in compliance with this subparagraph if the owner diligently attempts to notify the parties described in clause (i) but fails through no fault of the owner's.*

(4) ~~Nothing in this~~ This subdivision shall *not* affect the rights of authorship created in subdivision (d) of this section.

(5) *If the work is removed at the expense of the artist, a city art commission, or the artist's heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person or entity.*

(i) ~~No~~ *An* action ~~may~~ *shall not* be maintained to enforce any liability under this section unless brought within three years of the act complained of or one year after discovery of the act, whichever is longer.

(j) This section shall become operative on January 1, 1980, and shall apply to claims based on proscribed acts occurring on or after that date to works of fine art whenever created.

(k) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect any other provisions or applications of this section which can be effected without the invalid provision or application, and to this end the provisions of this section are severable.

**SEC. 2.** Section 989 of the Civil Code is amended to read:

**989.** (a) The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.

(b) As used in this section:

(1) "Fine art" means an original painting, *mural*, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest.

(2) "Organization" means a public or private not-for-profit entity or association, in existence at least ~~three years~~ *one year* at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the ~~public or~~ *public*, to promote the interests of the arts or ~~artists.~~ *artists, or preserve the cultural or historical integrity of the community.*

(3) "Cost of removal" includes reasonable costs, if any, for the repair of damage to the real property caused by the removal of the work of fine art.

(c) An organization acting in the public interest may commence an action ~~for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987.~~ *for any of the*



following:

(1) *Injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987.*

(2) *Any other relief the court deems proper.*

(d) In determining whether a work of fine art is of recognized quality and of substantial public interest the trier of fact shall rely on the opinions of those described in subdivision (f) of Section 987.

(e) (1) If a work of fine art cannot be removed from real property without substantial physical defacement, mutilation, alteration, or destruction of ~~such the~~ work, ~~no an~~ action to preserve the integrity of the work of fine art ~~may shall not~~ be brought under this section. However, if an organization offers some evidence giving rise to a reasonable likelihood that a work of art can be removed from the real property without substantial physical defacement, mutilation, alteration, or destruction of the work, and is prepared to pay the cost of removal of the work, it may bring a legal action for a determination of this issue. In that ~~action~~ *action*, the organization shall be entitled to injunctive relief to preserve the integrity of the work of fine ~~art, art~~ but shall also have the burden of proof. The action shall commence within 30 days after filing. ~~No An action may shall not~~ be brought under this paragraph if the organization's interest in preserving the work of art is in conflict with an instrument described in paragraph (1) of subdivision (h) of Section 987.

(2) If the owner of the real property wishes to remove a work of fine art ~~which that~~ is part of the real ~~property, property~~ but ~~which that~~ can be removed from the real property without substantial harm to ~~such the~~ fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or ~~destruction~~ *destruction*, the owner shall do *both of* the following:

(A) If the artist or artist's heir, legatee, or personal representative fails to take action to remove the work of fine art after the notice provided by paragraph (2) of subdivision (h) of Section 987, the owner shall provide 30 days' notice of ~~his or her the owner's~~ intended action affecting the work of art. The written notice shall be a display advertisement in a newspaper of general circulation in the area where the fine art is located. The notice required by this paragraph may run concurrently with the notice required by subdivision (h) of Section 987.

(i) If within the 30-day period an organization agrees to remove the work of fine art and pay the cost of removal of the work, the payment and removal shall occur within 90 days of the first day of the 30-day ~~notice.~~ *notice, unless a court extends that 90-day period.*

(ii) If the work is removed at the expense of an organization, title to the fine art shall pass to that organization.

(B) *If Subject to an extension granted by a court pursuant to clause (i) of subparagraph (A), if an organization does not agree to remove the work of fine art within the 30-day period or fails to remove and pay the cost of removal of the work of fine art within the 90-day ~~period~~ *period*, the owner may take the intended action affecting the work of fine art.*

(f) To effectuate the rights created by this section, the court may do the following:

(1) Award reasonable attorney's and expert witness fees to the prevailing party, in an amount as determined by the court.

