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## **HARDLY A WALK IN THE PARK: COURTS' HOSTILE TREATMENT OF SITE-SPECIFIC WORKS UNDER VARA**

“Men do change, and change comes like a little wind that ruffles the curtains at dawn, and it comes like the stealthy perfume of wildflowers hidden in the grass.”—John Steinbeck<sup>1</sup>

### I. INTRODUCTION

As you walk through Grant Park on your way to downtown Chicago, you enjoy the ordered, natural splendor of two beautiful elliptical fields of wildflowers.<sup>2</sup> The pleasure is further amplified by the seasonal transformation of nature's palette that brings forth a kaleidoscope of colors and patterns as new flowers emerge and older ones fade.<sup>3</sup> Now, after twenty years of enjoying this park, one day you discover that sixty percent of the flowers have been destroyed, and those remaining have been abandoned to grow without care.<sup>4</sup> Imagine the feelings of the artist who created this living canvas when witnessing the culmination of his life's work destroyed by the Chicago Park District without notice after twenty

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1. JOHN STEINBECK, *SWEET THURSDAY* 20 (The Viking Press 1954).

2. See *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at \*1, (N.D. Ill. Sept. 29, 2008).

3. See generally *id.*; Ray Quintanilla, *Bed of Prairie Wildflowers Help Wake Up Downtown*, CHI. TRIB., Aug. 7, 1994, at 1. For images of *Wildflower Works I*, see Chapman Kelley, <http://www.chapmankelley.com/Gallery.asp?GalleryID=18115&AKey=JLBDK6W2> (last visited Nov. 15, 2009).

4. See generally *Kelley*, 2008 WL 4449886, at \*3; Hal Dardick, *Garden too wild for new park landscape; Wildflower artist sees part of work now destroyed*, CHI. TRIB., July 18, 2004, at 4. For photographs of the modified *Wildflower Works I*, see Matthias Merkel Hess, *Wildflower Works Follow Up* (June 30, 2009), <http://www.sustainablepractice.org/2009/06/30/wildflower-works-followup>.

years of tending and sustaining his artistic vision.<sup>5</sup> What should the artist do in this situation? Should the Park District be allowed to change the work simply because it is on park property? If not, what remedies should the artist have to protect his work from destruction?

In 1990, through the passage of the Visual Artists Rights Act (“VARA”), Congress enacted protection for certain violations against art such as the alteration or destruction of a piece of artwork.<sup>6</sup> However, in part because the Act was implemented to appease an international standard, VARA has proven to be ineffective in protecting artists’ rights, because it has been perceived to threaten common law property rights.<sup>7</sup> This has caused federal courts to interpret VARA narrowly, which further limits the protection of artwork.<sup>8</sup> In *Kelley v. Chicago Park District*, the Northern District of Illinois refused to extend VARA protection to the plaintiff’s work, which was entitled *Wildflower Works I*, because the court determined that the work was not copyrightable and that it was site-specific, thus excluding the work from protection under VARA.<sup>9</sup>

In Part II, this Note will look at the historical background of moral rights, focus on the United States’ adoption of VARA, and describe the courts’ treatment of these cases, particularly of site-specific art. Part III will summarize the *Kelley* opinion, highlighting how the district court refused to extend VARA protection because the work was not copyrightable and because it was site-specific. Part IV will analyze the district court’s opinion to illuminate how and why the courts fear granting VARA protection when it goes against the common law view of property

5. See *Kelley*, 2008 WL 4449886, at \*3.

6. For the text of VARA, see 17 U.S.C. §§ 106A, 113 (2006).

7. See Francesca Garson, *Before that Artist Came Along, It was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL’Y 203, 213 (2001); Natalia Thurston, *Buyer Beware: the Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 705 (2005).

8. See generally Rebecca Stuart, *A Work of Heart: A Proposal for a Revision of the Visual Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 660-69 (2007) (summarizing cases where the courts narrowly interpret VARA).

9. *Kelley*, 2008 WL 4449886, at \*6.

in the United States. In addition, this part will emphasize the court's incorrect narrowing of VARA because VARA's legislative history and plain language protect site-specific work. Finally, in Part V, this Note will suggest ways for site-specific artists to protect their rights through effective contracts in light of the lack of protection that they have received from the interpretation of VARA.

The district court's narrow interpretation of VARA and its hostility to the plaintiff's claim illustrates that the courts, fearing the restriction of property rights, have mistakenly limited the scope of VARA to the point that it is no longer a viable source of protection for site-specific artists. Thus, unless Congress and the courts take steps to strengthen VARA rights, site-specific artists will be forced to revert back to the less effective and protective pre-VARA claims provided by contract law.

## II. BACKGROUND

### *A. What are Moral Rights?*

Originally championed in France and other civil law countries, moral rights or *droit moral*, protect the artist's non-economic rights, including the artist's reputation and the integrity of his work, even after the sale and transfer of the piece of artwork.<sup>10</sup> Arising out of the theory of natural rights, the policy behind moral rights is that "an author has the right to reap the fruits of his creations, obtain rewards for his contributions to society, and protect the integrity of his creations as extensions of his

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10. Amy M. Alder, *Against Moral Rights*, 97 CAL. L. REV. 263, 266 (2009); Kristin Robbins, *Artists Beware: The Effect of the First Circuit's Refusal to Apply VARA to Site-Specific Art*, 9 TUL. J. TECH. & INTELL. PROP. 395, 396-97 (2007). The recognized moral rights include: attribution, integrity, disclosure, resale royalty, withdrawal and protection from excessive criticism. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 173 (Carolina Academic Press 2nd ed. 2008). For more information on the individual rights, see MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8D.03-05 (Matthew Bender & Company, Inc. 2009); Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41 (1998).

personality.”<sup>11</sup> Based on this theory, civil law countries group moral rights with their copyright statutes, because they consider moral rights to be integral to copyright law as rights existing in “works of authorship.”<sup>12</sup> Both economic copyright and moral rights are rights of the author in his work and are thus protected and analyzed within similar framework.<sup>13</sup>

### *B. Moral Rights in the United States*

The United States and other common law countries have been slow to adopt moral rights in their copyright laws.<sup>14</sup> A reason for this resistance is that the copyright system under common law countries is based on utilitarianism, the object of which is to create a system to “‘encourage artists to create’ and ‘to enrich[] society at the least cost to the consumers’” by granting economic rights to the artists.<sup>15</sup> This utilitarian focus on economic incentives does not support the theory of moral rights, because moral rights do not facilitate commerce.<sup>16</sup>

Furthermore, moral rights conflict with the common law of property, which emphasizes the importance of complete control over one’s property.<sup>17</sup> In allowing the artist to retain moral rights to his work, this control is limited to some extent.<sup>18</sup> For example, suppose an artist sold his painting to a restaurant owner who displays it in his restaurant and attributes the painting to the artist. After owning the painting for a number of years, the owner decides to “improve” the painting and draws a big smiley face in the middle of the painting, but he continues to display it as the artist’s work. In a country protecting the artist’s right of

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11. Stuart, *supra* note 8, at 672. See also J. Carolina Chavez, *Copyrights “Elephant in the Room”: A Realistic Look at the Role of Moral Rights in Modern American Copyright*, 36 AIPLA Q.J. 125, 131 (2008).

12. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 360 (2006).

13. *Id.* at 360.

