Site-Specific Art in Legal Limbo: Toward a Public-Centric Approach

Introduction

Site-specific art occupies a unique and precarious position in American law. These works, which derive their meaning and artistic significance from their physical location, challenge traditional notions of both property rights and artistic preservation. When artists create site-specific works, they often intend them to remain permanently in their original locations, effectively seeking to encumber real property with artistic rights. This inherent tension between artists' creative vision and property owners' rights has led to numerous legal disputes and the destruction of significant artworks.

This paper examines the legal framework governing site-specific art in the United States, with particular focus on the Visual Artists Rights Act (VARA) and its interpretation by federal courts. While Congress enacted VARA in 1990 to bring United States law in accordance with international moral rights standards under the Berne Convention, courts have struggled to reconcile the statute's protections with America's strong tradition of property rights. The First Circuit's decision in *Phillips v. Pembroke Real Estate* effectively eliminated VARA protection for site-specific art, though the Seventh Circuit later questioned this interpretation in *Kelley v. Chicago Park District*. This circuit split reflects deeper questions about how to balance artistic preservation with property rights in American law.

Through analysis of domestic and international case law, scholarly commentary, and proposed solutions, this paper argues that the current legal framework inadequately protects site-specific art. Rather than attempting to force site-specific art protection into VARA's existing framework, this paper proposes a new public-centric approach modeled on historic preservation law. This alternative framework would better serve both artists and communities by recognizing

site-specific artworks as cultural resources worthy of preservation, while providing clear guidelines for property owners and artists alike.

Site-specific works

The term site-specific art encompasses a variety of artwork in which context serves as an essential element of the composition.[1] In his article on site-specific art, Professor Chused aptly described that site-specific works "create unified compositions combining surfaces, canvases, walls, or horizontal planes with three-dimensional forms sculpture, architectural spaces, or landscape designs."[2] Scholars also use the term more specifically to refer to a 1960s/70s artistic movement in which artists explicitly made location the subject of their works.[3] This site-specific movement encompassed and overlapped with other genres that came to the forefront in this era: installation art, conceptual art, and land/environmental art.[4]

Many notable site-specific works from this period, as well as more recent works that descend from this movement, have made their way into the art historical canon. Robert Smithson created perhaps the most iconic site-specific work, *Spiral Jetty*, 1970.[5] This work consists of a 1,500-feet-long and 15-feet-wide coil, made with over six thousand tons of black basalt rocks and earth from the site, that winds counterclockwise off the shore into the Great Salt Lake.[6] Also an important work of site-specific land art, Nancy Holt's *Sun Tunnels,* 1973–76, consists of four concrete structures arranged in a cross formation that Holt positioned precisely to frame the sun

[1] Site-Specific Art/Environmental Art, Guggenheim, https://www.guggenheim.org/artwork/movement/site-specific-artenvironmental-art (last visited Dec. 19, 2024).
[2] Richard Chused, *Charging Bull, Fearless Girl, Artistic Composition, and Copyright*, 10 N.Y.U. J. Intell. Prop. & Ent. L. 44, 65 (2020).
[3] Site-Specific Art, Nat'l Galleries Scot., https://www.nationalgalleries.org/art-and-artists/glossary-terms/site-specific-art (last visited Dec. 19, 2024).
[4] See Site-Specific Art/Environmental Art, supra note 1.
[5] Robert Smithson, *Spiral Jetty*, Dia Art Found., https://www.diaart.org/exhibition/exhibitions-projects/robert-smithson-spiral-jetty-site (last visited Dec. 19, 2024).
[6] *Id.*

as it rises and sets during the summer and winter solstices above of a remote valley of Utah's Great Basin Desert so that the small holes in the concrete structures cast projections of constellations along the tunnels' interior.[7] Since 1977, James Turrell has continuously worked on a similarly impressive site-specific land work, *Crater Site Plan with Survey Net,* 1977–present.[8] He is creating in this specific spot in the north-central Arizona an observatory-type space with a network of pathways, tunnels, and mostly subterranean spaces with apertures for viewing of atmospheric phenomena located[9]. On a somewhat smaller scale and in an urban context, Robert Irwin's light installation *Miracle Mile*, 2013, is an iconic Los Angeles-specific artwork, permanently at the Los Angeles County Museum of Art.[10] For this work, Irwin installed 66 florescent tubes on a wall that extends for 36 feet that subtly play and respond to Wilshire Boulevard beyond the gallery window.[11]

Of course, site-specific art predates the twentieth century. Throughout history, rulers, artists, and activists have strategically placed monuments, memorials, and other public art to communicate messages, preserve memories, and transform spaces. While the term "site-specific" may be modern, the concept is ancient: Michelangelo's frescoes are inseparable from the architecture of the Sistine Chapel, Stonehenge's astronomical alignments are fundamental to its significance, and numerous historic works demonstrate similar site-dependent qualities. For instance, Chagall's ceiling frescoes at the Paris Opéra Garnier celebrate the composers whose

[7] Nancy Holt, *Sun Tunnels*, Dia Art Found., https://www.diaart.org/collection/collection/holt-nancy-sun-tunnels-197376-2018-003 (last visited Dec. 19, 2024).
[8] Site-Specific Art/Environmental Art, Guggenheim, https://www.guggenheim.org/artwork/movement/site-specific-artenvironmental-art (last visited Dec. 19, 2024).
[9] *Id.*
[10] Robert Irwin: Miracle Mile, L.A. Cnty. Museum of Art, https://www.lacma.org/art/exhibition/miracle-mile (last visited Dec. 19, 2024).
[11] *Id.*

music fills the hall, while Diego Rivera's murals in Mexico City's National Palace engage in dialogue with their architectural setting to tell Mexico's history.

