

## Burning Man Festival Bus-Galleon Fails VARA Visual Art Test

(June 9, 2016) A school bus turned into a 16<sup>th</sup>-century Spanish galleon at the Burning Man Festival may be art, but its destruction is not a violation of the Visual Artists Rights Act (VARA).

The Ninth Circuit affirmed that *La Contessa* is not a “work of visual art” entitled to VARA protection. Instead, the galleon is applied art, but the court’s justices disagreed on how to define applied art.

VARA protects the right of integrity and attribution for works of visual art, allowing the artist to prevent any deforming or mutilating changes to the work. *La Contessa* was a Spanish galleon built bus by the plaintiffs in 2002 on the chassis of a school. It measured sixty feet by sixteen feet with a mast over fifty feet tall. It appeared at the Burning Man Festival in 2002, 2003, and 2005. After the 2005 festival, it was stored on property in Nevada, which was acquired by the defendant in 2006. In December 2006, the wooden structure of *La Contessa* was burned so that a scrap metal dealer could remove the underlying school bus from the property. The artists filed a VARA claim in March 2009. The trial court found *La Contessa* was not a work of visual art and granted summary judgment for the defendant.

The appellate court noted that at Burning Man “*La Contessa* was used for transportation, providing rides to festival-goers, hosting musical performances and weddings, and serving as a stage for poetry and acrobatics shows. Indeed, the *La Contessa* often was driven about the Festival grounds and was banned from the Festival in 2004 because ‘its unsafe driving practices far exceeded community tolerance and out-weighed the visual contribution’ it made.”

Because *La Contessa* served the utilitarian function of transportation, it is applied, not visual, art. The appellate court said “that an object constitutes a piece of ‘applied art’—as opposed to a ‘work of visual art’—where the object initially served a utilitarian function and the object continues to serve such a function after the artist made embellishments or alternations to it.”

The concurring opinion disagreed with the definition, noting that “courts should evaluate the work as a whole, asking whether its primary purpose is to serve a useful function and whether the artistic creation is subservient to that purpose. If the primary purpose is for the work to be viewed and perceived as art, then any incidental utilitarian function will not push it outside the scope of VARA.”

The concurring opinion said *La Contessa* was used as a performance venue, restaurant, and means of transportation around Burning Man. “Taken as a whole, this is powerful evidence that the primary purpose of *La Contessa* was to serve the utilitarian functions of performance venue, gathering space, and people-mover. Although Cheffins and Jones testified passionately about *La Contessa*’s beauty and the artistic expression they felt it embodied—and it is an impressive work for art in many respects—I conclude it is applied art because its aesthetic appeal was subservient to its primary utilitarian purpose. Thus, the VARA claim fails.”

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*Simon Cheffins and Gregory Jones v. Michael B. Stewart*, Ninth Cir. No. 12-16913, issued June 8, 2016.

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