14. GERSTENBLITH, *supra* note 10, at 173. See also Garson, *supra* note 7, at 214; Thurston, *supra* note 7, at 705.

15. Chavez, *supra* note 11, at 127; Stuart, *supra* note 8, at 672.

16. Stuart, *supra* note 8, at 673.

17. GERSTENBLITH, *supra* note 10, at 173.

18. *Id.*

attribution and integrity, the artist could bring a legal action to remove his name from being associated with the painting and recover damages for its alteration.<sup>19</sup> This concept is at odds with the common law of property because it emphasizes the importance of an owner having complete control over his property.<sup>20</sup> Under common law, the restaurant owner was within his rights to draw a smiley face.<sup>21</sup> In a country that recognizes moral rights, the artist retains a right to prevent such alteration in his work, which limits the ownership rights of the property owner.<sup>22</sup>

The United States has reluctantly incorporated some moral rights protection into its statutory law.<sup>23</sup> In 1988, after over 100 years of debate, the United States finally ratified the Berne Convention in order to gain more protection for American intellectual property, such as computer software, but with the express caveat that the ratification did not incorporate moral rights into United States laws.<sup>24</sup> The Berne Convention codified moral rights in Article 6*bis*.<sup>25</sup> Congress felt that artists had sufficient

19. See generally Liemer, *supra* note 10, at 47-52; NIMMER & NIMMER, *supra* note 10, at § 8D.03-04.

20. GERSTENBLITH, *supra* note 10, at 173.

21. See generally Garson, *supra* note 7, 214; GERSTENBLITH, *supra* note 10, at 173; Thurston, *supra* note 7, at 702; 714-16.

22. Thurston, *supra* note 7, at 701-02; 716.

23. Karen M. Corr, *Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U. L. REV. 855, 856-57 (1989); Stuart, *supra* note 8, at 652.

24. GERSTENBLITH, *supra* note 10, at 187. The Berne Convention was first ratified in September 9, 1886. Congress ratified it with the specific provision: CERTAIN RIGHTS NOT AFFECTED. -- The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law – (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the work, that would prejudice the author's honor or reputation.

An Act to amend title 17, United States Code, to implement the Berne Convention for the Protection of Library and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes, Pub. L. No. 100-568 (1988).

25. Chavez, *supra* note 11, at 135. Article 6*bis* states: Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to

protection with other causes of action such as defamation, unfair competition, breach of contract, and violation of the Lanham Act.<sup>26</sup> Yet artists have rarely brought successful actions under these claims, because the courts would often discern that the artist was trying to infer moral rights protection and thus would refuse to grant the protection until legislative action was taken.<sup>27</sup>

### *C. The Visual Artists Rights Act of 1990*

Eventually, in 1990, moral rights advocates persuaded Congress to incorporate moral rights into the Copyright Act with the passage of the Visual Artists Rights Act (“VARA”).<sup>28</sup> VARA was intended to cultivate “a climate of artistic worth and honor that encourages the author in the arduous act of creation” and “protect[] both the reputations of certain visual artists and the

object to any distortion, mutilation or other modification of, or derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Chavez, *supra* note 11, at 135 n.59 (quoting Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1986, revised July 24, 1971, 25 U.S.T. 1341, 28 U.N.T.S. 221).

26. GERSTENBLITH, *supra* note 10, 187; Stuart, *supra* note 8, at 652.

27. GERSTENBLITH, *supra* note 10, 187; Stuart, *supra* note 8, at 652. *See also*, e.g., *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1052 (2d Cir. 1988) (when the artist tried to prevent the removal of his sculpture on the basis of a violation of his First Amendment and Due Process rights, the court held that neither were violated based on the fact that he had “no protected property interest in the continued display” of his sculpture); *Vargas v. Esquire, Inc.* 164 F.2d 522, 527 (7th Cir. 1947) (when plaintiff used a contract action to argue for right of attribution, the court commented that “what plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries”); *Crimi v. Rutgers Presbyterian Church in New York*, 89 N.Y.S.2d 813 (N.Y. App. Div. 1949) (when plaintiff used a contract action to prove that the defendant should have given him notice before removing mural, the court refused to hold that the plaintiff had any interests in the mural outside of the contract).

28. Alder, *supra* note 10, at 266. *See also* Roberta Rosenthal Kwall, *How Fine Art Fares Post-VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997) (“Significantly, on the last day of the 101st Congress, a major bill was passed which authorized eighty-five new federal judgeships. Sponsors of this bill had to include several unrelated measures in order to appease senators who otherwise would oppose the federal judgeships bill. One such measure was VARA . . .”).

works of art they create.”<sup>29</sup>

In order to be protected under VARA, a work must: (1) be copyrightable, (2) fall within the categories designated by the statute, and (3) not be subject to an exception.<sup>30</sup> First, the artwork must be copyrightable under the Copyright Act of 1976.<sup>31</sup> In order to be copyrightable, a work must be an “original [work] of authorship fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>32</sup> Works of authorship include “pictorial, graphic, and sculptural works.”<sup>33</sup> The Copyright Act does not protect “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>34</sup>

Second, the work must be a “work of visual art” as defined by VARA’s positive and negative arms.<sup>35</sup> The positive arm protects only works of visual art defined as “a painting, drawing, print, or sculpture . . . or a still photographic image produced for exhibition purposes only.”<sup>36</sup> The works must either be a single copy or “in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”<sup>37</sup> The negative arm

29. H.R. REP. NO. 101-514, at 5 (1990).

30. 17 U.S.C. § 101 (2006).

31. *Id.*

32. *Id.* at § 102(a).

33. *Id.* at § 102(a)(5).

34. *Id.* at § 102(b).

35. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2nd Cir. 1995).

36. 17 U.S.C. § 101.

37. *Id.* In addition, the medium of the artwork stipulates certain requirements such as the artist’s signature that must be met in order to fall under VARA. The statute reads:

A “work of visual art” is--

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

excludes from protection many utilitarian and mass produced works including “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication,” advertising material and works for hire.<sup>38</sup>

VARA further narrows the rights extended to artwork by stipulating four exceptions to the categories of protected artwork.<sup>39</sup> First, an artist’s right of integrity is not violated by “the modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials.”<sup>40</sup> Second, “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” does not violate the right of integrity or the right to prevent destruction of a work of recognized stature.<sup>41</sup> Third, the rights of integrity and attribution will “not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item” in the negative arm of VARA.<sup>42</sup>

Finally, the fourth “building exception” allows artwork that “has been incorporated in or made part of a building” to be removed without violating the artist’s right of integrity or right to prevent destruction of a work of recognized stature.<sup>43</sup> If removal of the work “will cause the destruction, distortion, mutilation, or other modification of the work,” the building owner may remove it if it

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(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

*Id.*

38. *Id.*

39. Laura Flahive Wu, *Massachusetts Museum of Contemporary Art v. Büchel: Construing Artists’ Rights in the Context of Institutional Commissions*, 32 COLUM. J.L. & ARTS 151, 158 (2008).

40. 17 U.S.C. § 106A(c)(1).

41. *Id.* at § 106A(c)(2).

42. NIMMER & NIMMER, *supra* note 10, at § 8D.06(B)(2) (quoting 17 U.S.C. § 106A(c)(3) and 17 U.S.C. § 101). *See also* Wu, *supra* note 39, at 158.

43. 17 U.S.C. § 113(d)(1)(A)-(B).

falls into one of two categories.<sup>44</sup> For works installed before VARA's effective date of June 1, 1991, the author must have consented to the installation of the work.<sup>45</sup> For works installed after June 1, 1991, the owner and the artist must have signed a contract stipulating installation with the waiver of integrity rights if the work is removed.<sup>46</sup> If the artwork can be removed "without the destruction, distortion, mutilation or other modification of the work," then the owner may remove the work only if he "made a diligent, good faith attempt without success to notify the author of the owner's intended action" or "the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal."<sup>47</sup>

After a court determines that the artwork is protected under VARA, the court then must interpret whether the artist is granted the right of attribution and integrity.<sup>48</sup> The right of attribution, which protects the artist's name and reputation, gives the artist the right "to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create."<sup>49</sup> If the work suffers "distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation," then the artist may stop his name from being associated with the work.<sup>50</sup>

The right of integrity allows the artist to bring an action in order "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."<sup>51</sup> In addition, an artist may "prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that

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44. *Id.*

45. *Id.* at § 113(d)(1)(B). The effective date is six months after the December 1, 1990 enactment, which is June 1, 1991. *Id.* at § 106A.

