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Journal of Intellectual Property Law

Volume 16
Issue 2 *Symposium - James Bessen and Michael J. Meurer's Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovations at Risk*

Article 4

March 2009

Phillips Has Left Vara Little Protection for Site-Specific Artists

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Recommended Citation

Lauren R. Spotts, *Phillips Has Left Vara Little Protection for Site-Specific Artists*, 16 J. INTELL. PROP. L. 297 (2009).
Available at: https://digitalcommons.law.uga.edu/jipl/vol16/iss2/4

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PHILLIPS HAS LEFT VARA LITTLE PROTECTION FOR SITE-SPECIFIC ARTISTS

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> Art is under no categorical imperative to correspond point by point to the underlying tendencies of its age. Artists will do whatever they can get away with, and what they can get away with is not to be determined beforehand.[1]
>
> –*Clement Greenberg*

I. INTRODUCTION

Artists pride themselves on coloring outside the lines. Throughout history, art has progressively evolved from one movement to the next by artists taking chances and breaking rules. In the past century, artists have exhibited this rule-breaking behavior by experimenting with ways to remove art from its traditional forms and locations in unexpected ways.[2] Site-specific art is one such product of these pioneering artists. Unlike artists who create traditional paintings or sculptures that stand alone and apart from their surroundings, site-specific artists incorporate their own unique creation into the surrounding location so as to create one complete work of art.[3]

Even as artists continue to find new ways to break the traditional rules of art, those in the artistic community desire more legislative rules that would offer greater protection for artists and their works.[4] While Congress chose to exercise its grant of constitutional authority to promote the useful arts by creating some economic protection for artists under the Copyright Act of 1976,[5] Congress declined to grant moral rights, such as the rights of integrity and attribution for works of art.[6] Eventually, after some hesitation, Congress passed the Visual Artists Rights Act of 1990 (VARA) to specifically grant artists these moral rights of attribution and integrity to their works of visual art.[7]

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[1] Clement Greenberg, *Abstract Art*, NATION, Apr. 15, 1944, at 450.

[2] *See* FRED S. KLEINER ET AL., GARDNER'S ART THROUGH THE AGES 1099 (11th ed. 2001) (discussing site-specific art with pop and surrealism because "these artists insisted on moving art out of the rarefied atmosphere of museums and galleries and into the public sphere").

[3] *See id.* at 1099–1103 (examining several well-known examples of site-specific and environmental artworks).

[4] *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 (1st Cir. 2006) (detailing arguments by sculptor for protection of site-specific art under state and federal legislation); Kelley v. Chicago Park District, No. 04-C-07715, 2008 WL 4449886, at *1 (N.D. Ill. Sept. 29, 2008) (discussing an artist who argues that his nontraditional works of art should be granted moral rights protection from destruction or removal).

[5] 17 U.S.C. §§ 101–810 (2000).

[6] *See* Jeff C. Schneider, *Recently Enacted Federal Legislation Providing Moral Rights to Visual Artists: A Critical Analysis*, 43 FLA. L. REV. 101, 102–03 (1991) (observing that traditionally the American legal system only allowed artists to retain the right to exploit the economic value of their work).

[7] *See* Joseph Zuber, *The Visual Artists Rights Act of 1990—What It Does, and What It Preempts*, 23

While VARA seems to grant moral rights protection for all visual artists, recent court decisions have made clear that site-specific art is not protected by this statute.[8] In determining why site-specific art is being treated separately and differently from other works of visual art, one should look to the competing interests of the owner of the private property on which the art sits and of the public that are unique to this form of visual art. Implied in these courts' evaluations of the relationship between site-specific art and VARA are the weighty interests of the private owner and the public in the creation and removal of works of site-specific art balanced against the rights of integrity and attribution of the artist.[9] In the unique situation of site-specific art, these courts' decisions have implied that an artist's moral rights can be trumped by the competing interests of others in the community.[10]

Because moral rights protection for artists helps promote the useful arts in this country, it is important that new and innovative forms of art, like site-specific art, are not excluded from this type of legislative protection. However, it is also important to balance the competing interests of the private owner and the public in granting such protective rights. Thus, site-specific artists, while not protected by VARA, deserve certain limited moral rights as to their work in order to better promote the progress of useful arts. This Note addresses the need for new legislation that would grant certain limited moral rights for site-specific artists while balancing the unique countervailing interests of private owners and the public.

First, this Note will explore the defining characteristics, development, and thematic elements of site-specific art. Additionally, the competing interests implicated in site-specific art, such as those of the artist, the private owner, and the public, will be illuminated using the controversial site-specific work of art, the *Tilted Arc*,[11] as an example.

PAC. L.J. 445, 473 (1992) (stating that VARA was passed in 1990 and put into effect in 1991).

[8] *See, e.g.*, *Phillips*, 459 F.3d at 143 (concluding that VARA does not apply to site-specific art); *Kelley*, 2008 WL 4449886, at *1 (holding that a finding of site-specificity is sufficient to remove the protections of VARA from a work of visual art).

[9] *See Phillips*, 459 F.3d at 142 (noting that extending VARA to site-specific art could impact real property interests of private owners); *Kelley*, 2008 WL 4449886, at *6 (following the persuasive reasoning of *Phillips*).

[10] *See Phillips*, 459 F.3d at 129 (holding that VARA does not apply to site-specific art and allowing the art to be removed by the property owner); *Kelley*, 2008 WL 4449886, at *6 (following the court's reasoning in *Phillips*).

[11] *See* KLEINER ET AL., *supra* note 2, at 1102–03 (examining the rise and fall of the *Tilted Arc*); PATRICIA HILLS, MODERN ART IN THE USA: ISSUES AND CONTROVERSIES OF THE 20TH CENTURY 442–45 (2001) (discussing the controversy surrounding the *Tilted Arc*).

Second, this Note will examine the historical background of VARA. The works covered by, rights conferred by, and exceptions from this federal statute will be explained next.

Third, the current case law on site-specific art and VARA, *Phillips v. Pembroke Real Estate, Inc.*,[12] will be analyzed. After a brief background of this case, the arguments of the artist and analyses of the district court and circuit court will be examined. Also, the commentary and reaction as well as the influence and significance of this case will be explored, including its impact on the most recent case involving site-specific art and VARA, *Kelley v. Chicago Park District*.[13]

Finally, in light of this background, the need for new legislation conferring certain limited moral rights to site-specific artists will be explored. This analysis will start with the proposition that the *Phillips* court was correct in holding that a finding of site-specificity is sufficient to remove a work of art from the protections of VARA. Building on this conclusion that site-specific art is not currently afforded moral rights protection, the analysis will then present and examine several compelling reasons why site-specific artists should be granted such rights. Finally, due to the unique nature of site-specific art and the competing interests that are involved, the analysis concludes that new and narrowly-tailored legislation is needed to sufficiently balance these interests against the moral rights of site-specific artists.