(2) Require the organization to post a bond in a reasonable amount as determined by the court.

(g) ~~No-An~~ action ~~may shall not~~ be maintained under this section unless brought within three years of the act complained of or one year after discovery of such act, whichever is longer.

(h) This section shall become operative on January 1, 1983, and shall apply to claims based on acts occurring on or after that date to works of fine art, whenever created.

(i) If any provision of this section or the application thereof to any person or circumstances is held invalid, ~~such the~~ invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.



18 March 2020

**Via Email Only**

c/o [Erika.Salazar@asm.ca.gov](mailto:Erika.Salazar@asm.ca.gov)

Office of Assemblymember Ash Kalra - 27th Assembly District

State Capitol, Room 2196

Sacramento, CA 95814

Re: Proposed AB2902

Dear Assemblymember Kalra,

This letter is in response to your proposed AB2902 which would amend §§987 and 989 of the California Code, also referred to as the California Art Preservation Act (CAPA). We are a group of public art administrators and advocates who have committed most if not all of our professional lives to supporting public art, artists, and the ecosystem that makes public art possible. While we agree that the language found in CAPA could use some revision and clarification, we are concerned that the overly broad changes proposed in AB2902 will instead create more confusion, and potential for controversy and litigation. Ultimately, these revisions will result in draconian hinderances on public art programs and hurt artists. Our reasoning is set forth below for each of the substantive proposed changes.

**Substantive proposed change to §987(f):**

(f) In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on ~~the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.~~ *all of the following:*

*(1) The opinions of artists, art dealers, collectors of fine art, and curators of art museums.*

*(2) The opinions of other persons involved with the creation or marketing of fine art.*

*(3) The visibility of the work.*

*(4) Community recognition awards attributable to the work.*

*(5) Recognition and awards received by the artist of the work.*

The purpose of this proposed revision appears to be to widen the circle of authorities upon which an artist can rely in establishing that an artwork qualifies as “a work of recognized quality”. It is true that as the field of public art expands beyond traditional permanent works, more than the marketability or museum quality of an artwork should be considered when determining “recognized quality”. While a legitimate case can be made that the circle of who gets to weigh in on the importance of a work of art in the public sphere should be broadened to include

historically underrepresented communities and community members, this revision, however well-intended, only muddies the waters. As proposed, this revision creates overly broad language that will be ineffective in providing any effective procedural guidance. The likely result will be to increase conflict and potential litigation.

**Substantive proposed change to §987(h)(2) & (3):**

In both subsections (2) and (3), the rights and duties of §987 shall apply unless:

~~the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of his or her intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person. either of the following is true:~~

*(A) (i) If the artist is not deceased, the owner has given written notice of the owner's intended action to the artist, **the interested community, and the city art commission**, if any, and the notified person or entity has failed within 90 days to either remove the work or pay for its removal.*

*(ii) A court may extend the 90-day period described in clause (i).*

*(iii) An owner shall be deemed in compliance with this subparagraph if the owner diligently attempts to notify the parties described in clause (i) but fails through no fault of the owner's [sic].*

*(B) (i) If the artist is deceased, the owner has given written notice of the owner's intended action to the artist's heir, beneficiary, devisee, personal representative, **interested community, and the city art commission**, if any, and the notified person or entity has failed within 90 days to either remove the work or pay for its removal.*

*(ii) A court may extend the 90-day period described in clause (i).*

*(iii) An owner shall be deemed in compliance with this subparagraph if the owner diligently attempts to notify the parties described in clause (i) but fails through no fault of the owner's [sic].*

These revisions add two parties to the list of those who must receive a ninety-day notice of an owner's intentions to remove a work of art from a building or allow it to be destroyed in the demolition process.

The first additional party to be notified is "the interested community". How is the interested community determined or defined? What if the owner misjudges or misinterprets who the



interested community is? This is a vague, non-specific and unenforceable requirement that will lead to confusion and potential litigation.

The second additional party to be notified is “the city art commission”. First of all, not all cities have art commissions. Second, not all projects are funded with city dollars so including the city art commission (if one exists) might not be relevant or helpful to anyone. Many public art projects are funded through private parties, county agencies, state agencies, and quasi-governmental agencies such as airports, metro systems, the postal service to name a few.