46. *Id.* at § 113(d)(1)(B).

47. *Id.* at § 113(d)(2)(A)-(B).

48. *Id.* at § 106A(a)(1)(A)-(B).

49. 17 U.S.C. § 106A(a)(1)(A)-(B). *See also* Liemer, *supra* note 10, at 47-49; NIMMER & NIMMER, *supra* note 10, at § 8D.06(B)(1).

50. *Id.* at § 106A(a)(2).

51. *Id.* at § 106A(a)(3)(A). *See also* Liemer, *supra* note 10, at 50-52; NIMMER & NIMMER, *supra* note 10, at § 8D.06(C)(1).

right.”<sup>52</sup> VARA does not define recognized stature, but case law has found that the artist must show “(1) that the visual art in question has “stature,” *i.e.* is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society.”<sup>53</sup> Artists are entitled to VARA rights until their death.<sup>54</sup> These rights may be waived in writing but may not be transferred at anytime.<sup>55</sup>

Given the narrow scope and complicated nature of VARA, it can be extremely difficult for an artist to bring claims under VARA successfully.<sup>56</sup> In fact, since its passage, only one artist has won a claim under VARA.<sup>57</sup> Moreover, fearing both judicial activism and restraint on personal property, the courts insist on a narrow interpretation of the statute so that the work often falls outside the scope of protection.<sup>58</sup>

52. *Id.* at § 106A(a)(3)(B).

53. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994). *See, e.g., Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *NIMMER & NIMMER*, *supra* note 10, at § 8D.06(C)(1).

54. 17 U.S.C. § 106A(d)(1).

55. *Id.* at § 106A(e).

56. *Stuart*, *supra* note 8, at 659. *See also Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006) (holding that VARA does not protect site-specific work); *Pollara v. Seymour*, 344 F.3d 265, 366 (2nd Cir. 2003) (holding that, even though the work was artistic, it was used to promote or advertise which fell outside the scope of VARA protection); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2nd Cir. 1995) (holding that VARA did not protect the work because it was a work for hire by applying a multiple factor test and reversing the district court’s conclusion).

57. *Stuart*, *supra* note 8, at 658. *See also Martin*, 192 F.3d at 613 (holding that the artist’s work was of recognized stature and he could recover for its destruction).

58. *See generally Stuart*, *supra* note 8, at 660-69. In *Phillips*, the First Circuit justified its holding to exclude site-specific art from VARA protection by stating:

Once a piece of art is considered site-specific, and protected by VARA, such objects could not be altered by the property owner absent consent of the artist. Such a conclusion could dramatically affect real property interests and laws . . . If such protection is necessary, Congress should do the job. We cannot do it by rewriting the statute in the guise of statutory interpretation.

*Phillips*, 459 F.3d at 142-43.

*D. The Treatment of Site-Specific Artwork under VARA*

Site-specific art, a type of integrated art, incorporates the location and environment into the artwork.<sup>59</sup> The purpose is, “to become part of its locale, and to restructure the viewer’s conceptual and perceptual experience of that locale through the artist’s intervention.”<sup>60</sup> The location is an essential element of the piece and integral to the artistic vision.<sup>61</sup> Government agencies and private owners commission site-specific work in order to beautify and enhance a building or public area.<sup>62</sup>

*1. The First Circuit’s Opinion in Phillips v. Pembroke Real Estate*

In *Phillips v. Pembroke Real Estate, Inc.*, the First Circuit, fearing the restraint of site-specific art on real property, adopted a bright-line rule and held that VARA did not protect site-specific art.<sup>63</sup> David Phillips, a sculptor on commission from Pembroke Real Estate, Inc., designed twenty-seven sculptures for Eastport Park in Boston, incorporating the location into the design and the placement of the sculptures.<sup>64</sup> When Pembroke decided to redesign the Park, requiring the alteration and relocation of his sculptures, Phillips brought an action under VARA for injunctive relief to prevent removal of his sculptures on the grounds that

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59. *Phillips*, 459 F.3d at 129. Integrated art “is comprised of two or more physical objects that must be presented together as the artist intended for the work to retain its meaning.” *Id.* See also Carrie Jones, *Site-Specific Art Parks on Moral Ground: Distilling Old Whine in New Battles Over the Visual Artists Rights Act*, 9 COMP. L. REV. & TECH. J. 355, 380-85 (2005); Lauren Ruth Spotts, *Phillips has left VARA Little Protection for Site-Specific Artists*, 16 J. INTELL. PROP. L. 297, 300-05 (2009).

60. Spotts, *supra* note 59, at 300 (quoting Guggenheim Museum, Site-specific art/Environmental art, [http://www.guggenheimcollection.org/site/movement\\_works\\_Site\\_specific\\_art\\_Environmental\\_art\\_0.html](http://www.guggenheimcollection.org/site/movement_works_Site_specific_art_Environmental_art_0.html)).

61. See Jones, *supra* note 59, at 380-81

62. Jones, *supra* note 59, at 380; Spotts, *supra* note 59, at 301-02.

63. *Phillips*, 459 F.3d at 143. For other site-specific cases, see *Bd. of Managers of Soho Int’l Arts Condo. v. City of N.Y.*, No. 01 Civ. 1226 (DAB), 2003 WL 21403333, at \*1 (S.D.N.Y. June 17, 2003); *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, at \*1 (S.D.N.Y. Dec. 3, 1997).

64. *Phillips* 459 F.3d at 129-30.

removal would destroy his work conceptually.<sup>65</sup> The First Circuit held that VARA did not protect site-specific art.<sup>66</sup>

In its decision, the First Circuit rejected the district court's analysis that VARA protected site-specific art.<sup>67</sup> The district court held that "a work of visual art" under VARA included site-specific art, but "the public presentation exception permits the removal of site-specific art."<sup>68</sup> The First Circuit found this argument to be unpersuasive because the very removal of a site-specific work would destroy the work and the statute would not protect the artwork but then allow its destruction.<sup>69</sup>

Second, the First Circuit rejected Phillips's "dual regime" argument that VARA has a different standard depending on the type of art.<sup>70</sup> Phillips argued that the public presentation exception should only apply to "plop-art" that does not incorporate the environment into its surroundings, such as moving a painting to another wall.<sup>71</sup> The First Circuit found his argument to be problematic because it "would require [the court], essentially, to rewrite VARA" and go against the plain language of the statute.<sup>72</sup> Rejecting this argument, the First Circuit drew a bright line excluding site-specific artwork from protection under VARA.<sup>73</sup> The District Court for the Northern District of Illinois in *Kelley v. Chicago Park District*, the subject of this note, relied heavily on the First Circuit's holding.

### III. THE OPINION IN KELLEY V. CHICAGO PARK DISTRICT

#### *A. Facts and Procedural History*

In 1984, Chapman Kelley, an internationally known artist, received permission from the Chicago Park District to create an

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65. *Id.* at 128, 131-32, 140.

66. *Id.* at 143.

67. *Id.* at 139-40.

68. *Id.* at 140.

69. *Phillips*, 459 F.3d at 140.

70. *Id.* at 140.

71. *Id.* at 134; 140-43.

72. *Id.* at 142.