II. BACKGROUND

A. SITE-SPECIFIC ART

1. Defining Characteristics. According to the Guggenheim Museum of modern and contemporary international art,

> Site-specific or Environmental art refers to an artist's intervention in a specific locale, creating a work that is integrated with its surroundings and that explores its relationship to the topography of its locale, whether indoors or out, urban, desert, marine, or otherwise . . . . Site-specific art is meant to become part of its locale, and to restructure the viewer's conceptual and perceptual experience of that locale through the artist's intervention.[14]

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[12] 459 F.3d at 128.

[13] 2008 WL 4449886 at *1.

[14] Guggenheim Museum, Site-specific art/Environmental art, http://www.guggenheimcollection.org/site/movement_works_Site_specific_art_Environmental_art_0.html (last visited Apr. 21, 2009).

Thus, site-specific art involves more than just the physical creation of the artist; the artist is striving to create a relationship between his artistic creation and its surroundings.[15] When artists incorporate their creation within natural surroundings, the work is often referred to as environmental art.[16] Site-specific work, on the other hand, is created when artists incorporate their creation with any surrounding, whether it be a public area or privately owned property.[17]

2. Development. Site-specific art developed as a part of a much larger art movement in the late twentieth century known as postmodernism.[18] As its name implies, postmodernism was a direct reaction to modernism, which was the prevailing art movement for most of the twentieth century.[19] While the definition of modernism fluctuated throughout the twentieth century, the term "modernism" generally encompasses the art concepts and techniques of the time.[20] While such a definition of modernism may seem self-evident, it inevitably leads one to ask, how can anything be postmodern? Art historians explain that postmodern art is anything that flouts the rules of modernism.[21] Although such an explanation is not very precise, neither is postmodernism itself. Art historians posit that "postmodernism's ability to accommodate seemingly everything in art makes it extremely difficult to provide a clear and concrete definition of the term."[22] Nevertheless, although postmodernism itself is difficult to define, art historians clearly identify site-specific art and its predecessor, environmental art, as being included in this broad art movement.[23]

Environmental art developed in the 1960s, a decade in American history which saw an overwhelming increase in awareness and concern for environmental protection and preservation.[24] As a part of this increased environmental awareness, environmental artists used their artwork to highlight the inherent beauty of nature.[25] Environmental artists created man-made objects that were typically very large in scale and seamlessly incorporated these objects into natural

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[15] Rachel E. Nordby, *Off of the Pedestal and into the Fire: How* Phillips *Chips away at the Rights of Site-Specific Artists*, 35 FLA. ST. U. L. REV. 167, 171 (2007).

[16] KLEINER ET AL., *supra* note 2, at 1099.

[17] *See id.* at 1102 (discussing works that call attention to art's role in public spaces, rather than the environment).

[18] *See* HILLS, *supra* note 11, at 338–39, 433–36, 442–45 (discussing site-specific art, also known as public art, as a development of postmodern art in public spaces from the 1980s to 1990s).

[19] *See id.* at xvi (describing modernism as the "reigning phenomenon of the twentieth century").

[20] *Id.*

[21] KLEINER ET AL., *supra* note 2, at 1075.

[22] *Id.*

[23] *See id.* at 1099–1103 (discussing environmental and site-specific art as a subset of postmodern art).

[24] *Id.* at 1099.

[25] *Id.*

surroundings.[26] However, contrary to the environmental artists' motive to raise environmental awareness, their works of environmental art were often located in very isolated areas with little access to the general public, which limited the influence and impact of their art.[27]

Seizing on the overall idea of environmental art to use artwork to call attention to its surroundings, rather than just the work of art itself, site-specific artists began to incorporate their creations into city squares and other very public places.[28] Art in public spaces was not a new concept, as statues, sculptures, and murals have been placed in public areas for centuries.[29] However, site-specific artists did not merely place their art in any area where it could be viewed, but rather chose a particular location so as to incorporate the surroundings and even the public into their work of art, in order to call attention to "art's role in public places."[30]

3. Thematic Elements. Site-specific artists, while exploring a new and innovative approach to the purpose of art, still emphasize several very traditional American themes in their pursuit.[31] Site-specific artists focus on the commonplace, which is a theme found throughout American art.[32] Another traditional American theme emphasized by site-specific artists is the social dimension of art-making.[33] By combining this social awareness with a focus on the commonplace, site-specific artists have taken on the social responsibility of making art available to and about the common person.[34]

4. Competing Interests. The creation of public art, and specifically site-specific art, is in some ways much more challenging than other more traditional forms of art because of the various competing interests involved.[35] Not only are the interests of the artist and the private owner of the property at stake, but most notably, the public has a strong interest in what is arguably being created for them.[36] Often, these interests are in conflict, as was illustrated in the creation and ultimate removal of the infamous *Tilted Arc.* The *Tilted Arc*, created by Richard Serra and commissioned by the General Services Administration, was a curved

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[26] *See id.* at 1099–1102 (describing examples of site-specific art integrated into natural environments).

[27] *Id.* at 1099–1100.

[28] *See id.* at 1102 (highlighting the placement of art in public places).

[29] HILLS, *supra* note 11, at 433–36.

[30] KLEINER ET AL., *supra* note 2, at 1102.

[31] *See* HILLS, *supra* note 11, at xvii (discussing, in general, themes that recur throughout American art, of which site-specific art is a subcategory).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* KLEINER ET AL., *supra* note 2, at 1103 (discussing the inherent problems of public art, including the competing rights and responsibilities of the artist and the public).

[36] *Id.*

steel wall that created a twelve foot high, 120 foot long partition across the plaza in front of the Jacob K. Javits Federal Building in New York City.[37] Using this controversial work of art as an example, the interests of the artist, the private owner, and the public in the creation and control of site-specific art will be explored.

a. Interests of the Artist. As the creator of the site-specific work of art, the artist has an interest in creating something that draws attention to and is inseparable from its surroundings.[38] The artist also has an interest in the integrity of his work, such as protection from its destruction or modification.[39] The concept of destruction is vastly expanded for a site-specific artist, as the artist believes that removal of the piece of work from its location destroys the work of art itself.[40] Thus, a site-specific artist has an interest in the permanency of his work in the location for which the work of art was created.[41]

For example, when Richard Serra created the *Tilted Arc*, he wanted to "dislocate or alter the decorative function of the plaza and actively bring people into the sculpture's context."[42] Therefore, to him, any removal of the structure would be to destroy it because the sculpture had been specifically designed for the Federal Plaza in New York City.[43] Thus, the artist not only has an interest in the creation of the work, but also in the integrity, duration, location, and permanency of the work once created.[44]

b. Interests of the Private Owner. The private owner of the property on which the site-specific art is located also has unique interests in the work of art.[45] First, the owner may have an interest in creating something unique and beautiful for the location.[46] Second, the owner may have an interest in removing the work of art for a variety of reasons, whether it be a change of taste or a new vision for the

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[37] *Id.* at 1102.

