

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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MASSACHUSETTS MUSEUM OF  
CONTEMPORARY ART FOUNDATION, INC.,

Plaintiff/Defendant-  
in-Counterclaim,

v.

CHRISTOPH BÜCHEL,

Defendant/Plaintiff-  
in-Counterclaim.

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CIVIL ACTION  
NO. 3:07-30089-MP

**ANSWER AND COUNTERCLAIMS OF CHRISTOPH BÜCHEL**

**Introduction**

The Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A, affords defendant Christoph Büchel (“Büchel”), a visual artist, fundamental artistic, or “moral,” rights with respect to his reputation and the integrity of his works of visual art, separate and apart from any economic rights in those works. Under the right to attribution, Büchel has the right to prevent the display of an unfinished, distorted and modified work of visual art of which he is the sole author and that is attributable to him. Under the right to integrity, Büchel has the right to prevent the intentional modification, distortion and mutilation of his works. VARA provides that these artistic rights can only be waived “in a written instrument signed by the author” that “specifically identif[ies] the work, and uses of that work to which the waiver applies....” 17 U.S.C. § 106A(e).

By its Complaint, plaintiff Massachusetts Museum of Contemporary Art Foundation, Inc. (“MASS MoCA”) seeks an unprecedented declaration that, despite

the VARA rights Congress granted to visual artists like Büchel, it can display Büchel's admittedly unfinished work of visual art, entitled "Training Ground for Democracy" (the "Work of Art"), against Büchel's express wishes. Without the express written and signed waiver of his VARA rights—which Büchel undisputedly did not give—MASS MoCA is not permitted to display Büchel's unfinished and intentionally distorted and modified Work of Art without violating VARA as well as other of Büchel's rights under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

Büchel, a renowned Swiss artist who exhibits around the world, is known for large, complicated installations designed to engage a viewer on multiple levels as he or she passes through the artwork. As conceived of and designed by Büchel, and as agreed to be exhibited by MASS MoCA, "Training Ground for Democracy," his titled but unfinished Work of Art, was to be installed in the football field-sized Building 5 gallery at MASS MoCA.

"Training Ground for Democracy," essentially a village, was to have contained several major architectural and structural elements integrated into a whole, through which a viewer could walk (and climb). It was based on existing mock-up villages and virtual reality training software that the U.S. army has designed to train its members to tackle real-life battle situations in the war on terror and the Iraq war. These mock-up villages are fictitious test sites in which political positions and identities can be sampled and exchanged. "Training Ground for Democracy" was to adapt this role-play for its visitors, who would be given the opportunity to "virtually" change their own various identities in relation to the collective project called "democracy": training to be an immigrant, training to vote, protest, and revolt, training to loot, training iconoclasm, training to join a political rally, training to be the objects of propaganda, training to be interrogated and detained and to be tried or to judge, training to reconstruct a disaster, training to be in conditions of suspended law, and training various other social and political

behavior. All of these concepts were to have been made visible in the final, installed work.

The basic architectural structures of the work were meant to be found or rebuilt objects which would “house” the various social functions to which the work referred, in each case employing used elements such as a mobile home (to house a mobile tribunal), cargo containers (to house, among other things, illegal immigrants), a single family house divided by a wall, a 30-foot section of a destroyed passenger airplane fuselage (to simulate a disaster zone), and so on. The content of each component element, and its function within the overall work, was to have been defined by the specific details of each fictitious “scene.” As thus designed, the Work of Art as a whole would be fully realized only when all of its elements were completed and fully detailed.

This was Büchel’s Work of Art, which MASS MoCA agreed to fund, to provide logistical and technical support for, and, upon its completion, to display to the public.