73. *Id.* at 143.

exhibit entitled *Wildflower Works I* (“*Wildflower*”).<sup>74</sup> In the initial permit, the Park District gave Kelley the right to use its land to display his work.<sup>75</sup> Kelley was responsible for the expenses required to install and maintain this work.<sup>76</sup> The permit included a clause that allowed the Park District to request the removal of *Wildflower* after ninety days of notice.<sup>77</sup> In June 1984, Kelley planted *Wildflower* in Grant Park.<sup>78</sup> It “consisted of two elliptical shapes, formed by gravel and metal edging that enclosed two beds of wildflowers, which were laid out in accordance with Kelley’s design.”<sup>79</sup> *Wildflower* received national attention from the media and government officials.<sup>80</sup>

In 1988, when the Park District gave Kelley ninety days notice to terminate the permit, Kelley filed a lawsuit in the Northern District of Illinois claiming that the Park District was violating his First Amendment rights.<sup>81</sup> The Park District settled this case by agreeing to renew the permit for another year, with a clause setting forth the property rights of both parties in respect to *Wildflower*.<sup>82</sup>

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74. Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at \*1. (N.D. Ill. Sept. 29, 2008). For information on Chapman Kelley’s career and accomplishments, see Brief of Petitioner-Appellant at 2-3, Kelley v. Chi. Park Dist., No. 08-3701 & No. 08-3712 (7th Cir. Apr. 13, 2009), available at <http://www.scribd.com/doc/14288104/Chapman-Kelley-Opening-Brief-in-the-7th-Cir-April-13-2009>; Chapman Kelley.com, <http://www.chapmankelley.com/Asset.asp?AssetID=6098&AKey=JLBDK6W2>.

75. Kelley, 2008 WL 4449886, at \*1.

76. *Id.*

77. *Id.* The clause states: “[t]his installation is subject to a 90 day notice to remove the planting upon written notice from the General Superintendent.” *Id.*

78. *Id.*

79. *Id.* For photographs of the completed *Wildflower*, see *supra* note 3.

80. *Id.* at \*2.

81. Kelley, 2008 WL 4449886, at \*2.

82. *Id.* The clause stated:

The planting material is the property of Mr. Chapman Kelley. If the Chicago Park District does not extend the Permit by September 1, 1989, Mr. Kelley may remove the planting material. If this Permit is not extended by September 1, 1989, the permittees are not required to restore the planted area to its original condition . . . . This agreement does not create an proprietary interest for Chicago Wildflower Works, Inc. [a non-profit corporation associated with the exhibit], and/or Mr.

The Park District renewed the permit in 1989, 1990, and 1992.<sup>83</sup> The last permit expired on September 30, 1994, but Kelley continued to maintain *Wildflower* without a permit until June 9, 2004.<sup>84</sup> In March 2004, the Park District commissioner Margaret Burroughs allegedly told Kelley and the President of the Wildflower Works, Inc., “[y]ou’re still there, aren’t you? That’s all you need to do,” which they took to mean no further permit was needed.<sup>85</sup>

In May 2004, the Park District decided to alter and change the area containing *Wildflower*.<sup>86</sup> On June 10, 2004, Kelley attended a planning meeting to discuss the changes, but he did not approve of the options.<sup>87</sup> Despite his disapproval, the Park District “reduced the wild flower-planted spaces . . . from roughly 66,000 square feet to under 30,000 square feet, and reconfigured the two ellipses as rectilinear shapes. The wildflower beds were edged with new evergreen hedges.”<sup>88</sup>

Kelley filed this lawsuit in the Northern District of Illinois requesting damages for a violation of his right of integrity and breach of contract.<sup>89</sup> The district court held that VARA does not protect *Wildflower* but that the Park District had breached its implied contract.<sup>90</sup> The case is currently on appeal to the Seventh Circuit.<sup>91</sup>

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Chapman Kelley in continuing to operate and maintain the Wildflower Garden Display after September 1, 1989.

*Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at \*3.

87. *Kelley*, 2008 WL 4449886, at \*3.

88. *Id.* For photographs of the reconfiguration, see *supra* note 4.

89. *Id.* at \*1.

90. *Id.* at \*6, \*8.

91. See Brief of Petitioner-Appellant, *supra* note 74; Martha Lufkin, *Artist Chapman Kelley Launches Federal Appeal over Chicago Wildflower Work*, ART NEWSPAPER, June 4, 2009, <http://www.theartnewspaper.com/articles/Artist%20Chapman%20Kelley%20launches%20federal%20appeal%20over%20Chicago%20Wildflower%20work/17459>.

*B. The District Court's Discussion**1. VARA Does Not Protect Wildflower Works I.*

The district court began its analysis by determining that *Wildflower* is a work of visual art.<sup>92</sup> VARA defines a “work of visual art” as “a painting, drawing, print or sculpture” but does not define these terms.<sup>93</sup> The district court pointed to “a tension between the law and the evolution of ideas in modern and avant garde art; the former requires legislatures to taxonomize artistic creations, whereas the latter is occupied with the expanding definition of what we accept to be art.”<sup>94</sup> The court must, therefore, find a balance between adhering to the “‘plain and ordinary’ meanings” of art and taking into account the changing concept of art.<sup>95</sup> In order to achieve this balance, the court considered both the dictionary definition of the art terms, as well as testimony from art experts.<sup>96</sup> The court concluded that *Wildflower* was both a sculpture and a painting, and, therefore, “a work of visual art” as stipulated by VARA.<sup>97</sup>

Second, the court excluded *Wildflower* from VARA protection by determining that it lacked originality and, thus, was not

92. *Kelley*, 2008 WL 4449886, at \*4-\*5.

93. *Id.* at \*3-\*4.

94. *Id.* at \*4.

95. *Id.*

96. *Id.* at \*5. The district court defined sculpture as “a three-dimensional work of art,” and heard testimony suggesting that “any non-two dimensional art form . . . including environmental art and some conceptual art” should be included as well. *Id.* This led the court to find that *Wildflower* was a sculpture because “the manipulation of the flowers, metal, and gravel into an elliptical shape fits within the broadest of the definitions of sculpture.” *Id.* For defining a painting, the court considered the testimony that *Wildflower* “was conceived as a painting to be viewed from a height, and that many paintings are, in fact, three dimensional” and the definition of paint, which included “to decorate, adorn, or variegate by applying lines and colors.” *Id.* Applying these definitions, the court found *Wildflower* to be a painting because “an exhibit that corrals the variegation of wildflowers in bloom into pleasing oval swatches, as *Wildflower Works* did, could certainly fit within some of the above definitions of a painting.” *Id.* (italics added).

97. *Id.*

copyrightable.<sup>98</sup> Under the Copyright Act, in order for an object to be copyrightable, it must be an “original [work] of authorship fixed in any tangible medium of expression.”<sup>99</sup> Under the same analysis for finding *Wildflower* to be “a work of visual art,” the district court determined that *Wildflower* fit into the categories of “pictorial, graphic and sculptural works.”<sup>100</sup> However, the district court found that *Wildflower* was not original, because Kelley did not adequately prove originality.<sup>101</sup> Therefore, *Wildflower* was not copyrightable and not protected by VARA.<sup>102</sup>

### 2. VARA Does Not Protect Site-Specific Artwork.

Furthermore, the court stated that even if *Wildflower* was copyrightable, VARA would not protect it because *Wildflower* was site-specific.<sup>103</sup> The district court concluded that *Wildflower* was site-specific, because Kelley deliberately chose the location in order to incorporate Chicago’s skyline into his artistic vision and had characterized it as site-specific in his deposition.<sup>104</sup> Noting that few cases deal with site-specific issues, the district court found the First Circuit’s reasoning in *Phillips* to be persuasive and applied the First Circuit’s *Phillips* holding that VARA does not protect site-specific work.<sup>105</sup> The district court found that VARA did not protect *Wildflower* because it was site-specific.<sup>106</sup>

### 3. The Park District Breached the Implied Contract.

Although the court determined that *Wildflower* was not protected under VARA, the court found that the Park District breached the implied contract by not providing Kelley with reasonable notice before it reconfigured *Wildflower*.<sup>107</sup> The court

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98. *Kelley*, 2008 WL 4449886, at \*6.

99. *Id.* at \*5 (citing 17 U.S.C. § 102)

100. *Id.* at \*6.

