

By E-mail and First Class Mail

January 31, 2018

Gregory Scharff
Mayor
City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301

Re: *Digital DNA Removal and the City of Palo Alto*

Dear Mayor Scharff:

We represent Adriana Varella, creator of the sculpture *Digital DNA* (the "Sculpture") currently on public display in the City of Palo Alto. On behalf of Ms. Varella, we hereby demand pursuant to the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A ("VARA") and the city's own deaccessioning policies that the City of Palo Alto cease and desist its stated intentions to remove the Sculpture from its current location. The City of Palo Alto's demand that Ms. Varella make arrangements to remove the Sculpture on or before February 23, 2018 violates her rights in the ways explained below.

As you likely know, the Sculpture was commissioned in 2003. Pursuant to a "Contract No. S04100333 for Acquisition of ARTWORK" (the "Contract"), Ms. Varella created and transferred the Sculpture to the City of Palo Alto. The Sculpture addresses complicated themes of technology and public space in the very heart of Silicon Valley. Since its installation it has become a beloved landmark in Palo Alto. As recently reported in *Hyperallergic*:¹

For 12 years, a giant egg covered in computer circuit boards has balanced in the middle of Lytton Plaza in downtown Palo Alto. "Digital DNA," created by artist Adriana Varella and commissioned by the city's Public Art Program in 2000, quickly became a beloved, local landmark that acknowledges Palo Alto's reputation as the heart of Silicon Valley. People love taking photographs of it and with it; individuals literally embrace it. You could say the sculpture carries a similar public sentiment as New York City's Astor Place Cube.

The Sculpture is widely visited and beloved. A recent review of social media, for example, reveals that the Sculpture is photographed and shared orders of magnitude more often than any other public art in Palo Alto, and at a rate on par with *The Burghers of Calais* by Auguste Rodin at Stanford University. In sum, the Sculpture is recognized for its significance, an importance that is inextricably related to the site on which it is located.

¹ See <https://hyperallergic.com/404716/digital-dna-adriana-varella-palo-alto/>.

The Proposed Removal Violates Ms. Varella's VARA Rights

Pursuant to VARA, Ms. Varella 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.

Both of Ms. Varella's moral rights articulated above are violated by the proposed removal of the Sculpture. At the outset it is important to note that the Sculpture's meaning and integrity are linked inextricably to its public display in Palo Alto. The Sculpture's meaning and commentary on the impact of technology cannot be conveyed anywhere else. To move the Sculpture is to distort and modify it. To be clear, the City of Palo Alto may not avail itself of the exception in § 106A(c)(2) of VARA, that "the modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." That provision excludes the placement of art from VARA's protections. The current question concerns its removal. That additional exclusion cannot be read into the statute. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011). As a result, removing the Sculpture injures Ms. Varella's reputation by eliminating at a stroke the public display with which she is associated.

Moreover, Ms. Varella's rights under § 106A(a)(3)(b) will be violated by its removal. First, it is beyond dispute that the Sculpture is a work of recognized stature. To constitute a work of recognized stature under VARA, it need only be considered as such by "art experts,' other members of the artistic community, or . . . some cross-section of society.'" *Cohen v. G&M Realty L.P.*, No. 13-CV-05612 (FB) (RLM), No. 15-CV-3230 (FB) (RLM), 2017 U.S. Dist. LEXIS 50943 (E.D.N.Y. Mar. 31, 2017), quoting *Pollara v. Seymour*, 206 F. Supp. 2d 333, 336 (N.D.N.Y. 2002). The wide acclaim and reputation the Sculpture enjoys clears this hurdle easily. Noted art curator and critic Denise Carvalho said of *Digital DNA*: [It] is an important piece of contemporary art that should be maintained by the city. ... I saw the piece when visiting Palo Alto years before I met the artist. I remember stopping to show my son and my husband this intriguing and attractive piece. Later I met Adriana Varella and invited her to participate [in] various exhibitions I curated, including the Mediations Biennale in Poland in 2012. She has an important career as a contemporary artist and her work should be respected and enjoyed."

That leaves only the question of the consequence of that recognition. Here it is clear. The moment that the Sculpture is removed, it will be destroyed because it cannot be what it is anywhere else. See *Kelley v. Chi. Park Dist.*, 635 F.3d at 292.

As a result of the foregoing, Ms. Varella asserts her VARA rights and demands that the Sculpture remain where it is.

The City Has Failed its Own Deaccession Policy

The City of Palo Alto Deaccession Policy of February 2017 (the "Deaccession Policy") sets forth criteria and procedures for the removal of any work of art owned by Palo Alto from its collection. The proposed removal of the Sculpture violates the Deaccession Policy.