[38] *See id.* at 1103 (discussing the purpose of site-specific art as being the ability of the artist to call attention to the role of art in public areas).

[39] *See id.* (noting that artists believe they have a right to their work being "uncensored, respected, and tolerated, although deemed abhorrent, perceived as challenging, or experienced as threatening" (citing Calvin Tomkins, *The Art World: Title Arc*, NEW YORKER, May 20, 1985, at 98)).

[40] HILLS, *supra* note 11, at 443.

[41] *Id.*

[42] Tomkins, *supra* note 39, at 100.

[43] HILLS, *supra* note 11, at 442.

[44] *See, e.g., id.* at 442–43 (discussing Serra's interest in creating and protecting the *Tilted Arc*).

[45] *See, e.g.*, KLEINER ET AL., *supra* note 2, at 1102–03 (discussing the role of the General Services Administration in the commission and removal of the *Tilted Arc*).

[46] *Id.*

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property.[47] Thus, the private owner has an interest in being able to control what is and is not on the property at any given time, regardless of his reason.

In the case of the *Tilted Arc*, the commissioner of the work of art was the General Services Administration, which is a federal agency that oversees the selection and installation of artworks for government buildings.[48] The *Tilted Arc* was installed in the plaza in front of the Jacob K. Javits Federal Building in New York City.[49] However, upon public outcry, the General Services Administration was forced to reconsider its decision to commission the *Tilted Arc*[50] and thus had an interest in being able to remove the work of art should it decide to do so. In conclusion, the private owner of the property has an interest, in general, of being able to control the property, whether that be the ability to commission or to remove works of art.

c. Interests of the Public. Because of the unique nature of site-specific art and the artist's desire to bring art to the people, the public often has a strong interest in this type of artwork.[51] The public's interest includes being involved in the decision to commission works of art that would affect them or, in the same regard, having a voice in the decision to remove or not remove the work of art.[52]

As for the *Tilted Arc*, the public had a strong aversion to the twelve-foot-high, 120 foot long, curved wall that dissected a previously open plaza in front of this federal building.[53] Many people felt that the *Tilted Arc* was not aesthetically pleasing and was impractical in its location.[54] The public also felt it had no input into the creation of this work of art and therefore some viewed it as a symbol of the government's dominance over them.[55] Thus, because of the nature of site-specific art, the public has a strong interest in being able to have input into the creation and removal of works of art that are designed for them and affect their everyday lives and gathering areas.[56]

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[47] *See, e.g., id.* (discussing the General Services Administration's decision to remove the *Tilted Arc* due to public protests and petitions).

[48] *Id.* at 1102.

[49] *Id.*

[50] *Id.* at 1103.

[51] *See, e.g.*, HILLS, *supra* note 11, at 442–45 (discussing Richard Serra's desire to incorporate the public in his site-specific work of art and the public's strong aversion to the *Tilted Arc*).

[52] *See id.* (pointing out that one of the main issues coming to the forefront in the 1980s was the demand by the public to be included in different arenas of decision making).

[53] KLEINER ET AL., *supra* note 2, at 1102–03.

[54] *Id.* at 1103.

[55] HILLS, *supra* note 11, at 444 (stating the opponents of the *Titled Arc* complained that the decision making process for commissioning the work was "entirely in the hands of government bureaucrats").

[56] *See, e.g.*, KLEINER ET AL., *supra* note 2, at 1102–03 (discussing the public's role in the ultimate removal of the *Tilted Arc*).

d. Balancing the Interests. Obviously, these interests can easily conflict with each other, as was the case with the *Tilted Arc*.[57] Thus, the interests of the artist, the private owner, and the public must be balanced in order to either create a meaningful and lasting work of site-specific art or to find a solution when that plan goes awry.[58] In the end of the *Tilted Arc* debacle, the government bowed to the public interest and removed the steel wall, despite vehement protests by the artist, who claimed that removal of the sculpture was destruction of his work.[59] As a result of this contentious situation, the General Services Administration now solicits input from the public before commissioning public art.[60] In that instance, the interests of the public outweighed those of the artist and influenced those of the private owner.[61] However, VARA was not enacted at the time.[62] Would the outcome have been different under this federal legislation?

Some legal commentators have pointed out that the dispute over the *Tilted Arc* was well known to the legislators drafting and voting on VARA and that because this legislation does not explicitly identify site-specific art as being protected, the federal legislation was not intended to grant artists like Richard Serra any rights over those of the private owner and public.[63] Perhaps it is impossible to know how the *Tilted Arc* issue would have been litigated under VARA, but more recent controversies involving site-specific art have shed light on the emphasis that courts, when interpreting VARA, will place on the competing interests of the artist, the private owner, and the public.[64]

B. VISUAL ARTISTS RIGHTS ACT OF 1990

1. Historical Background. While the protection of moral rights for visual artists may be a product of the twentieth century, it is also the fruit of a seed planted hundreds of years ago in the United States Constitution.[65] Article I, Section 8

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[57] *See id.* (examining the controversy over the *Tilted Arc* and the roles that the private owner, the artist, and the public played).

[58] *See, e.g., id.* (reviewing the issues that arose from the *Tilted Arc* mishap).

[59] *Id.* at 1103.

[60] *Id.*

[61] *Id.*

[62] *See* Zuber, *supra* note 7, at 472–73 (explaining that VARA was passed in 1990 and put into effect in 1991).

[63] *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 138 (1st Cir. 2006) (recognizing the district court's inference that Congress declined to include site-specific art in VARA, as Congress was aware of the *Tilted Arc* controversy when the legislation was passed).

[64] *See Phillips*, 459 F.3d at 143 (holding that VARA does not cover works of site-specific art); Kelley v. Chicago Park District, No. 04-C-07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008) (following the reasoning of the *Phillips* court).