101. *Id.* at \*6.

102. *Id.* at \*6.

103. *Id.* at \*6.

104. *Kelley*, 2008 WL 4449886, at \*7.

105. *Id.* at \*6-\*7.

106. *Id.* at \*7

107. *Id.* at \*8.

found that Burroughs's statement constituted an implied contract to extend the temporary permit.<sup>108</sup> The court pointed out that even though the temporary permit did not include the ninety-day notice of the first permit, it gave Kelley the right to remove his work when the permit expired.<sup>109</sup> Thus, the Park District should have given him a reasonable amount of time to remove the work, which the court found to be ninety days.<sup>110</sup> The court held that the Park District breached this implied contract.<sup>111</sup>

*C. The District Court awarded Kelley One Dollar in Damages.*

Finally, the court discussed Kelley's request for damages and determined that Kelley did not adequately prove his damages to a reasonable degree of certainty.<sup>112</sup> Kelley wanted damages "for the material removed by the Park District," which would be calculated by "the value of the plants that Kelley could have removed, less the costs of removal."<sup>113</sup> Kelley's expert witness estimated the cost of the wildflower plants in *Wildflower* but did not take into account "the approximately 30,000 square feet of Kelley's wildflowers that remain in Grant Park, the percentage of *Wildflower Works* that had been overtaken by invasive weeds by 2004, the wildflowers removed during the garden's reconfiguration but replanted afterward, or the cost to Kelley of removing and transporting those wildflowers . . . ."<sup>114</sup> Without this additional evidence, the court concluded that he did not prove damages to a reasonable degree of certainty and awarded him one dollar.<sup>115</sup>

#### IV. ANALYSIS AND IMPLICATIONS OF KELLEY

The district court's decision in *Kelley* highlights how the courts'

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108. *Id.*

109. *Id.*

110. *Kelley*, 2008 WL 4449886, at \*8.

111. *Id.*

112. *Id.* at \*9.

113. *Id.*

114. *Id.* (italics added).

115. *Id.*

narrow interpretation of VARA has limited its usefulness in protecting the moral rights of artists. This section will first explore the district court's adoption of *Phillips* to illustrate the court's incorrect interpretation and consequent narrowing of VARA in relation to site-specific work. It will analyze the First Circuit's flawed reasoning and examine VARA's plain language and legislative intent to determine that VARA protects site-specific artwork. Second, it will explore the real property policy concern underlying the courts' decisions in *Kelley* and *Phillips*. By focusing on the district court's flawed reliance on *Phillips* and its analysis of originality, this section will also highlight why courts mistakenly place undue weight on this policy.

#### *A. Incorrect Narrowing of VARA: Site-Specific Work*

In *Kelley*, the district court's decision on site-specific work illustrates how courts incorrectly interpret VARA to limit the category of artwork under its protection. First, this section will explain the district court's incorrect application of the faulty holding from the First Circuit's decision in *Phillips*. Second, it will conclude that site-specific art is protected under VARA, as indicated by VARA's plain language and legislative intent.

##### *1. The District Court's Incorrect Application of Phillips*

The district court erred by not analyzing the site-specific art reasoning in *Phillips* before applying it to *Kelley*. Summarizing the First Circuit's decision, the district court accepted the First Circuit's reasoning because "no court in [the Seventh] circuit has dealt with the issue of VARA's coverage of site-specific art" and the reasoning was "persuasive," but the district court did not analyze why it was persuasive.<sup>116</sup> As the following analysis demonstrates, the First Circuit's holding in *Phillips* is flawed, and given that it is not controlling authority, the district court should have analyzed the issue separately and in relation to the specific facts in *Kelley*.

As the following discussion will show, analyzing the *Phillips*

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116. *Kelley*, 2008 WL 4449886, at \*6.

reasoning demonstrates the district court's mistaken application of *Phillips*, because the First Circuit incorrectly interpreted the statute to not protect site-specific artwork. The First Circuit found the District Court of Massachusetts's holding to be in conflict with the plain meaning of VARA because, understanding that site-specific artwork only achieves the artist's meaning in its specific location, any removal would destroy the artwork.<sup>117</sup> The First Circuit correctly found that the public presentation exception does not apply to site-specific art, but its reasoning is flawed and leads to an overbroad statutory interpretation.<sup>118</sup> The First Circuit

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117. *Phillips, v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006). The District Court of Massachusetts held that VARA protected site-specific artwork but then allowed its removal through the public presentation exception. *Id.* at 140. In addition, on appeal, the First Circuit correctly rejected Phillips's "dual regime" argument. *Id.* at 141-42. Phillips argued that VARA when "applied to non-site-specific art [has] a different meaning when applied to site-specific art." *Id.* at 141. Under this "dual regime," the public presentation exception would only apply to "plop art" that could be removed but not to integrated site-specific art. *Id.* at 141-42. The First Circuit reasoned that if Congress intended for VARA to have this regime, it would have added it to the statute and given the courts some way to determine what is site-specific. *Id.* at 142. *But see Jones, supra* note 59, at 386-88. Given that the "dual regime" is not in the plain language of VARA, the First Circuit correctly rejected Phillips's argument. *Phillips*, 459 F.3d at 142. However, Phillips did not need to argue a 'dual regime' into the statute for the court to find that the public presentation exception does not include site-specific art. *See infra* note 118 and accompanying text.

118. The First Circuit should have analyzed the district court's reasoning to illuminate why the public presentation exception does not apply to site-specific works and why this does not affect the coverage of site-specific work under VARA. *See generally Garson, supra* note 7, at 230; Spotts, *supra* note 59, at 302-04. The district court in *Phillips* referenced *Board of Managers of Soho International Arts Condo v. City of New York*, No. 01-1226, 2003 WL 21403333, at \*10, which states "the point of VARA 'is not to preserve a work of visual art *where* it is, but rather to preserve the work *as it is.*" *Phillips*, 459 F.3d at 139. This does not support the district court's holding, because if VARA must protect the work as it is, then Phillips's sculptures must remain in the park as removal will destroy his work conceptually. *See generally Garson, supra* note 7, at 230; Spotts, *supra* note 59, at 302-04.

Second, the legislative intent does not support the district court's holding, as the district court pointed to the language that "[g]enerally, the removal of a work from a specific location comes within the [presentation] exclusion because the location is a matter of presentation." *Phillips*, 459 F.3d at 138 (quoting H.R.

unequivocally stated that VARA could not protect an artist's work but then permit its destruction, an interpretation that does not make sense in the context of the statute as Congress specifically wrote exceptions to limit VARA's protection of works in certain situations.<sup>119</sup> From this explanation, the court concluded that site-specific art was either protected or not protected under VARA.<sup>120</sup> Illogically, the First Circuit "did not understand how a statute could apply to a work of art and not protect it" in every situation.<sup>121</sup>

The flaw in the First Circuit's reasoning is that it analyzed the VARA claim incorrectly.<sup>122</sup> When deciding a VARA claim, the court must first determine whether VARA protects the work by looking at the threshold questions of whether it is copyrightable and a work of visual art.<sup>123</sup> Then, the court must consider whether the work falls into one of the exceptions.<sup>124</sup> In *Phillips*, the First Circuit did this backwards by deciding that if a work would be destroyed by the public presentation exception, then VARA must not protect the work.<sup>125</sup> This incorrect analysis led the First Circuit

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REP. NO. 101-514, at 16 (1990)). Commentators find this intent instructive to demonstrate that "Congress specifically contemplated site-specific work as within VARA's scope, despite the fact that the public presentation exception limits the protection of such work." Wu, *supra* note 39, at 162; *see also* Jones, *supra* note 59, at 388. The House Report continues, "[u]nder [the public presentation exception] galleries and museums continue to have normal discretion to light, frame, and place works of art. However, conduct that goes beyond presentation of a work to physical modification of it is actionable." H.R. REP. NO. 101-514, at 16 (1990). Here, Congress did not intend for the public presentation exception to remove site-specific art because it refers to any physical modification being an actionable offense. *But see* Jones, *supra* note 59, at 386-88. In *Phillips*, the removal of the sculptures led to the destruction of the artist's work, which is more than the mere removal of the artwork, but akin to the physical modification. *Phillips*, 459 F. 3d at 133-34.