Under the City's Deaccession Policy, any deaccession is to be a "seldom employed action that is taken only after issues such as Artists' rights, public benefit, censorship, copyrights, and legal obligations have been carefully considered." These criteria were not carefully considered, nor does it appear that they were considered at all with regards to Ms. Varella's rights as an artist, as noted above. It appears the only consideration given to the Sculpture was its present condition, which can only be a reason to remove a work under the Deaccession Policy if it requires "excessive maintenance" or its repair is "impractical or unfeasible." As described below, the Sculpture may easily be maintained if the City were to follow the standard practices for maintaining outdoor plastic sculptures. Moreover, according to its own report, the City has only spent a little over a thousand dollars per year to maintain the Sculpture since its installation, which does not constitute "excessive" maintenance expense. As a result, the Sculpture did not and does not meet any condition for consideration for deaccession set forth in the Deaccession Policy. Accordingly, the Sculpture should never have been considered for deaccession in the first place.

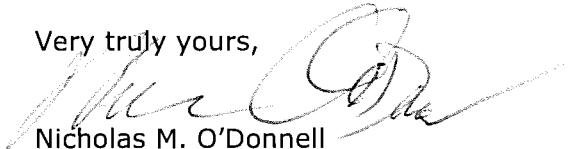
In its deaccession request to Ms. Varella, the city makes clear that in the very worst case it could maintain the work by reapplying a protective coating every "4-5 months." Even if this were necessary, it is neither overly burdensome nor expensive. Nor did the City of Palo Alto even follow through on the recommendations it procured from ARG Conservation Services, Inc. ("ARG"). ARG suggested several relatively straightforward and inexpensive options to maintain *Digital DNA*, yet the City's response was simply to abandon the work. This is entirely inconsistent with the Deaccession Policy. As a city official quoted in the *Hyperallergic* article conceded, even if it were eligible to be considered for deaccession, deaccession of Digital DNA would be legal (notwithstanding VARA) only if the City followed "the proper procedures" of its Deaccession Policy. Here, the City failed to comply with this Policy in its most important respects. When the City asserts it is infeasible to maintain an artwork, its Policy requires it to include in its Deaccession Request "[i]nformation about the condition of the Artwork and the estimated cost of its conservation provided by a qualified visual arts conservator." First, the City failed to include an "estimated cost of [the Sculpture's] conservation" by ARG or any other qualified visual arts conservator. Instead, the City misleadingly included the total cost of an ambitious project proposed by Ms. Varella and a collaborator that included a documentary film and new improvements to the Sculpture that bears no relation to the cost of conservation measures identified by ARG. Moreover, while the City did include ARG's observations about the Sculpture's weathering, it failed to include ARG's summary assessment that if a "water based coating is applied annually and the artwork inspected regularly, it will be acceptable to keep [Digital DNA] in its current location." ARG's summary assessment undermines the City's entire premise for deaccessioning the Sculpture. Since the City failed to include this information in its Deaccession Request, no one could make an informed judgment about the City's claims that the Sculpture requires "excessive maintenance" or that its repair is "impractical or

unfeasible."²

For the foregoing reasons, Ms. Varella demands that the City of Palo Alto cease and desist from the proposed removal of the Sculpture. Please confirm in writing within seven (7) days that the Sculpture will remain in place. Ms. Varella also requests that the city of Palo Alto and she work together to establish an optimal maintenance / restoration schedule for the Sculpture and the application of optimal protective coatings. Failing a satisfactory resolution, Ms. Varella reserves all of her rights, including but not limited to bringing a civil action for injunctive relief and damages.

I look forward to hearing from you.

Very truly yours,



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cc: Elise DeMarzo (by e-mail)
Palo Alto Public Arts Commission (by e-mail)
Palo Alto City Council (by e-mail)

² According to its own report, the City's total maintenance costs for the Sculpture since its 2005 installation have been only \$1,358 per year. The City reports it has applied protective coating to the Sculpture only "several" times since its installation (and possibly not since 2013), not annually as is standard practice and as recommended by ARG. If this is the case, the City has [grossly] failed to maintain the Sculpture properly. The City complains that sun exposure has weathered the Sculpture, but it has not regularly applied the protective coatings that would protect it from such exposure. The City claims that the "several" times it has applied protective coating it "[began] peeling within 4-5 months." Even in the very unlikely event the City could not find a more durable coating, applying a protective coating to the Sculpture even twice per year is neither "impractical" nor "excessively" expensive. It is likely, though, that the City can find a more durable coating if it consults with leading art caretakers such as the Getty Museum that have extensive experience maintaining different outdoor plastic sculptures.