MASS MoCA failed to adequately and competently provide the support necessary to complete the Work of Art. But instead of dismantling the unfinished Work of Art, MASS MoCA sued Büchel. To the extent there is any dispute remaining, it is of MASS MoCA’s own making: the Work of Art is not permanently affixed to the gallery. MASS MoCA can remove it at any time. Nonetheless, MASS MoCA has sought to cloud Büchel’s clear moral right to protect his artistic reputation and the integrity of his work, by making numerous erroneous statements about Büchel, first to the press and now repeated in its Complaint. MASS MoCA’s public statements, its Complaint, as well as considerable press coverage of this matter have resulted in Büchel being inextricably linked in the public’s mind to his unfinished Work of Art. The bottom line with respect to the accuracy of MASS MoCA’s statements is that the parties never entered into a written agreement and

they never agreed on a budget for the cost of completing the Work of Art. They also did not agree about what would happen if MASS MoCA was unable to raise sufficient funds to complete the Work of Art, as happened here.

In any event, the sole issue presented in MASS MoCA's Complaint is its allegation that it can display the distorted, modified, and unfinished Work of Art over Büchel's objections. It cannot. Any such display is barred by VARA and other provisions of the Copyright Act. Indeed, as set forth in the Counterclaims, MASS MoCA's actions to date have already violated Büchel's rights under these laws.

### **ANSWER**

Defendant/Plaintiff-in-Counterclaim Büchel hereby answers the Complaint of MASS MoCA and counterclaims as follows:

#### **Nature of the Action**

1. No response to paragraph 1 of the Complaint is required, as it merely characterizes MASS MoCA's request for relief.

2. Büchel denies the allegations contained in paragraph 2 of the Complaint, except Büchel states that there exists in MASS MoCA's Building 5 a partially completed Work of Art, of which Büchel is the sole author, entitled "Training Ground for Democracy," as well as component elements of same.

3. Büchel admits that his New York counsel corresponded by letter, dated May 2, 2007, with MASS MoCA, that the letter speaks for itself, and in part states:

Not only is it shocking that a fine art museum would even consider exhibiting an artist's incomplete work against his wishes, it is also, in this case, (1) illegal – a violation of the Visual Artists Rights Act (because, given the enormous publicity the project has already received, it would be impossible to disassociate Mr. Büchel's name from the work and, in addition, it could not be

accomplished without distorting and modifying elements of the work against his wishes) and (2) a breach of the parties' clear understanding (it was always made very clear that none of the elements of the work could be shown other than as part of the complete installation).

Büchel denies the remaining allegations contained in paragraph 3 of the Complaint.

4. Paragraph 4 of the Complaint sets forth legal conclusions requiring no response. To the extent that paragraph 4 encompasses factual allegations, Büchel denies the remaining allegations contained in paragraph 4 of the Complaint.

5. Answering paragraph 5 of the Complaint, Büchel admits that there is an actual case and controversy between the parties and denies that MASS MoCA is entitled to declaratory judgment in its favor.

### **Jurisdiction and Venue**

6. Büchel admits that the Court has subject matter jurisdiction over these claims.

7. Büchel admits that Court has personal jurisdiction over him for these claims.

8. Büchel admits that venue is proper.

### **Parties**

9. Büchel admits that MASS MoCA is located in North Adams, Massachusetts. Büchel lacks sufficient knowledge to answer the remaining allegations contained in paragraph 9 of the Complaint.

10. Answering the third sentence of paragraph 10 of the Complaint, Büchel admits that "Training Ground for Democracy" is an incomplete work of art presently located in the football field-sized Building 5 gallery, and denies the remaining allegations of the third sentence of paragraph 10 of the Complaint.

Answering further, Büchel admits that MASS MoCA has featured works of renowned contemporary artists. Büchel lacks sufficient knowledge to answer the remaining allegations contained in paragraph 10 of the Complaint.

11. Büchel admits the allegations contained in paragraph 11 of the Complaint.

### **Facts**

12. Büchel admits the allegations contained in paragraph 12 of the Complaint.

13. Answering paragraph 13 of the Complaint, Büchel admits that in August, 2006, he prepared a model of the proposed work of art to be entitled “Training Ground for Democracy,” which MASS MoCA agreed to fund, to provide logistical and technical support for, and to exhibit, with an original planned and mutually agreed-upon opening date of December 16, 2006. Answering further, Büchel denies the allegation that describes their relationship as a “collaboration.” Büchel was the sole author of the Work of Art, while MASS MoCA’s role was to provide funding, logistical and technical support and to provide the necessary components and objects for the Work of Art. Answering further, Büchel states that to facilitate the creation of the Work of Art and its planned exhibition to the public, he waived any compensation for his efforts. Büchel denies the remaining factual allegations contained in paragraph 13 of the Complaint.