[65] *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power to promote the useful arts via

grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[66] While this enumerated power would allow Congress to protect moral rights of artists should it so choose, until recently, Congress chose only to promote the arts through economic protection for artists under the Copyright Act of 1976.[67]

This approach lagged behind those taken by other countries, especially France, which protected not only economic rights but also the moral rights of artists.[68] These moral rights include "the right to create, the right of disclosure, the right to withdraw, the right to claim authorship, and the right to preserve the work from any alterations, mutilations, or modifications."[69]

In 1987, an attempt was made by Representative Edward J. Markey and Senator Edward M. Kennedy to pass legislation that would protect these moral rights for artists in the United States.[70] However, Congress failed to pass the Visual Artists Rights Act of 1987.[71] Then, in what some thought would be a definite step toward moral rights protection for artists, the United States adopted the Berne Convention for the Proliferation of Literature and Art in 1988.[72] This reciprocal copyright treaty requires that each signatory recognize the moral rights of its authors.[73] However, Congress initially hesitated to pass legislation protecting artists' moral rights, asserting that previously enacted legislation already protected these rights.[74] Congress may have been referencing "the law of copyright, the doctrine of waste, defamation, unfair competition, contract law, and invasion of privacy" to argue that the United States had sufficient moral rights protection.[75] Nevertheless, these theories arguably fall very short of protecting moral rights of artists.[76]

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legislation).

[66] *Id.*

[67] *See* Schneider, *supra* note 6 (observing that traditionally, the American legal system only allowed artists to retain the right to exploit the economic value of their work).

[68] *See* Jill R. Applebaum, Note, *The Visual Artists Rights Act of 1990: An Analysis Based on the French* Droit Moral, 8 AM. U. J. INT'L L. & POL'Y 183–86 (1992) (discussing the developed moral rights protection in France as compared to the lack thereof in the United States).

[69] Schneider, *supra* note 6, at 103 (citations omitted).

[70] Zuber, *supra* note 7, at 470–71.

[71] *Id.* at 471.

[72] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of title 17 of the U.S.C.).

[73] *Id.*

[74] Timothy M. Case, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, 91 (1991).

[75] *Id.* (citations omitted).

[76] *Id.*

Recognizing this shortfall, Representative Markey and Representative Robert Kastenmeier introduced H.R. 2690, entitled the Visual Artist Rights Act of 1989, on June 20, 1989.[77] While Senator Kennedy had also introduced a nearly identical bill in the Senate on June 16, 1989, H.R. 2690 was passed by the Senate and the House on October 27, 1990, and then signed by President Bush on December 1, 1990.[78] Thus, the Visual Artists Rights Act of 1989 was enacted as the Visual Artists Rights Act of 1990, and took effect on June 1, 1991.[79]

2. Works Covered. The protections of VARA extend only to works of visual art.[80] Congress has defined a work of visual art as a painting, drawing, print, sculpture, or still photograph, subject to certain limitations.[81] For example, the work of visual art must either be a single copy or a limited edition.[82] To constitute a limited edition, there must be 200 or fewer copies of the work of visual art that are signed and consecutively numbered by the author.[83] Explicitly excluded from the definition of a work of visual art are posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, databases, electronic information services, electronic publications, merchandising items or advertising, promotional, descriptive, covering, or packaging materials or containers.[84] Also excluded from works of visual art are works made for hire, which include works prepared by an employee within the scope of his employment or works specially ordered for use as a contribution to a collective work.[85]

3. Rights Conferred. VARA grants the creators of works of visual art, as defined above, the moral rights of attribution and integrity to their works.[86] Under VARA, an artist who creates a work of visual art has the right of attribution "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."[87] Also, the artist has "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."[88]

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[77] Zuber, *supra* note 7, at 472.
[78] *Id.* at 472–73.
[79] *Id.* at 473.
[80] Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2000).
[81] Copyright Act of 1976, 17 U.S.C. § 101 (2000).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* § 106A.
[87] *Id.*
[88] *Id.*

Additionally, subject to certain limitations, an artist of a work of visual art has the right of integrity "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation" and "to prevent any destruction of a work of recognized stature."[89] The limitations on this right involve a work of visual art that was created prior to VARA, which cannot be removed from a building without its destruction.[90] In such a case, these specific rights included in VARA do not apply.[91]

Finally, there is a time limitation on the moral rights conferred by VARA.[92] Works of visual art that were created on or after VARA was effectuated are protected for the lifetime of the artist.[93]

4. Exceptions. The rights conferred by VARA are also subject to several exceptions.[94] First, "the modification of a work of visual art which is the result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification."[95] Additionally, "the modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence."[96] This is more commonly referred to as the public presentation exception and has been of great importance in the litigation involving site-specific works of art so far.[97]

C. *PHILLIPS V. PEMBROKE REAL ESTATE, INC.*

1. Background. David Phillips is an artist nationally recognized for his work with stone and bronze, which he integrates into the surrounding environment.[98] Phillips's works can be seen at universities and public spaces across the United States and internationally.[99] Like a true environmental and site-specific artist,

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[89] *Id.*
[90] 17 U.S.C. § 113(d) (2000).
[91] *Id.*
[92] *Id.* § 106A(d).
[93] *Id.*
[94] 17 U.S.C. § 106A.
[95] *Id.*
[96] *Id.*
[97] *See, e.g.*, Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 131 (1st Cir. 2006) (discussing the district court's in-depth analysis of the public presentation exception as applied to site-specific art).
[98] *Id.* at 129.
[99] *Id.* at 130.

Phillips proclaims that it is his "inherent reverence for natural beauty in this ecologically ravaged world that influences all his decisions."[100]

In 1999, Pembroke Real Estate, Inc. (Pembroke) commissioned Phillips and three other artists to work on Eastport Park located in Boston.[101] Pembroke is the lessee of the land on which the park is built, which is situated across from the Boston Harbor in the South Boston Waterfront District.[102] The park is free and open to the public twenty-four hours a day.[103] Phillips and the three other artists created a sculptural park with a nautical theme to match the waterfront locale.[104]

Phillips's work in the park is extensive. He had an agreement with the landscape architect to be the artist that coordinated with the landscape specialists.[105] Phillips helped design a series of repeated spirals that run along a diagonal axis of the park as a part of this agreement.[106] Phillips also contracted with Pembroke to create twenty-seven sculptures for the park, including fifteen abstract bronze works.[107] Another contract with Pembroke required Phillips to design and install stonework, including stone walls and granite walkways.[108] Phillips also carved from granite the centerpiece for the park, a large spherical sculpture, *Chords*.[109] Despite the fact that Phillips's work throughout the park is extensive and diverse in nature, his work is "unified by a theme of spiral and circular forms."[110]

In 2001, Pembroke wanted to redesign the park: simplify walkways, include more plants for shade, remove stone that caused maintenance problems, and remove and relocate some of Phillips's sculptures.[111] Phillips objected to Pembroke's original redesign plans to remove his stonework and relocate his sculptures.[112] In 2003, Pembroke revised its plan and agreed to retain all but one of Phillips's sculptures, but still relocate some of the stone and change the walkways.[113] Even with the changes in his favor, Phillips was not satisfied with Pembroke's redesign plans and filed suit.[114]