Courts have adopted a broad definition of site-specific art that encompasses any artwork where location plays a critical role in its meaning. However, since the applicable laws are relatively recent, legal claims have focused exclusively on works from the twentieth and twenty-first centuries. The Second Circuit in the seminal site-specific art case *Serra v. U.S. Gen. Servs. Admin* quoted artist Richard Serra's definition: a site-specific work is "'one which is conceived and created in relation to the particular conditions of a specific site.' Site-specific sculpture is meaningful only when displayed in the particular location for which it was created; such works are not intended to be displayed in more than one place."[12] The First Circuit added that "in a work of 'site-specific art,' one of the component physical objects is the location of the art. To remove a work of site-specific art from its original site is to destroy it."[13] In a related decision, the Supreme Judicial Court of Massachusetts rather poetically described site-specific as "a combination of readymade work and a crafted work: the site is the readymade work, from which the artist draws her inspiration, and upon which the artist adds a crafted material. Together, the readymade and the crafted material exist as the artwork."[14] However, the court also disclaimed that "the term 'site-specific' is also admittedly a sort of catchall phrase for a variety of artworks that elevate, in varying degrees, the importance of the relationship between context and object."[15] In this case, landscape architect Craig Halvorson described site-specific art in less poetic terms

[12] Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988).
[13] Phillips v. Pembroke Real Est., Inc., 459 F.3d 128, 134 (1st Cir. 2006).
[14] Phillips v. Pembroke Real Est., Inc., 443 Mass. 110, 111–12, 819 N.E.2d 579, 580 (2004).
[15] *Id.*

by contrasting this category with what he called "'plop-art' where a separately conceived art object is simply placed in a space. A piece of 'plop-art' does not incorporate its surroundings."[16]

Site-specific challenges

Site-specific art faces unique preservation challenges. While all artworks are vulnerable to physical damage, site-specific works can be effectively destroyed by changes to their location or surrounding environment. As artist Richard Serra emphasized, even a failure to maintain the surrounding landscape can fundamentally compromise a site-specific work's integrity.[17] Unfortunately, owners do not necessarily have financial incentives to purchase or preserve these works.

The market for site-specific art is limited by the very nature of the medium. Since these works are inseparable from their locations, any sale must typically include both the artwork and its site, significantly restricting potential buyers. This arrangement creates unique challenges: buyers must not only acquire the property but also commit to preserving both the work and its surrounding environment. While a site-specific work by a renowned artist might enhance property value, the pool of potential buyers remains small, limited to those willing to maintain the work's integrity and pay a premium for this responsibility. Some buyers might choose to disregard the artist's intent, though this choice carries its own consequences, as discussed below. This tension between artistic vision and market forces is not a coincidence. Artists in the 1960s and 70s embraced site-specific art partly as a rejection of the commercialization of the art

[16] Phillips v. Pembroke Real Est., Inc., 459 F.3d 128, 134 (1st Cir. 2006).
[17] Serra, 847 F.2d at 1047.

market.[18] As the Noguchi Museum notes, these "positivist and utopian objectives at mid-century had not yet fully grappled with the unsentimental nature of capitalist terrains."[19]

Furthermore, few buyers are willing to encumber their property to accommodate an artist's intent. Site-specific art creates an inherent tension between artistic integrity and real property rights. When a property owner installs or commissions a site-specific work with a commitment to maintain its integrity, they effectively place an encumbrance on their property. The relationship resembles a covenant running with the land, as artists often intend their site-specific works to remain permanently in place. However, unlike formal property covenants, which have a set of requirements,[20] artists may mistakenly assume that the site-specific nature of their work automatically creates binding obligations on property owners. This assumption conflicts with fundamental principles of American property law, which prioritize free alienability and absolute ownership rights.[21]

Despite market forces and property law weighing against the protection of site-specific art, compelling arguments support its preservation, benefiting both the public and artists. Site-specific artworks in public spaces serve multiple functions: they activate and beautify spaces, commemorate events, and provide information. These works democratize art by making it accessible to all, not just museum visitors or art collectors. Over time, site-specific art become integral to a place's visual landscape, creating a reciprocal relationship where context enriches the artwork, and the artwork imbues its surroundings with meaning. Destroying such works means losing part of a community's collective visual history. As an ethical matter, owners should