14. Answering paragraph 14 of the Complaint, Büchel admits that he was in residence in North Adams in late August-early September 2006, and again for several weeks from late October through December 17, 2006 for the purpose of creating the Work of Art. Answering further, Büchel states that MASS MoCA attempted to provide certain required elements and logistical and technical

support for the Work of Art, but those efforts proved inadequate. Büchel denies the remaining allegations contained in paragraph 14 of the Complaint.

15. Answering paragraph 15 of the Complaint, Büchel admits that he left North Adams on December 17, 2006. Answering further, Büchel states he departed North Adams on December 17, 2006 (after the scheduled date for the opening) for the upcoming holidays, but intended to return to finish the Work of Art for a revised opening date of March 3, 2007 until he was informed by MASS MoCA in late December 2006 that it had insufficient funds with which to complete the proposed and agreed upon Work of Art. Büchel denies the remaining allegations contained in paragraph 15 of the Complaint.

16. Büchel denies the allegations contained in paragraph 16 of the Complaint, except Büchel admits that “Training Ground for Democracy” is an unfinished and preliminary work of art.

17. Answering paragraph 17 of the Complaint, Büchel admits that MASS MoCA sent him a letter, dated March 28, 2007, which speaks for itself and otherwise denies the remaining allegations contained in paragraph 17 of the Complaint.

18. Büchel denies the allegations contained in paragraph 18 of the Complaint.

19. Answering paragraph 19 of the Complaint, Büchel states that the letter speaks for itself and otherwise denies the remaining allegations contained in paragraph 19 of the Complaint.

20. Büchel denies the allegations contained in paragraph 20 of the Complaint.

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21. Büchel repeats and realleges his answers to paragraphs 1-20 above.

22. Büchel denies the allegations contained in paragraph 22 of the Complaint.

23. Büchel denies the allegations contained in paragraph 23 of the Complaint, except Büchel admits that he spent several months working to complete the Work of Art.

24. Paragraph 24 of the Complaint sets forth legal conclusions requiring no response. To the extent that paragraph 24 encompasses factual allegations, Büchel denies the allegations contained in paragraph 24 of the Complaint.

25. Büchel admits the allegations contained in paragraph 25 of the Complaint.

26. Paragraph 26 of the Complaint sets forth a prayer for declaratory relief, and Büchel denies that MASS MoCA is entitled to a declaration in its favor.

27. Büchel denies the allegations contained in the paragraph labeled “REQUEST FOR RELIEF,” and avers that Plaintiff is not entitled to any relief whatsoever.



## **AFFIRMATIVE DEFENSES**

Defendant/Plaintiff-in-Counterclaim Büchel asserts the following defenses in response to the claims in MASS MoCA's Complaint. Büchel does not assume the burden of proof for any claim where such burden is otherwise on MASS MoCA. Büchel expressly reserves the right to raise additional defenses or to supplement or amend the following defenses, as this litigation proceeds.

### **First Affirmative Defense**

MASS MoCA's claim is barred, in whole or in part, because the Complaint fails to state a claim upon which relief can be granted.

### **Second Affirmative Defense**

MASS MoCA's claim is barred, in whole or in part, by the Copyright Act and the Visual Artists Rights Act of 1990, 17 U.S.C. §§ 101 *et seq.*

### **Third Affirmative Defense**

MASS MoCA's claim is barred, in whole or in part, by the doctrine of unclean hands.

## **BÜCHEL'S COUNTERCLAIMS**

Plaintiff-in-Counterclaim Büchel as for his counterclaims against MASS MoCA alleges, as follows:

### **Jurisdiction and Venue**

1. This Court has subject matter jurisdiction over Büchel's counterclaims under 28 U.S.C. §§ 1331, 1332, and 2201 because the action arises under the Federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and because there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000.