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 130–31.
[109] *Id.* at 131.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*

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2. District Court. Phillips sued Pembroke in federal district court, seeking injunctive relief under VARA and a similar state statute.[115] After a nonevidentiary hearing on August 21, 2003, the court issued a temporary restraining order to prevent Pembroke from changing the park.[116] Pembroke then returned to its first redesign plan to remove nearly all of Phillips's sculptures.[117] The court then conducted a two-day evidentiary hearing.[118]

a. Arguments of Artist David Phillips. In his suit against Pembroke, Phillips sought "to prevent Pembroke from altering, moving, or modifying any of his work in the [p]ark in any way."[119] Phillips's first argument to the district court involved the site-specific nature of his works in the park. Phillips argued that his sculptures and stonework constituted site-specific works of art because they were designed for and inseparable from the park.[120] Phillips also argued that VARA protected these site-specific works from any alteration, which would include any relocation or removal of the site-specific works.[121] Phillips also addressed the public presentation exception of VARA, arguing that the removal of his site-specific art did not fall within this exception.[122]

Phillips's second argument to the district court involved his works as one large integrated piece.[123] As an integrated work of art, Phillips argued, the removal of any one of the pieces would harm the larger work and therefore violate VARA.[124] As a last resort, Phillips was also willing to argue that the entire park was a single work of integrated art protected by VARA.[125]

b. Analysis. In addressing Phillips's site-specific arguments, the district court found that most of his work in the park was site-specific.[126] The court determined that Phillips "used the harborside location [of the park] as one medium of his art," thus making it site-specific to the park.[127] The court then looked to case law and decided that the public presentation exception excluded site-specific works from the protections of VARA.[128] Here, the court referenced

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[115] *Id.* (citing the Massachusetts Art Preservation Act, which the Massachusetts Supreme Judicial Court determined did not include protection for site-specific art).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 134.

[120] *Id.* at 135.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 137.

[127] *Id.*

[128] *See id.* at 138 (concluding that Congress did not intend for VARA to protect site-specific art

the widely-publicized dispute over the *Tilted Arc* as evidence that Congress was aware of site-specific art when it did not explicitly include it in the provisions of VARA.[129] Thus, the district court concluded that "an artist has no right to the placement or public presentation of his sculpture," even site-specific work, under VARA's public presentation exception.[130]

The district court also addressed the issue of whether Phillips's twenty-seven sculptures, or in the alternative the entire park, constituted a single integrated work of art.[131] The court looked to case law and legislative history to determine if VARA recognized integrated works of art as works of visual art.[132] The district court decided that VARA did recognize integrated art as a work of visual art.[133] The court also found that most of Phillips's pieces in the park made up a work of integrated art, but that some were free-standing pieces of sculpture.[134] The works that the court identified as making up an integrated work of visual art were those located on a diagonal axis across the park, tied together by a spiral theme.[135] Other nautical-themed sculptures not located on this axis were determined to be separate from the integrated work.[136] The court went on to reject Phillips's last resort argument that the park itself was one integrated work of art.[137] The court did not, however, decide that a park could never be a work of visual art under VARA, leaving that question open for future litigation.[138] Yet, though it concluded that VARA did apply to integrated art and that Phillips had created a work of integrated art, the court decided that VARA did not prevent the removal of the work from the park because of the public presentation exception of VARA.[139]

After the two-day evidentiary hearing, the district court found that although most of Phillips's work was one integrated work of visual art, he had no right to the placement or public presentation of it under the exception found in VARA.[140] The district court issued a memorandum and order in which it found that if

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because VARA and the public presentation exception were enacted after the highly publicized *Tilted Arc* controversy).

[129] *Id.*; *see also* Serra v. U.S. Gen. Serv. Admin., 847 F.2d 1045 (2d Cir. 1988) (holding that removal of site-specific artwork did not violate an artist's right of free expression or due process).

[130] *Phillips*, 459 F.3d at 138.

[131] *Id.* at 135.

[132] *Id.* at 136.

[133] *Id.*

[134] *Id.* at 136–37.

[135] *Id.* at 136.

[136] *Id.*

[137] *Id.* at 137.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 131.

Pembroke did not alter, modify, or destroy the works of visual art, it could move Phillips' work from the park without violating VARA.[141] Thus, the district court held that the free-standing works could be relocated and the integrated work of art could be "disassembled and moved piecemeal," as long as individual pieces were not altered or destroyed.[142]

3. Circuit Court.

a. Arguments of Artist David Phillips. On appeal, Phillips contended that the district court misinterpreted the language and legislative history of the public presentation exception.[143] Phillips argued that the public presentation exception of VARA does not apply to site-specific art and removal of such art is prohibited.[144] Phillips claimed that the words "presentation" and "placement" are indefinite as to location, arguing that "placement" indicates something temporary.[145] Phillips invoked the doctrine of *noscitur a sociis*, arguing that the words of the statute should be read in the context of the words around them.[146] Therefore, according to Phillips, the words "placement" and "lighting" must be read as related to each other, indicating a meaning of non-permanent changes in public presentation.[147] Additionally, Phillips argued that the words of VARA mean one thing as applied to non-site-specific art and another as applied to site-specific art.[148] He claimed that the silence of the statute on site-specific art is evidence that site-specific art is covered.[149]

b. Analysis. The circuit court rejected Phillips's arguments on appeal and modified the holding of the district court.[150] The court held that site-specific art does not fall into the public presentation exception of VARA because the Act does not apply to site-specific art at all.[151] The court concluded that the plain language of VARA did not include protection of moral rights for site-specific art.[152] Disagreeing with the district court, the circuit court concluded that VARA could not protect site-specific art and then allow its destruction by removal and relocation pursuant to the public presentation exception.[153] These variances of opinion hinge on the courts' interpretations of what is destruction of site-specific

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[141] *Id.*
[142] *Id.* at 131–32.
[143] *Id.* at 139.
[144] *Id.* at 140.
[145] *Id.* at 140–41.
[146] *Id.* at 141.
[147] *Id.*
[148] *Id.* (claiming that VARA has a "dual regime").
[149] *Id.* at 142.
[150] *Id.* at 143.
[151] *Id.*
[152] *Id.*
[153] *Id.*

work.[154] While the district court determined that destruction would only occur if the individual pieces were damaged during removal, the circuit court, agreeing with Phillips ironically, found that removal of site-specific work from a particular location was destruction as the surroundings are an integral part of the work.[155] Thus, instead of creating a site-specific exception to VARA when none was explicitly mentioned, the court held that site-specific work was not covered by VARA at all.[156] The court, noting the tensions between the interests of the artist and the private owner that would be created should the protections of VARA extend to site-specific art observed 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[, and s]uch a conclusion could dramatically affect real property interests and laws."[157] The court ended its opinion by suggesting that if moral rights protection should be granted to site-specific art it is a job for the legislature: "If such a protection is necessary, Congress should do the job."[158]