119. *Phillips*, 459 F.3d at 140. *See also supra* notes 39-46 and accompanying text.

120. *Id.* at 143.

121. Rachel E. Nordby, Note, *Off the Pedestal and into the Fire: How Phillips Chips away at the Rights of Site-Specific Artists*, 35 FLA. ST. U. L. REV. 167, 190 (2007).

122. *See generally Id.*

123. *See supra* notes 30-38 and accompanying text.

124. *See supra* notes 39-46 and accompanying text.

125. *Phillips*, 459 F.3d at 140.

to draw the drastic conclusion that site-specific art was not protected under VARA.<sup>126</sup> Analyzing the First Circuit's reasoning highlights the flaws in its holding, which the district court may have discovered if it had engaged in any discussion of *Phillips* before wholly accepting the holding as "persuasive."<sup>127</sup>

## 2. VARA's Plain Language and Legislative Intent: Protecting Site-Specific Art

The First Circuit and the Northern District of Illinois erred because VARA's plain language and the legislative intent demonstrate that VARA protects site-specific art. The First Circuit supported its holding by stating that because the statute does not explicitly refer to site-specific work, VARA does not protect the work.<sup>128</sup> However, the statute's silence on site-specific work does not automatically mean that Congress meant to exclude the entire genre from protection.<sup>129</sup> In VARA, Congress did not specifically indicate a type of artwork, but rather used general categories similar to those used in the Copyright Act.<sup>130</sup> If Congress wanted to exclude site-specific artwork from VARA, it could have put it in the negative arm of the statute.<sup>131</sup> In fact, the court's exclusion of site-specific work "fractures 'visual art' in more categories than those enumerated in 17 U.S.C. § 101" and works against the plain language of the statute.<sup>132</sup>

Furthermore, the legislative history suggests that Congress wanted to protect general categories of art. Understanding the evolving nature of art, Congress created a flexible statute and

126. *Id.* at 143.

127. *Kelley*, 2008 WL 4449886, at \*6.

128. *See Nordby, supra* note 121, at 190.

129. *Id.* at 186; 188; Robbins, *supra* note 10, at 403; Brief of Petitioner-Appellant, *supra* note 74, at 21.

130. *See Nordby, supra* note 121, at 186; Robbins, *supra* note 10, at 403; Spotts, *supra* note 59, at 317-18; Brief of Petitioner-Appellant, *supra* note 74, at 21. The Copyright Act protects "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5) (2006). VARA protects "a painting, drawing, print, or sculpture." *Id.* at § 101.

131. Brief of Petitioner-Appellant, *supra* note 74, at 21; *See also supra* note 38 and accompanying text.

132. Robbins, *supra* note 10, at 404.

instructed the courts to use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.<sup>133</sup>

VARA's legislative history indicates that Congress intended to protect works of visual art that contain particular attributes, those that have the risk of being irrevocably lost if damaged, altered or destroyed, as opposed to "a mass produced piece of art, such as a film, song, or book."<sup>134</sup> This intent further supports the conclusion that VARA protects site-specific art because it could be completely lost if damaged or destroyed.<sup>135</sup> Thus, both VARA's plain language and legislative intent illustrate that the courts in *Phillips* and *Kelley* incorrectly limited the scope of VARA by holding that it does not protect site-specific artwork.

### *B. Public Policy: The Restriction of Real Property*

Underlying the courts' decisions in *Phillips* and *Kelley* is the policy fear of restricting real property. The United States property law system is based on the common law ideal that property owners retain the rights of "free alienability and absolute ownership against the world" in their property.<sup>136</sup> Under VARA, the site-specific artist and the real property owner have competing interests.<sup>137</sup> Given that the location is an integral artistic element of the piece, removal or modification of the artwork would destroy it conceptually; thus, the artist could have a possible VARA claim.<sup>138</sup> On the other hand, the real property owner has an important interest in being able to control what rests on his

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133. H.R. REP. NO. 101-514, at 11 (1990). See also Nordby, *supra* note 121, at 187.

134. Brett Sirota, Note, *The Visual Artists Rights Act: Federal Versus State Moral Rights*, 21 HOFSTRA L. REV. 461, 471 (1992).

135. See generally Spotts, *supra* note 59, at 302-04.

136. Garson, *supra* note 7, at 214.

137. Spotts, *supra* note 59, at 302-04.

138. *Id.* at 303-04.

property.<sup>139</sup> Courts are especially frightened by site-specific work, because its removal may cause VARA violations that would force real property owners to lose control over their property.<sup>140</sup> The fear of restraining property, while not explicit in the district court's reasoning, is apparent in its application of *Phillips* and incorrect holding on originality.

### *1. The Real Property Policy Concern of Phillips*

The district court's fear of restricting real property can be surmised from its reliance on the *Phillips*'s holding.<sup>141</sup> The First Circuit, motivated by this policy, reasoned that “[o]nce a piece of art is considered site-specific, and protected by VARA, such objects could not be altered by the property owner absent consent of the artist. . . . [This] could dramatically affect real property interests and laws.”<sup>142</sup> It supported this policy argument by stating that “[t]he Supreme Court has . . . emphasized the principle that ‘statutes which invade the common law are to be read with a presumption favoring the retention of a long-established and familiar principles, except when a statutory purpose to the contrary is evident.’”<sup>143</sup> By applying *Phillips*, the district court accepts this policy justification without any analysis of the First Circuit's reasoning and possible application to the facts in *Kelley*. Such analysis demonstrates that the courts unduly rely on the real property policy justification in order to exclude site-specific artwork from VARA protection and ignore Congress's intent in enacting VARA.

First, the First Circuit in *Phillips* found that because Congress did not explicitly state that VARA may restrict property, it must hold that VARA does not protect site-specific work.<sup>144</sup> However, VARA's purpose is to protect “the reputations of certain visual

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139. *Id.*

140. See generally Garson, *supra* note 7, at 320; Spotts, *supra* note 59, at 302-04.

141. See *supra* notes 115-129 and accompanying text.

142. *Phillips*, 459 F.3d at 142. See also Robbins, *supra* note 10, at 404.

143. *Phillips*, 459 F.3d at 142 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal citations and quotation marks omitted)).

144. *Id.*

artists and the works of art they create,” by granting certain moral rights to artists.<sup>145</sup> The court failed to acknowledge that sometimes the enforcement of these rights limits a property owner’s rights.<sup>146</sup> Congress tried to reduce the restraint on property by enacting a narrow statute and including exceptions, but the enactment of VARA, understandably, would have some effect on real property rights.<sup>147</sup> In addition, the First Circuit jumped to the drastic conclusion that if VARA protected site-specific work then VARA would prevent the removal of it.<sup>148</sup> Yet, once the court determines that a work is protected under VARA, the analysis does not stop there.<sup>149</sup> It then must decide if the work is of “recognized stature” in order to prevent the works destruction, which limits the works that may restrict property.<sup>150</sup> The First Circuit failed to recognize that an additional level of analysis under the court’s discretion would be required to prevent the removal of the artwork.<sup>151</sup> Thus, the policy argument of preventing the restriction of property rights does not adequately support denying VARA rights to site-specific artwork.

Second, factually distinguishing *Kelley* from *Phillips* illustrates that not all VARA rights restrict real property as severely as courts fear. In *Phillips*, the artist sought to prevent the removal of his sculptures, which consequently restricts the use of the land, because removal would destroy his work.<sup>152</sup> However, in *Kelley*,

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145. H.R. REP. NO. 101-514, at 5 (1990).