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

### **Facts**

3. Defendant/Plaintiff-in-Counterclaim Büchel is a citizen of Switzerland and lives and works in Basel, Switzerland.

4. Büchel is a visual artist who creates, among other works of art, large and complex art installations.

5. In 2006, MASS MoCA invited Büchel to create a solo exhibition in its football-field sized Building 5 gallery in North Adams, Massachusetts.

6. In August 2006, Büchel visited MASS MoCA for several days. During that visit, Büchel presented a model of his proposed Work of Art, an installation for Building 5 entitled “Training Ground for Democracy.” (More detailed sets of plans, based on the model, were later developed.) As set forth more fully in the Introduction to this pleading, which is incorporated by reference herein, the “Training Ground for Democracy” is a work of integrated art comprised of a number of elements, several of which are independent artworks in their own right, but all of which must be presented together as the artist intended for the overall work to maintain its meaning and integrity.

7. MASS MoCA approved the model presented by Büchel and agreed to fund, to provide logistical and technical support for, to procure the necessary objects, and to exhibit the completed Work of Art as proposed. The Work of Art had a planned opening of December 16, 2006.

8. MASS MoCA and Büchel did not execute a written contract with respect to the Work of Art. The parties did not agree to a budget for the completion of the Work of Art.

9. MASS MoCA was responsible for procuring elements for the Work of Art. Financial decisions relating to the procurement of elements, such as price to

be paid (if any), were MASS MoCA's and MASS MoCA's alone. There was never any discussion between MASS MoCA and Büchel—let alone any agreement—as to what would happen if the cost of completing the Work of Art was more than MASS MoCA may or may not have anticipated.

10. Büchel never waived, in writing or otherwise, any of his rights under the Copyright Act 17 U.S.C. §§ 101 *et seq.*, including his rights under VARA, 17 U.S.C. § 106A, in the Work of Art or any of its component elements. He has owned, and continues to own, all of the moral rights and copyrights to the Work of Art and its component elements.

11. MASS MoCA holds itself out as having expertise in organizing and mounting large-scale and complex installations for display to the public, such as the Work of Art proposed by Büchel. Büchel relied on this claimed expertise in committing to create the Work of Art for exhibition at MASS MoCA.

12. Between Büchel's two visits to North Adams in the Fall of 2006, MASS MoCA continued to procure the required elements of the Work of Art. For example, MASS MoCA's Director, Joseph Thompson, sent an e-mail to Büchel on September 16, 2006 stating that the "[o]nly big things we haven't really nailed down yet are the house, and the big airplane fuselage. Nato [Thompson] is hauling a ton of useful junk in every day, and Richard [Criddle] has found great bar stools, and related materials. Going pretty well on that front, and we're just getting started."

13. In that same September 16, 2006 e-mail, Thompson also stated: "I'm terrified about the costs, by the way. So far, we have zero in sponsorships, nada, ... if you have any ideas for that, let me know, as I really have to get to work on that right away."

14. Although funding for the Work of Art was not Büchel's responsibility, he suggested to MASS MoCA, among other things, several foundations and sponsors that they might contact as possible funding sources.

Büchel waived any compensation for his efforts and provided information and ideas with respect to ways in which MASS MoCA could recoup funds expended with respect to the Work of Art.

15. From the very start, MASS MoCA had administrative and logistical difficulties that affected the completion of Büchel's Work of Art. A number of factors caused an almost three-week delay clearing the gallery of the previous exhibit. MASS MoCA did not procure or organize the necessary elements in a timely fashion. MASS MoCA also wasted time and money on the wrong materials, and it expended funds on the right materials but at unnecessarily high prices. To take but one example, as noted above, one of the elements in Büchel's model was an old mobile home. Instead of buying one of several options that Büchel recommended, MASS MoCA selected a slightly less expensive model, only to find that it was too big to fit into the gallery. In the end, a mobile home that Büchel had originally recommended was purchased. MASS MoCA also did not assign a project manager to Büchel until December 15, 2006, one day before the originally scheduled opening date.