4. Commentary and Reaction. William Patry, a copyright lawyer with an online blog, agreed with the result of Phillips's case but not the circuit court's analysis.[159] In a posting titled "The First Circuit Misses the Boat Again," Patry asserts that the issue was incorrectly framed by the circuit court.[160] While the circuit court framed the issue as whether or not VARA recognizes site-specific art and therefore protects it, Patry claims that the issue was really whether VARA grants the right to prevent the removal of the work, even if the work is not physically destroyed, because removal itself is destruction.[161] Patry argues that VARA does not protect mere removal and points to the *Tilted Arc* controversy and its influence on the formulation of VARA as support.[162] Donn Zaretsky notes in another blog the harm Phillips's suit may have on the future claims of artists, especially those of site-specific works.[163] Whereas previously site-specific artists could use the threat of suing under VARA as leverage in a negotiation of the removal of their work, that threat is obviously much less effective post-*Phillips*.[164]

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[154] *See id.* at 140 (discussing the illogical conclusion of the district court that removal of works of site-specific art was not destruction of those works).

[155] *Id.*

[156] *Id.* at 142–43.

[157] *Id.* at 142.

[158] *Id.* at 143.

[159] The Patry Copyright Blog, http://williampatry.blogspot.com/ (Aug. 22, 2006, 15:14 EST).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] The Art Law Blog, http://theartlawblog.blogspot.com/ (Aug. 24, 2006, 19:50 EST).

[164] *Id.*

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5. Impact and Significance. Within the year following *Phillips*, another case involving a different form of site-specific art commenced.[165] In *Kelley v. Chicago Park District*, artist Chapman Kelley installed a work of art known as *Wildflower Works* in Chicago's Grant Park pursuant to a permit from the city of Chicago.[166] *Wildflower Works* consisted of two very large elliptical forms filled with wildflowers, which Kelley replanted and tended to throughout the year.[167] Chicago renewed the permit for a period of ten years spanning from the installation in 1984 until 1994.[168] After 1994, Kelley continued replanting and tending his *Wildflower Works* pursuant to an oral permit renewal.[169] This continued for ten years as well, until the Chicago Park District concluded that *Wildflower Works* would need to be reconfigured for maintenance and park expansion purposes in 2004.[170] The Park District approached Kelley with its plans to reduce and reshape *Wildflower Works* in order to solicit his input but did not to seek his approval.[171] Kelley disapproved of the plans, but the Park District went forward with them and reduced *Wildflower Works* to less than half its previous size and changed its form from ellipses to rectilinear shapes.[172]

Kelley then sued the Chicago Park District in federal court, alleging a violation of VARA, copyright infringement, and other various state law claims.[173] In order to be covered by the protections of VARA, Kelley asserted that *Wildflower Works* is a work of visual art.[174] Kelley argued that *Wildflower Works* is either a painting or a sculpture, thus constituting a work of visual art.[175]

In evaluating Kelley's argument that his work of flowers is either a painting or a sculpture, the court noted that neither term was defined by Congress in the Copyright Act.[176] The court appropriately observed that, absent a statutory definition, words are to be given their plain and ordinary meaning.[177] However, the court also noted that "[t]here is a tension between the law and the evolution of ideas in modern or avant garde art; the former requires legislatures to taxonomize artistic creations, whereas the latter is occupied with expanding the

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[165] *See* Kelley v. Chicago Park Dist., No. 04-C-07715, 2008 WL 4449886 (N.D. Ill. Sept. 29, 2008).

[166] *Id.* at *1.

[167] *Id.*

[168] *Id.* at *2.

[169] *Id.*

[170] *Id.* at *3.

[171] *Id.*

[172] *Id.*

[173] *Id.* at *1.

[174] *Id.* at *3.

[175] *Id.*

[176] *Id.* at *4.

[177] *Id.*

definition of what we accept to be art."[178] Thus, the plain and ordinary meanings of modern art terms are often difficult to discern in the legal context.

The Chicago Park District argued for the application of a bright line rule that any artifact that "changes over time, requires ongoing maintenance, or contains living matter" cannot be considered a work of visual art.[179] However, the court declined to follow this path of reasoning.[180] After referring to several accepted works of art that change over time, the court refused to determine that an arrangement of living plants can never be a work of visual art per se.[181]

The court began to evaluate Kelley's claim that *Wildflower Works* was a sculpture by looking to the dictionary meaning of sculpture and testimony offered by Kelley's expert witness, a fine art appraiser and professor of art history at New York University.[182] The court then determined that Kelley's "manipulation of the flowers, metal, and gravel into an elliptical shape" fit within the broadest definition of sculpture.[183] Again, in evaluating Kelley's claim that *Wildflower Works* was a painting, the court looked to the dictionary definition of painting and testimony offered by the expert witness.[184] Using these sources for guidance, the court determined that the oval swatches of wildflowers in bloom could be considered a painting.[185]

Although the court determined that *Wildflower Works* was a work of visual art as either a sculpture or painting, the court went on to decide that *Wildflower Works* was not copyrightable.[186] Nevertheless, for argument's sake, the court addressed the possibility that had *Wildflower Works* been copyrightable, it still would not have been protected under VARA because it was site-specific.[187] The court determined that Kelley's work was site-specific based on expert testimony and admissions by the artist.[188] The court found that "the theoretical concepts that motivated Kelley's design and placement of *Wildflower Works* required that it be placed in Grant Park [because] Kelley wanted a location that would create a contrast between the linearity of the urban grid, the rondure of the elliptical gardens, and the entropy of the wildflower beds."[189] Indeed, before choosing the Park, Kelley

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[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at *5.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at *6.
[187] *Id.* (citing the *Phillips* decision as support).
[188] *Id.* at *7.
[189] *Id.*

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surveyed Chicago from the air via airplane and helicopter to find a location that would appropriately express his artistic vision.[190] Also, Kelley incorporated preexisting elements of the environment into *Wildflower Works*, such as air vents, that became figurative elements in the finished work itself.[191] Thus the court concluded that *Wildflower Works* was site-specific.[192]

The court, like the circuit court in *Phillips*, observed that VARA is silent on the issue of site-specific art.[193] Noting that there are few published decisions on VARA and that no court in its circuit had dealt with the issue of VARA's coverage of site-specific art, the court decided to follow the persuasive reasoning set forth by the First Circuit in *Phillips*.[194] Thus, the court held that Kelley's *Wildflower Works* could not be protectable under VARA, even if it was copyrightable, for the sole reason that it was site-specific to Grant Park.[195]