146. See *supra* notes 17-22 and accompanying text.

147. See *supra* notes 39-46 and accompanying text.

148. *Phillips*, 459 F.3d at 142.

149. See *supra* notes 47-54 and accompanying text.

150. See Nordby, *supra* note 121, at 190.

151. See *supra* notes 51-52 and accompanying text. VARA leaves the recognized stature determination “open to argument and judicial resolution,” which gives the courts discretion in deciding what works to protect. Keshawn M. Harry, *A Shattered Visage: the Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990*, 9 J. INTELL. PROP. L. 193, 207-08 (2001) (quoting *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999)). Some scholars critique this standard as giving the courts too much discretion over aesthetic decisions. See Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1965 (2000). See generally Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005).

152. See *supra* note 64 and accompanying text.

the Park District partially modified *Wildflower*, thus damaging Kelley's artistic vision by leaving it mutilated rather than completely destroyed.<sup>153</sup> Kelley did not try to enjoin the removal of the work; instead, he tried to recover for the damage to his work, a remedy that does not restrict real property rights.<sup>154</sup> By applying *Phillips*, the district court prevented Kelley from recovering for any VARA violations, even those that do not severely restrict real property.<sup>155</sup> Kelley may not recover anything for the mutilation of his artwork, even though such acts could damage his artistic integrity and reputation.<sup>156</sup> In addition, if the Park District associated his name with the current flowerbeds, under *Phillips*, Kelley would have no way to prevent them from imposing such an association.<sup>157</sup> Thus, the district court should not have adopted the extreme holding of *Phillips*, because the degree of real property restriction is distinguishable and should mandate a different outcome.

## 2. *Fear of Restricting Real Property: Kelley's Originality Holding*

Furthermore, the fear of restraining property, while not explicit in the court's reasoning, would explain the district court's disposal of Kelley's VARA claim by citing his lack of evidence and ignoring the relevant case law on originality.<sup>158</sup> The district court

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153. *Kelley*, 2008 WL 4449886, at \*1

154. *Id.*

155. *See Id.* at \*7; Nordby, *supra* note 121, at 186

156. *See generally supra* note 50 and accompanying text.

157. *See generally supra* notes 48-49 and accompanying text. This is merely hypothetical. The Park District does not associate the current reconfigured flower beds with Kelley. Oral Argument Podcast, <http://www.podcastdirectory.com/podshows/5199679>.

158. *Kelley*, 2008 WL 4449886, at \*1. For information regarding the effect of this holding on copyright and VARA law, *see generally* Charles Cronin, Dead on the Vine: Living and Conceptual Art and VARA (August 24, 2009), <http://ssrn.com/abstract=1460449> (discusses the problems of granting copyright to works composed of living material and argues that VARA should not be extended to such works); Morgan M. Stoddard, *Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572 (2008) (analyzes the issues authors face to copyright works inspired by, based on, or depicting nature and the courts' treatment of such cases).

held that *Wildflower* was not original, because Kelley did not adequately differentiate his work from other works such as Monticello's oval gardens and specify which elements are copyrightable.<sup>159</sup> Given that "[i]t is, ultimately, for the courts to determine whether disputed works demonstrate original expression qualifying them for copyright protection and also for moral rights protection as works of visual arts," Kelley's lack of proof gave the district court an easy way to avoid the implications of extending copyright protection to such a work.<sup>160</sup> If Kelley's work was held to be original, then other landscape artists could try to obtain copyright, and consequentially, VARA protection for their work, potentially leading to increased conflicts and a possible restraint on property.<sup>161</sup>

However, if the district court had analyzed the issue within the widely accepted originality framework, it would have determined that *Wildflower* is original.<sup>162</sup> The Supreme Court, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, held that originality "requires 'only that the work was independently created by the author (as opposed to copied from other works) and that it possess at least some minimal degree of creativity,'" but it does not have to be novel.<sup>163</sup> Unless evidence was introduced that

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159. *Kelley*, 2008 WL 4449886, at \*1. As an example, the district court directed the reader's attention to a website about Monticello's oval wildflower gardens. *Id.* Thomas Jefferson designed twenty oval flowerbeds for his home in Monticello by choosing a specific plant for each bed ranging from plants grown in Europe to plants more common to America. The Oval Flower Beds of Monticello, <http://www.monticello.org/gardens/flower/ovalbeds.html>. Certainly one can see the similarity between Jefferson's flower beds and the Work, as Kelley also specifically chose wildflowers for two oval flowerbeds, but that does not preclude originality. *Compare Id. with* Chapman Kelley, <http://www.chapmankelley.com/Artist.asp?ArtistID=9918&Akey=JLBDK6W2>.

160. Cronin, *supra* note 158, at 49; *see also* NIMMER & NIMMER, *supra* note 10, at § 2.01(B).

161. *See generally supra* notes 137-41 and accompanying text.

162. *Kelley*, 2008 WL 4449886, at \*1. The Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) set forth the framework to determine originality in copyrighted work. Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 876 (2007).

163. Kwall, *supra* note 162, at 876 (quoting *Feist*, 499 U.S. at 345). *See also* NIMMER & NIMMER, *supra* note 10, at § 2.01(A). As previously mentioned, a copyrightable work must be an "original [work] of authorship," which include

Kelley created his living flower artwork after a visit to Monticello, it is most likely that Kelley created *Wildflower* independently.<sup>164</sup> Kelley's life work included his elliptical paintings of landscapes and wildflowers.<sup>165</sup> The creation of *Wildflower Works I* in Chicago and two other wildflower installations in Texas was an evolution of this work into a new medium of living plants and flowers.<sup>166</sup> It was the culmination of his life's work rather than a work inspired by Monticello's flowerbeds.

Additionally, *Wildflower* meets the "extremely low" standard of creativity for originality.<sup>167</sup> On appeal, in order to prove this standard, Kelley analogized to *Runstadler v. MCM Ltd. Partnership*, 768 F. Supp. 1292 (N.D. Ill. 1991), where the plaintiff's "sculpture of 39 clear glass rectangles arranged in a spiral form," possessed the minimum level of creativity to qualify as original because "[t]he choice of location, orientation, and dimensions of the glass panes, and the degree of arc of the spiral, show far more than a trivial amount of intellectual labor and artistic expression."<sup>168</sup> Similarly, Kelley specifically chose the

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"pictorial, graphic, and sculptural works. 17 U.S.C. § 102(a) (2006). See *supra* notes 31-34 and accompanying text. In addition, in order to be copyrightable a Work must be "fixed in a tangible medium of expression" and may not be a "system." *Id.* at § 102(a)-(b). At trial, the Park District argued that the Work was not fixed because "it contains living elements" and Kelley described it as "a vegetative management system." *Kelley*, 2008 WL 4449886, at \*6. The district court's opinion did not discuss either of these arguments focusing on the issue of originality. *Id.* On Appeal, Kelley refuted these two additional arguments in his Response brief. Response and Reply Brief of Petitioner-Appellant at 11-17, *Kelley v. Chi. Park Dist.*, No. 08-3701 & No. 08-3712 (7th Cir. June 12, 2009), available at <http://www.scribd.com/doc/16570937/Chapman-Kelley-Response-and-Reply-Vs-Chicago-Park-District-7th-Circuit-filed-June-12-2009>. During Oral Argument in front of the Seventh Circuit, these arguments did not seem to be a central issue. See Oral Argument Podcast, <http://www.podcastdirectory.com/podshows/5199679>.

164. The current record does not seem to have anything to suggest that Kelley had any knowledge of the Monticello flowerbeds but in fact these flower beds were introduced solely as an example by the district court. *Kelley*, 2008 WL 4449886, at \*6.

165. Brief of Petitioner-Appellant, *supra* note 74, at 4-5.

166. *Id.* at 3-5.