16. Büchel returned to MASS MoCA in late October 2006 with the expectation that he would complete the Work of Art.

17. By the first week of December 2006, however, it became clear that the exhibition could not open on time due to the above-described delays. As a result, MASS MoCA posted the following explanation on its website:

For his first major U.S. museum exhibition, Christoph Büchel will transform MASS MoCA's football field-size gallery into an imagined temporary community housed in sea containers and trailers and including a playing field, a cinema, and more.

**Due to logistical complexities encountered by the museum in preparing galleries for Christoph Büchel's vast installation, the exhibition's official opening date ... will be re-scheduled...**

“While MASS MoCA is known for undertaking intricate and dramatically-scaled installations, this one is an order-of-magnitude more complex than anything we have attempted up to now, requiring, among other things, vast cement walls comprised of over 2 miles of cinder block, an immaculately detailed cinema, and thousands of specific found objects, some of which weigh over 20 tons” said MASS MoCA Director Joseph Thompson. “Because of these logistical challenges and some technical snags, the museum needs a bit more time to provide the support this extraordinary work deserves: we do not want to shortchange the quality of what promises to be a landmark work of art ....”

(Emphasis added.)

18. Büchel departed North Adams on December 17, 2006 for the upcoming holidays, as originally planned (and one day after the originally scheduled opening of the exhibition), but he intended to return to North Adams in early January to finish the Work of Art for a new opening date of March 3, 2007.

19. As of Büchel’s last day in North Adams the unfinished Work of Art reflected at least four months of work by Büchel, including approximately eight weeks spent by Büchel in residence at MASS MoCA.

20. After the opening was postponed, in anticipation of his return to North Adams to complete the Work of Art, Büchel cancelled two previously scheduled solo shows, including one at the Palais de Tokyo (a well known contemporary art museum) in Paris, France, which had been scheduled to open on January 31, 2007.

21. In late December, 2006, Büchel learned that MASS MoCA claimed no longer to be able to provide the necessary and agreed upon support to complete the Work of Art in the form that MASS MoCA originally agreed to fund and exhibit.

22. Over the next few months, MASS MoCA and Büchel discussed ways in which the Work of Art could be completed.

23. After Büchel left North Adams in December, 2006, he learned that MASS MoCA made a number of modifications to his unfinished Work of Art that he did not approve and that distorted his Work of Art.

24. Büchel also learned that, contrary to his express wishes, MASS MoCA was allowing access to the unfinished Work of Art to public officials, art critics, reporters, collectors, curators, and others without the consent of, or even notice to, Büchel.

25. Various accounts posted on internet art blogs indicate that others have also seen Büchel's unfinished Work of Art. *See, e.g.,* Charles Giuliano, *Summer Arts Season Launched in the Berkshires*, May 30, 2007 ("It seems that every art person I have spoken to, at one time or another, got to see the Buchel installation in progress"); *The Boston Globe's* "Exhibitionist" blog, May 23, 2007 (asking "who hasn't" seen the unfinished Work of Art).

26. In a March 28, 2007 article, *The Boston Globe* reported that both the Mayor of North Adams and the Governor of Massachusetts have seen the unfinished Work of Art.

27. In that *Boston Globe* article, Thompson "defended his right to bring 'friends of the museum, potential supporters, and colleagues' through the [unfinished] exhibit."

28. Finally, on March 28, 2007, Thompson wrote a letter to Büchel threatening to "make the unfinished installation safe to the public" and "allow visitor access" to it, referring to it as "'Training Ground for Democracy: Abandoned Work,' or some similar title."

29. In response, Büchel expressed a willingness to discuss a "satisfactory resolution regarding the exhibition," provided that MASS MoCA withdraw its unprecedented threat to show his unfinished Work of Art to the public and correct the false impression that there had been an "agreed-upon budget" that

he had caused to be exceeded. Büchel at no time consented to the display of his unfinished Work of Art or any of its component elements.