Finally, if the artwork is not sited on city property, most cities would likely decline to be involved as they do not have jurisdiction. This is true even if the city has partially funded a work sited on private property, or if the work is a result of a public art for private development requirement.

While it would indeed be helpful for local arts authorities overseeing compliance with percent for art requirements to be aware of plans for the removal of artwork for enforcement purposes, the way in which this revision is written does not benefit potentially interested parties, the artists concerned, or the public in general. The reasons behind this revision should be reexamined and reconsidered with input from those potential recipients of any such removal notices.

Further, §989 already requires the owner to publish a written notice of owner’s intentions “in a newspaper of general circulation in the area where the fine art is located.” This publication requirement is the mechanism by which any interested parties within the community may receive notification of intended actions to be taken with regard to the subject artwork.

Finally, this revision potentially extends the current ninety-day notice period to an unspecified period of extension as determined by a court of law. While it might make sense in some limited circumstances for a court to extend the removal period beyond the initial ninety days, the proposed revision is open-ended and might be more reasonable if it were to include a not-to-exceed limitation to balance the potential effects on owners’ desired activities without putting an unrealistic time pressure on the artist or other parties wishing to remove the work.

A more pressing aspect of the current law that bears reconsideration and possible revision is the overlapping and potentially conflicting time for notice to the artist, and notice to third parties through publication, which can run concurrently. *See* §989(e)(2)(A).

### **Substantive proposed change to §989(b)(2):**

This substantive change proposes changing the definition of what organizations can step in to remove the artwork pursuant to an owner’s published notice of intended removal or destruction. Currently, the definition requires an organization be in existence for at least three years. This revision proposes that an organization need only be in existence for at least one year.

“Organization” means a public or private not-for-profit entity or association, in existence at least ~~three years~~ **one year** at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the ~~public or~~

*public, to promote the interests of the arts or ~~artists~~, artists, or preserve the cultural or historical integrity of the community.*

This revision could potentially hurt artists in the end as an organization that has not yet had the opportunity to prove its long-term viability may not be in a position to provide a reliable or sustainable venue in which to display or maintain the artwork. Ultimately, this could lead to further damage or destruction to the artwork in violation of both CAPA and Federal regulations found in §106A of the Copyright Law (commonly referred to as the Visual Artists Rights Act or VARA). Such an undesirable chain of events not only hurts the artist, but also puts the organization and the original owner at further risk for unintended consequential liability.

**Additional note:**

Finally, it bears mentioning that the proposed revisions also include adding to the definition of “Fine Art” as follows:

“Fine art” means an original painting, *mural*, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

Murals are currently the center of a number of controversies across the country and thus undeniably a “hot topic”. Undeniably, policies and procedures pertaining to mural commissions, maintenance, and removal need to be considered more seriously and effectively addressed by many communities. However, given the scope and complexity of this topic, it bears more discussion than a casual addition into the definition of “Fine Art”.

**Conclusion:**

In conclusion, all of the proposed revisions to CAPA reviewed above highlight important conversations that need to happen. But as it stands, these revisions create the likelihood that rules regarding the management of art in public spaces would become less clear and more burdensome. Ultimately, vague regulations with uncertain repercussions will be a wet blanket on future private-public art collaborations across the State of California.

The undersigned public art administrators and advocates agree that the language currently found in CAPA could be improved with some revisions. There is in fact a pressing need to practically address how we treat permanent and temporary artworks, including murals, in our communities. However, any such revisions should be crafted in collaboration with public art administrators and advocates around the State of California. We deal with these issues in the field every day. We would be honored and delighted to work with lawmakers to address gaps and inconsistencies in the law in order to better protect artists and allow us to continue supporting the sustainable evolution and strengthening of public art programs across our wonderful, creative State.

Sincerely,

cc: Alliance for Boys & Men of Color (ABMOC)  
Silicon Valley DE-BUG  
Community United for Restorative Justice  
California Arts Council  
California Arts Advocates