167. *Feist*, 499 U.S. at 345; Brief of Petitioner-Appellant, *supra* note 74, at 14.

168. Brief of Petitioner-Appellant, *supra* note 74, at 14 (quoting *Runstadler*,

placement, location and variety of flowers within two elliptical flower beds demonstrating “more than a trivial amount of intellectual labor and artistic expression.”<sup>169</sup> Furthermore, *Wildflower* was the culmination of Kelley’s artistic vision as he created three dimensional works of his elliptical wildflower paintings demonstrating his creativity.<sup>170</sup> Thus, *Wildflower* meets the minimal level for creativity.

Finally, the district court incorrectly implied that originality is synonymous with novelty. The district court stated, “Kelley leaves this Court to assume that he is the first person to ever conceive of and express an arrangement of growing wildflowers in ellipse-shaped enclosed areas,” suggesting that *Wildflower* must be novel.<sup>171</sup> However, the district court incorrectly applied the law from *Feist*, because “[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”<sup>172</sup> Even though other oval shaped flower beds may exist, that does not preclude *Wildflower* from being original. Thus, if the district court had analyzed the facts within the *Feist* framework, it would have determined that *Wildflower* is original.<sup>173</sup>

#### V. “A LITTLE WIND”: PROTECTING ARTISTS THROUGH CONTRACTS

Even though VARA clearly protects site-specific art, this causes a problem because it potentially leads to the restriction of real property rights.<sup>174</sup> Courts fix this problem by holding that VARA does not protect site-specific work, but it is unnecessary to go to such a drastic outcome in order to prevent the restriction of

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768 F. Supp. at 1295-96).

169. *Id.* at 14-15 (quoting *Runstadler*, 768 F. Supp. at 1295-96).

170. *Id.* at 4-5.

171. *Kelley*, 2008 WL 4449886, at \*1, \*6. See also Cronin, *supra* note 158, at 5; Brief of Petitioner-Appellant, *supra* note 74, at 15-16.

172. *Feist*, 499 U.S. at 345. See Brief of Petitioner-Appellant, *supra* note 74, at 15-16.

173. At oral argument, the judges seemed to very receptive to the Plaintiff’s argument that his work was original. Judge Skyes commented that “the statute doesn’t require a huge degree of creativity or originality. It’s a very, very low threshold.” Transcript at Oral Argument, *supra* note 116, at 7.

174. See generally *supra* notes 137-40 and accompanying text.

property.<sup>175</sup> Unfortunately, until Congress clarifies whether site-specific works are protected under VARA or finds a solution to the property issue, artists are forced to use contracts, as seen in pre-VARA cases, in order to protect their rights.<sup>176</sup> Thus, artists must be educated about their rights and become knowledgeable about certain contract provisions besides waiver that could more adequately protect them.<sup>177</sup>

An important issue to consider is the artist's waiver of VARA rights, which can only be done in writing.<sup>178</sup> Some scholars believe that artists should be forced to waive their VARA rights when installing artwork on real property.<sup>179</sup> In practice, property owners control the money and land, and thus have greater bargaining power which may force an emerging artist to waive his rights in order to secure a commission.<sup>180</sup> Although it has been

175. *See generally supra* notes 141-58 and accompanying text.

176. *See generally supra* notes 26-27 and accompanying text.

177. *See generally Nordby, supra* note 121, at 192; Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 843, 845-47 (1992). At the VARA Senate hearings, Congress considered enacting an exception that included both works installed in buildings and public structures, defining public structures as “[a]ny bridge, aqueduct, or other public edifice either owned or operated by the United States Government, a State, a political subdivision thereof, or any government agency therein, or erected on land owned by the United States Government, a state, a political subdivision thereof, or any governmental Agency therein.” Garson, *supra* note 7, at n. 209 (quoting *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. 19, 118 (statement of Peter H. Karlan, Attorney, La Jolla, California)). This provision would “ensure ‘that property containing fine art remains freely alienable.’” Monica Pa and Christopher Robinson, *Making Lemons out of Lemons*, 3 LANDSL 22, n. 18 (2009) (quoting *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. 19, 116-17 (June 20, 1989)). If Congress chose to revise VARA to include this provision, it would prevent many issues with site-specific work because it would require the artist and property owner to sign a contract before the installation of the work that allowed removal, even if removal caused destruction or modification.

178. 17 U.S.C. § 106A(e) (2006).

179. Garson, *supra* note 7, at 240-43.

180. Nordby, *supra* note 121, at 191; Thurston, *supra* note 7, at 716-17. On the other hand, some scholars argue that VARA's implementation has granted

suggested that “[a]rtists concerned about permanence and integrity of their work can refuse to grant such waivers,” that is not practical to an emerging artist with few options.<sup>181</sup> The following provisions, although not ideal solutions to these problems, may help artists more adequately protect their rights but the artist’s own personal circumstances must be considered to determine the appropriate solution.<sup>182</sup>

Instead of a waiver, an artist may insist on a buyout clause allowing the artist to purchase the work if the property owner wishes to move it instead of waiving his right of integrity at the creation of the artwork.<sup>183</sup> However, if he is unable to buy the work at that time, then the artist would at that point waive his right of integrity, allowing the removal of the work.<sup>184</sup> Alternatively, an artist may protect his work by “negotiat[ing] the number of years the buyer must preserve the work, which would reduce the possibility of confusion over property rights.”<sup>185</sup>

Another option includes “notice provisions [in the contract] . . . to ensure that the artist has fair warning if the buyer intends to remove or alter the work,” as illustrated in *Kelley*.<sup>186</sup> The Park District’s first permit gave “a 90 day notice to remove the planting,” if it wanted to change the property.<sup>187</sup> The Court held that the Park District breached an implied extension of this permit when it failed to give him reasonable notice to remove *Wildflower*.<sup>188</sup> Even though Kelley lost on the VARA claim, he

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artists more bargaining power. Thurston, *supra* note 7, at 718; VerSteeg, *supra* note 177, at 843-44. In *Phillips*, “the attorney for Phillips suggested that moral rights do more to level the negotiating playing field, and both the artist and the buyer benefit if they know where they stand with regard to display and removal of the work.” Thurston, *supra* note 7, at 718.

181. Nordby, *supra* note 121, at 191. See also Thurston, *supra* note 7, at 716-17.

182. For more information on issues to consider when drafting contracts for artists, see VerSteeg, *supra* note 177, at 843-71; Pa & Robinson, *supra* note 177, at 27-28.

183. Nordby, *supra* note 121, at 191-92.

184. *Id.* at 192.

185. Thurston, *supra* note 7, at 719.

186. *Id.* at 718. See also VerSteeg, *supra* note 177, at 865.

187. *Kelley*, 2008 WL 4449886, at \*1.

188. *Id.* at \*8.

recovered on a contract claim.<sup>189</sup> This lends further evidence of the importance of a contract in this situation.

## VI. CONCLUSION

As *Kelley* illustrates, the federal courts, fearing restraint of property, mistakenly interpret VARA's plain language and further narrow the statute by excluding site-specific art from the scope of the statute's protection. This goes against the ultimate purpose of VARA to encourage artistic creation by protecting "the reputations of certain visual artists and the works of art they create."<sup>190</sup> Until Congress or the courts strengthen VARA, artists must rely on contracts to protect their rights. Ultimately, some change in interpretation must come to make VARA more effective in protecting artists. Perhaps change will be a "stealthy perfume of wildflowers hidden in the grass," but for the sake of artists it should come from Congress or the Seventh Circuit.<sup>191</sup>

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189. *Id.* Certainly Kelley did not recover any damages for the breach of the implied contract but the court was correct in holding that he did not adequately prove damages. It does not reflect on the strength of the claim.

190. H.R. REP. NO. 101-514, at 5 (1990).

191. Steinbeck, *supra* note 1, at 20.