30. MASS MoCA refused these conditions. Instead, it announced that it was canceling the presentation of “Training Ground for Democracy” and opening another exhibition, “Made at MASS MoCA.” To get to that other exhibition, however, museum visitors must walk through Büchel’s unfinished Work of Art. As described on MASS MoCA’s website, [www.massmoca.org](http://www.massmoca.org):

To enter *Made at MASS MoCA*, visitors will pass through the Building 5 gallery housing the materials and unfinished fabrications that were to have comprised elements of *Training Ground for Democracy*. Reasonable steps have been taken to control and restrict the view of these materials, pending a court ruling which is being sought by MASS MoCA.

Thus, a visitor to Gallery 5 today still experiences Büchel’s (unfinished) Work of Art, but in a highly distorted form.

31. MASS MoCA announced that it had placed “view-restricting measures,” *i.e.*, tarps, to block certain elements of the Work of Art from view.

32. However, as shown in photographs in the *New York Times* (showing tarps that minimally obstruct the elements of the Work of Art) and on an internet blog (showing a museum visitor “peeking down” under MASS MoCA’s tarps to view “the cancelled show”), a visitor can easily see the Work of Art despite the so-called view-restricting measures. A July 1 article in *The Boston Globe* also describes how ineffective the “view-restricting measures” actually are:

As you follow a path between the fencing that leads through the unfinished installation, **you can see through openings** below the tarps parts of cars, trucks, trailers, storage containers, and other objects close to the ground. **And you can see rising above the fence** the second story of a white clapboard house, shipping containers stacked 20 or more feet high, cinder-block

walls topped by coils of barbed wire, a guard tower, and the upper part of an amusement-park carousel. At one end, there's an almost completely reconstructed interior of an old movie theater.

(Emphasis added.)

33. Büchel designed the Work of Art to be not merely a visual but also a physical experience whereby the visitor interacts with the design of the space itself. The ways that a visitor is moved through the Work of Art are as much a part of the meaning of the work as the objects within it. Thus, even if it were fully “tarped” (which it is not), MASS MoCA would nevertheless be publicly displaying Büchel’s unfinished Work of Art.

34. By publicly displaying Büchel’s unfinished Work of Art in this manner, MASS MoCA has shown, and continues to show, to the public a highly distorted version of the Work of Art in which some objects can be seen by the viewer and others cannot, thus distorting and modifying the Work of Art’s meaning and integrity in a manner prejudicial to Büchel’s reputation.

35. Because of MASS MoCA’s numerous public statements, the significant reporting on Büchel’s unfinished Work of Art by the press, including in *The New York Times*, *The Boston Globe*, and online at *Time Magazine* and *Newsweek*, numerous other reports posted on the internet, as well as the filing of this lawsuit, Büchel’s name and reputation are inextricably linked to his unfinished Work of Art. No part of the Work of Art can be shown without an association to him.

36. Indeed, as set forth in the July 1 article in *The Boston Globe*, “Whether or not the exhibition is clearly labeled ‘unfinished’ and whether or not Büchel is identified as its author, many people are going to judge him and his work on the basis of this experience.”



37. On its website, MASS MoCA states that it “is seeking a very narrow ruling only on the right to let the public view the materials assembled for the installation.” However, Thompson has publicly stated that the Work of Art is “90 percent completed,” and in a March 28, 2007 letter to Büchel, he referred to it as “works-in-progress” and “the unfinished installation.”

**FIRST COUNTERCLAIM: DECLARATORY JUDGMENT**  
**(Violation of the Visual Artists Rights Act)**

38. Büchel incorporates by reference the foregoing Counterclaim paragraphs as if fully set forth herein.

39. Büchel is the author of an unfinished work of visual art entitled “Training Ground for Democracy” and its component elements, as described above.

40. By filing its Complaint, MASS MoCA seeks a declaration that it is entitled to display Büchel’s unfinished Work of Art to the public.

41. VARA provides in pertinent part that the author of a work of visual art shall have the right “to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation....” 17 U.S.C. § 106A(a)(2).

42. VARA also provides that the author of a work of visual art shall have the right “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....” 17 U.S.C. § 106A(a)(3).

43. MASS MoCA seeks to display Büchel’s unfinished and intentionally distorted and modified work of visual art and the component elements thereof. Any such display would be prejudicial to his reputation.