III. ANALYSIS

A. FINDING OF SITE-SPECIFICITY SUFFICIENT FOR VARA EXCLUSION

As *Phillips* and *Kelley* clearly indicate, the position of the law as to site-specific works of art and VARA today is that a finding of site-specificity is sufficient to completely remove the work of art from the moral rights protection of the statute.[196] The courts' consensus of the rule, however, does not mean that it is necessarily the correct or appropriate one. In fact, there are at least three possible critiques of this rule. First, the courts may have correctly interpreted the statute as applied to site-specific artists and therefore developed a sound legal rule. Second, this rule may be legally incorrect and site-specific artists do have moral rights protection under VARA. Third, this rule may be a correct legal interpretation of the current statute, but the law should be changed so as to accommodate site-specific artists. This Note approaches the issue of moral rights for site-specific artists from this last assessment of the current state of law. A finding of site-specificity is sufficient to remove the work of art from the moral rights protections of VARA.[197] However, site-specific artists should be afforded some moral rights protection. In light of the fact that a site-specific work of art implicates the interests of not only the artist, but also those of the private owner

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[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *See supra* notes 151–58, 187–95 and accompanying text.
[197] *See supra* note 193 and accompanying text.

and the public,[198] new legislation should be adopted to appropriately balance the rights and responsibilities of these three interest groups.

The proposition that new moral rights legislation for site-specific artists is necessary presumes the court's holding that VARA does not apply to site-specific art is correct. As a matter of legislative intent, there is evidence that Congress was aware of site-specific art through the controversy over the *Tilted Arc* and yet did not specifically address site-specific art in VARA.[199] Such evidence would go to the proposition that Congress did not intend for VARA to provide moral rights protection for site-specific artists. Further, as a matter of statutory construction and application, the *Phillips* court properly identified the irony in the district court's finding that VARA recognizes site-specific art and yet allows its destruction through the public presentation exception.[200] Thus, as the *Phillips* court recognized, either VARA recognizes site-specific art and protects it in its location, or VARA provides no recognition or protection for this unique type of artwork.[201] As previously discussed, protecting site-specific works of art in their location would infringe on the interests of both private owners and the public.[202] Thus, the *Phillips* court is correct in holding that VARA does not protect site-specific works of art in any way.

B. MORAL RIGHTS PROTECTION FOR SITE-SPECIFIC ART

While the *Phillips* court may have correctly answered the question of whether VARA grants moral rights protection to site-specific artists, the court did not explicitly answer the question of whether site-specific artists should be granted moral rights protection. There are hints, however, that the *Phillips* court felt that its hands were tied because it did not have the ability to grant moral rights under current legislation.[203] Regardless of what the *Phillips* court did or did not indicate, site-specific artists should be granted moral rights protection for several reasons. First, site-specific works of art are works of visual art, and works of visual art, with

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[198] *See supra* note 32 and accompanying text.

[199] *See supra* notes 128–29 and accompanying text.

[200] *See supra* notes 154–55 and accompanying text.

[201] *See supra* note 153 and accompanying text.

[202] *See supra* Part II.A.*4.b–c.*

[203] *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006) ("We do not denigrate the value or importance of site-specific art, which unmistakably enriches our culture and the beauty of our public spaces. We have simply concluded, for all of the reasons stated, that the plain language of VARA does not protect site-specific art. If such protection is necessary, Congress should do the job. We cannot do it by rewriting the statute in the guise of statutory interpretation.").

few expressly stated exceptions, have been granted moral rights protection.[204] A work of visual art is statutorily defined as a painting, drawing, print, sculpture, or still photograph.[205] Site-specific works of art are often defined as sculptures of some sort. From the more traditional sculptures found in *Phillips* to the arrangement of flowers in *Kelley*, the courts did not have any issue in defining these site-specific works of art as works of visual art.[206] Through VARA, Congress has deemed moral rights protection appropriate for works of visual art.[207] Therefore, as works of visual art, site-specific works of art should also be granted moral rights protection.

Second, granting moral rights protection to site-specific works of art is important in promoting the development of public art, which can be beneficial to all parties involved, including the artist, the private owner, and the public. Even the *Phillips* court recognized the benefits that site-specific art can give: "We do not denigrate the value or importance of site-specific art, which unmistakably enriches our culture and the beauty of our public spaces."[208] Site-specific art can undoubtedly serve many important interests in society, including promoting an awareness of art among individuals who may never step foot in a museum or gallery.[209]

Finally, granting moral rights to site-specific artists is an important legislative step in not only protecting the art forms of today but also in fostering creativity for the future. Even the United States Constitution recognizes the importance of promoting art by granting Congress the power to legislate protection for authors and creators.[210] For Congress to simply limit protection to those art forms that neatly fall into traditional and easily-definable categories would be to stymie the very purpose of this enumerated power. Art will only continue to grow and change in unanticipated ways and the law should be flexible and dynamic enough to promote and protect the creative innovations of the future.

While site-specific artists should be granted moral rights protection for the reasons discussed above, there are several competing factors which should limit the rights granted to such artists. These factors include the interests of the private owner and the public. Because site-specific works of art implicate the interests of these two groups more than other types of visual art, the current legislation is inadequate to allow courts to balance these interests against the rights of the artist. However, with new legislation that is composed specifically for the unique

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[204] *See supra* Part II.B.*2–4*.

[205] Copyright Act of 1976, 17 U.S.C. § 101 (2000).

[206] *See supra* notes 126–27, 182–85 and accompanying text.

[207] *See supra* Part II.B.*2*.

[208] *Phillips*, 459 F.3d at 143.

[209] *See* KLEINER ET AL., *supra* note 2, at 1102.

[210] *See* U.S. CONST. art. I, § 8, cl. 8.

situation of site-specific art and adequately balances the competing interests of the public and private owner with the rights of the artist, there simply is not a significant countervailing reason why moral rights should not be granted to site-specific artists.

C. A LEGISLATIVE FIX: ADOPTING SARA (SITE-SPECIFIC ARTISTS RIGHTS ACT)

Seizing on the parting words of the *Phillips* court, Congress should do the job and grant moral rights protection for site-specific artists. However, as artists continue to find new ways to break old rules, legislators are faced with the difficult task of writing legislation that will continue to offer protection for the artists. This is a challenging task not just because of the ever-evolving nature of art, but also because of the conflicting interests implicated by offering artistic protection, especially to site-specific artists. For site-specific art, the interests of the artist, the private owner, and the public will often conflict with one another. Thus, legislators must appropriately balance the need for artistic protection for site-specific artists with the interests of the private owner and the public. Enactment of a Site-Specific Artists Rights Act (SARA) could effectively accomplish the dual goal of protecting the rights of site-specific artists and ensuring representation of private and public interests.