44. Büchel's name is inextricably associated with the unfinished Work of Art. Büchel opposes the display of the unfinished, distorted and modified Work of Art.

45. Büchel never waived any of his rights under VARA.

46. By its Complaint, MASS MoCA in effect seeks to violate, and by its conduct to date has violated, Büchel's rights of attribution and integrity as protected by VARA, 17 U.S.C. §§ 101 *et seq.*

47. Therefore, a substantial, actual and justiciable controversy exists between Büchel and MASS MoCA.

48. Büchel respectfully requests a declaration that MASS MoCA cannot present to the public the unfinished Work of Art or any of its component elements.

49. Büchel respectfully requests injunctive relief enjoining MASS MoCA from any public exhibition or display of Büchel's unfinished Work of Art or any of its component elements with or without any "view-restricting measures."

50. Büchel also respectfully requests that the Court order MASS MoCA to dismantle and remove the unfinished, distorted and modified Work of Art from the Building 5 gallery.

**SECOND COUNTERCLAIM**  
**(Violation of the Visual Artists Rights Act)**

51. Büchel incorporates by reference the Counterclaim paragraphs 1-37 as if fully set forth herein.

52. MASS MoCA has intentionally distorted and modified the Work of Art in various ways without Büchel's involvement or approval in a manner prejudicial to Büchel's reputation.

53. Further, by placing "view-restricting measures" over Büchel's unfinished work of visual art but allowing the public to see and pass through the

work of visual art, MASS MoCA has intentionally distorted and modified Büchel's Work of Art in a manner prejudicial to his reputation.

54. On information and belief, MASS MoCA has also allowed numerous individuals to see and pass through Büchel's unfinished work of visual art, uncovered and without any "view-restricting measures."

55. By allowing the public to see and pass through Büchel's unfinished, distorted and modified Work of Art, over Büchel's express objections, MASS MoCA also has violated Büchel's right to prevent the use of his name as the author of a work of visual art that has been distorted and modified in a manner prejudicial to his reputation.

56. Büchel is entitled to recover damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including such damages as a result of MASS MoCA's willful conduct.

**THIRD COUNTERCLAIM**  
**(Violation of § 106(5) of the Copyright Act)**

57. Büchel incorporates by reference Counterclaim paragraphs 1-37 as if they were set forth here in full.

58. Büchel is the owner of the copyright to the Work of Art described above.

59. Büchel is a citizen of Switzerland, a signatory to the Berne Convention, and thus exempted from the preregistration and registration requirements of 17 U.S.C. § 411(a).

60. Büchel retains the exclusive right under § 106(5) of the Copyright Act to display the Work of Art publicly.

61. MASS MoCA has breached this right by displaying the Work of Art publicly without Büchel's consent.

62. MASS MoCA's conduct, as set forth above, violates the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

63. Büchel is entitled to recover damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including such damages as a result of MASS MoCA's willful conduct.

64. Büchel respectfully requests injunctive relief enjoining MASS MoCA from any further display of Büchel's unfinished Work of Art or any of its component elements with or without any "view-restricting measures."

65. Büchel also respectfully requests that the Court order MASS MoCA to dismantle and remove the unfinished Work of Art from the Building 5 gallery.

**FOURTH COUNTERCLAIM**  
**(Violation of § 106(2) of the Copyright Act)**

66. Büchel incorporates by reference Counterclaim paragraphs 1-37 as if they were set forth here in full.

67. Büchel is a citizen of Switzerland, a signatory to the Berne Convention, and thus exempted from the preregistration and registration requirements of 17 U.S.C. § 411(a).

68. As owner of the copyright in the Work of Art described above, Büchel retains the exclusive right under § 106(2) of the Copyright Act to prepare derivative works based upon the copyrighted work.

69. MASS MoCA has breached this right by preparing a version of the Work of Art that recasts, transforms and adapts the copyrighted work.

70. MASS MoCA's conduct, as set forth above, violates the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

71. Büchel is entitled to recover damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including such damages as a result of MASS MoCA's willful conduct.

72. Büchel respectfully requests injunctive relief enjoining MASS MoCA from any further display of Büchel's unfinished Work of Art, any derivative works thereof, or any of its component elements with or without any "view-restricting measures."

73. Büchel also respectfully requests that the Court order MASS MoCA to dismantle and remove the unfinished Work of Art from the Building 5 gallery.

**FIFTH COUNTERCLAIM**  
**(Violation of § 106(2) of the Copyright Act)**

74. Büchel incorporates by reference Counterclaim paragraphs 1-37 as if they were set forth here in full.

75. Büchel is a citizen of Switzerland, a signatory to the Berne Convention, and thus exempted from the preregistration and registration requirements of 17 U.S.C. § 411(a).

76. As owner of the copyright to the model and plans for the Work of Art described above, Büchel retains the exclusive right under § 106(2) of the Copyright Act to prepare derivative works based upon the copyrighted work.

77. MASS MoCA has breached this right by preparing a distorted version of the Work of Art that recasts, transforms and adapts the copyrighted model and plans.

78. MASS MoCA's conduct, as set forth above, violates the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

79. Büchel is entitled to recover damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including such damages as a result of MASS MoCA's willful conduct.

80. Büchel respectfully requests injunctive relief enjoining MASS MoCA from any further display of Büchel's unfinished Work of Art, any derivative works thereof, or any of its component elements with or without any "view-restricting measures."

81. Büchel also respectfully requests that the Court order MASS MoCA to dismantle and remove the unfinished Work of Art from the Building 5 gallery.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Defendant/Plaintiff-in-Counterclaim Christoph Büchel prays for judgment as follows:

1. enter judgment in favor of the defendant on MASS MoCA's claim for declaratory judgment;
2. on the First Counterclaim, enter judgment in favor of the defendant/plaintiff-in-counterclaim on Büchel's claim for declaratory judgment; enjoin MASS MoCA from any public exhibition or display of Büchel's unfinished, distorted and modified Work of Art or any of its component elements with or without "view-restricting measures"; and order MASS MoCA to dismantle and remove the unfinished, distorted and modified Work of Art from the Building 5 gallery;
3. on the Second Counterclaim, award damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including as a result of MASS MoCA's willful conduct, pursuant to the Copyright Act, 17 U.S.C. §§ 101 *et seq.*;
4. on the Third Counterclaim, award damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including as a result of MASS MoCA's willful conduct, pursuant to the Copyright Act, 17 U.S.C. §§ 101 *et seq.*; and enjoin MASS MoCA from any public exhibition or display of Büchel's unfinished Work of Art or any of its component elements with or without "view-restricting measures"; and order MASS MoCA to dismantle and remove the unfinished Work of Art from the Building 5 gallery;

5. on the Fourth Counterclaim, award damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including as a result of MASS MoCA's willful conduct, pursuant to the Copyright Act, 17 U.S.C. §§ 101 *et seq.*; and enjoin MASS MoCA from any public exhibition or display of Büchel's unfinished Work of Art, any derivative works thereof, or any of its component elements, with or without "view-restricting measures"; and order MASS MoCA to dismantle and remove the unfinished art Work of Art from the Building 5 gallery;
6. on the Fifth Counterclaim, award damages, including actual damages, and any gains, profits, and advantages obtained by MASS MoCA as a result of its conduct, or statutory damages, including as a result of MASS MoCA's willful conduct, pursuant to the Copyright Act, 17 U.S.C. §§ 101 *et seq.*; and enjoin MASS MoCA from any public exhibition or display of Büchel's unfinished Work of Art, any derivative works thereof, or any of its component elements, with or without "view-restricting measures"; and order MASS MoCA to dismantle and remove the unfinished art Work of Art from the Building 5 gallery;
7. award Büchel his costs and expenses, including attorneys' fees, to the extent allowed by law, including under the Copyright Act and VARA, 17 U.S.C. §§ 101 *et seq.*; and
8. enter such other and further relief as the Court deems just and proper.



**CHRISTOPH BÜCHEL,**

By his attorneys,

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Dated: July 2, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 2, 2007.

/s/ Jonathan M. Albano