Picturing what such balancing legislation would look like is difficult. The legislature must first handle the issue of how much of the moral rights protection for visual artists should be granted to site-specific artists. There are obvious difficulties in this decision, as the very nature of site-specific art requires that it be protected in its location. Other works of visual art are subjected to the public presentation exception of VARA, which gives the artists no right as to how or where their works are displayed. In order to truly protect site-specific art, the legislature must allow site-specific artists some rights in how and where their works are displayed.

Such a grant of rights to the artist, however, brings up the next issue the legislature must handle: what rights will the private owner be able to retain over his own property as against the rights of the artist in the placement of his site-specific work of art? As the *Phillips* court aptly noted, "[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[, which] could dramatically affect real property interests and laws."[211] Obviously VARA was ill-equipped to handle the conflict arising between the recognition of the artist's right to the placement of his work and the private owner's right to control his own

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[211] *Phillips*, 459 F.3d at 142.

property and the objects thereon. Thus, any new legislation that Congress writes to protect site-specific art must retain important safeguards for the private owner. Otherwise, private owners would be discouraged from commissioning site-specific works of art—which can be of great benefit to the public at large—out of fear that they would lose control of and rights to their own property. An example of such a safeguard would be a time limit on the artist's right to the location of his work of art, which upon expiration would allow the private owner to remove the work of art from his property. Another safeguard for the private owner could be a buyout option, which would allow the private owner to purchase the work of art or the rights to its location for a preset price from the artist, regardless of the artist's desire to sell. While these safeguards do in fact infringe on the moral rights of the artist, which this Note have argued are necessary, such infringements on the rights of site-specific artists are better than no rights at all, which is the present state of the law.

Finally, legislators must determine what rights, if any, the public should have as against the moral rights of the artist or even the property rights of the private owner. As the *Tilted Arc* situation demonstrated, the public can be a powerful influence even without legislatively-granted rights. Therefore, while certain rights may need to be granted to the private owner as against the artist in order to incentivize the development and creation of site-specific works, the public may not need to be granted statutory rights as against the private owner or the artist, as its influence over both parties (but particularly the private owner) is already strong.

The above are just a few examples of how Congress could balance these competing interests while still granting moral rights protection for site-specific artists. Clearly such interests are unique to site-specific art. Therefore any legislation that is written must be narrowly tailored to the interests specifically involved with the creation and preservation of this type of art. While the details of how Congress can achieve this balancing between the artist, the private owner, and the public are difficult to determine, one thing is fairly easy to decide: moral rights protection for site-specific artists needs to be granted by Congress and the adoption of SARA could provide much needed protection for this unique art form.

IV. CONCLUSION

Site-specific art, which is the product of the incorporation of an artist's creation into its surrounding environment, developed as a way to allow the public to experience and interact with art in their everyday lives. By taking their artworks out of museums and galleries and into the wide-open world, site-specific artists invited the public to enjoy and become a part of their creation. Thus, by invitation

from the artist, the public plays an integral role in the creation of site-specific art. Additionally, by design, site-specific art is inseparable from its location as the surrounding environment is a part of the artwork. Thus, the private owner of the property on which the art is located also plays an integral role in the development and duration of site-specific art. These interests—those of the public and the private owner—coupled with the interest of the artist in the creation and duration of his unique work of art are all integral to site-specific art, yet they rarely align and often conflict with one another as the *Tilted Arc* debacle clearly illustrates. In that instance, the artist's interest in protecting his work from destruction by removal was outweighed by the public's unfavorable opinion of his artwork and the private owner's decision to remove the site-specific work. However, when Congress enacted VARA, visual artists received moral rights protection for their works, providing site-specific artists with the hope that the interests of the public and private owner would no longer trump the artist's interest in the integrity of his work.

Unfortunately, in *Phillips v. Pembroke Real Estate, Inc.*, the First Circuit stamped out the hope of site-specific artists by finding that VARA does not apply to site-specific works of art at all. Thus, the private owners of the park where the artworks at issue in the case were located were free to move the site-specific works, even though such removal would destroy the works of art as they were designed specifically for that location. The detrimental impact of the decision in *Phillips* was recently augmented when a district court decided to follow the First Circuit's reasoning and found that VARA does not apply to site-specific art, even though it is a form of visual art. Although the results of these cases are unfavorable to site-specific artists, the finding that VARA does not apply to site-specific artists is defensible. Because site-specific art implicates the competing interests of the public, the private owner, and the artist in ways that more traditional forms of visual art do not, VARA is not sufficiently tailored to the unique issues surrounding site-specific artists and their works.

Although VARA does not provide moral rights protection for site-specific artists, these artists should be granted such protection for several reasons. First, site-specific art is a form of visual art and Congress, by enacting VARA, has placed its stamp of approval on granting moral rights protection for works of visual art. Although the courts have decided that site-specific art is not covered by VARA, the courts were still able to define both the site-specific sculptures in *Phillips* and the site-specific display of flowers in *Kelley* as works of visual art. Thus, as works of visual art, site-specific works should receive moral rights protection. Second, moral rights protection for site-specific art will help promote the development of public art, which provides both cultural and educational benefits for society. Individuals who never step foot in a museum have the opportunity to experience art in their everyday lives through site-specific artworks.

Finally, adopting moral rights legislation for site-specific art will aid in promoting progressive art forms and fostering creativity, which is in step with the Constitution's grant of power to Congress to promote the useful arts.

Site-specific artists were certainly thinking outside the box of traditional art techniques and forums when they pioneered a new form of artistic expression that incorporated handcrafted works of art into their surrounding environment. For legislators to try and fit these creative and ambitious works into a one-size-fits-all box of legal protection for visual artists would be disastrous for both the art world and the community at large. To effectively protect the moral rights of site-specific artists while simultaneously protecting the interests of the property owner and public that are implicated by site-specific art, the legislature must adopt legislation that is specifically tailored to this unique art form. By adopting SARA, Congress can effectively protect this unique form of art without encroaching on established property rights of private owners or dismissing the public interest. In order to effectively balance these interests, the legislation could set a time limit on the artist's moral rights that is much shorter than the lifetime limit granted by VARA or give property owners a buyout option, which could include the right to purchase th site-specific work of art or the rights to its location. Such narrowly tailored provisions would allow the SARA to accomplish the goal of granting moral rights protection for these artists without overstepping the important interests asserted by private owners and the public.

In short, site-specific artists, as creators of works of visual art, should receive moral rights protection. Enacting a SARA can effectively protect the moral rights of these artists without disregarding the important interests of the private owner and public. Although *Phillips* has left VARA little protection for site-specific artists, Congress should use its constitutional power to promote the useful arts by providing moral rights for these specific visual artists.

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