[18] Sigda, Lauren D. (2021) "Site-Specific Art and Ephemerality," The Macksey Journal: Vol. 2, Article 67.
[19] Altered and Destroyed Works, Noguchi Museum, https://www.noguchi.org/isamu-noguchi/digital-features/altered-and-destroyed (last visited Dec. 19, 2024).
[20] 120 Am. Jur. 2d Covenants, Etc. § 21.
[21] *See* Virginia M. Cascio, *Hardly A Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under Vara*, 20 DePaul J. Art, Tech. & Intell. Prop. L. 167, 188 (2009).

protect artworks in their possession out of respect for the artist and the creativity, thought, time, labor, and, perhaps, genius that went into making the piece. Each site-specific work represents a crucial piece of an artist's overall oeuvre, and owners bear responsibility for safeguarding this artistic legacy. Practically, if artists have confidence in the custodians of their creative output, artists will more freely and willing share their prized works without fear of damage or loss. A site-specific artist who has confidence that their works will remain in situ permanently is more likely to create pieces that engage deeply with their surroundings. Conversely, without such assurance, artists may produce more generic works that could be easily relocated—effectively undermining the very essence of site-specific art.

Museums and arts institutions protect some site-specific pieces; however, many other works have been irreparably altered or destroyed when property rights, public opposition, or financial pressures override preservation concerns. Notoriously, and as discussed further below, the General Services Administration decided to remove Richard Serra's *Tilted Arc*, a massive 12 -foot-high and 120-foot-long steel sculpture that bisected the Federal Plaza in New York City, because the public complained that the work created a safety hazard and an impediment to efficient pedestrian travel across the plaza.[22] Similarly, in 1980, the Bank of Tokyo deinstalled Isamu Noguchi's site-specific sculpture *Shinto*, a 17-foot, 1,600-pound aluminum, rhomboid form suspended from the lobby's coffered ceiling between four columns, intentionally in contrast with the lobby's highly ornate, neoclassical décor.[23] Unfortunately, in a similar set of circumstances to *Tilted Arc*, the bank executives complained about the work, which they

[22] Lost Art: Richard Serra, Tate, https://www.tate.org.uk/art/artists/richard-serra-1923/lost-art-richard-serra (last visited Dec. 19, 2024).
[23] The Noguchi Museum devotes a section of its website to the Isamu Noguchi's destroyed (and altered) site-specific works. *See* Altered and Destroyed Works, Noguchi Museum, https://www.noguchi.org/isamu-noguchi/digital-features/altered-and-destroyed (last visited Dec. 19, 2024).

described as having a vaguely threatening presence like a "guillotine," and the work was deinstalled and removed from the building in pieces without any notice to the artist.[24] Noguchi described the deinstallation as "vandalism, and very reactionary," nonetheless, he said that he had no intention of "doing anything" because "as long as they paid for it, I have no legal right."[25] Later, when a private collector purchased the aluminum and asked Noguchi about reassembling the work, Noguchi responded that "once removed from its intended setting, *Shinto* had lost its function and meaning, rendering it purposeless."[26]

More recently, Trump International inserted its aesthetic into Robert Irwin's minimalist, site-specific work *48 Shadow Planes*, 1983 at the Old Post Office Building.[27] For this work, Irwin created a subtle interplay of light and space by suspending six cables across the atrium, each holding eight rectangles of semi-translucent white scrim.[28] The work was designed to respond to changing daylight and emphasize the building's architectural features, with Irwin noting, "the building's interior is all windows. My work creates another layer of windows suspended in space."[29] In 2013, Trump International leased the Old Post Office Building and transformed the space into a hotel.[30] Now Irwin's minimalist work hangs above several massive crystal chandeliers and perpendicular to gigantic American flags with many large flat-screen TVs below.[31] Tim Schneider of Artnet aptly described the combination as "something like trying to

[24] Grace Glueck, Bank of Tokyo Removes a Noguchi Sculpture, N.Y. Times, Apr. 19, 1980, at 1.
[25] *Id*.
[26] Altered and Destroyed Works, supra note 2.
[27] Tim Schneider, Did Donald Trump Ruin a High-Concept Artistic Masterwork Inside His DC Hotel?, ARTNET (Feb. 27, 2018), https://news.artnet.com/art-world/donald-trump-robert-irwin-1231517
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id.*

appreciate a Philip Glass composition played while a Mardi Gras parade surges around the lone pianist."[32]

Law governing site-specific works

Unable to rely on the art market to incentivize owners to protect site-specific works, artists have turned to the law seeking protection for these works with mixed results. Europe, particularly France, has long recognized artists' moral rights, including the right to preserve site-specific works' integrity. The United States, however, was slower to adopt such protections. Though some states began enacting moral rights statutes in the 1970s and 80s, federal protection only came in 1990 with the Visual Artists Rights Act (VARA), passed to comply with the Berne Convention. Yet even after VARA's enactment, circuit courts remain divided on whether the statute protects site-specific art.

<u>The law governing site-specific works outside of the United States</u>

The idea of moral rights originated in France, *droit d'auteur*, through judge made law in the 19th century, inspired by enlightenment principles of the French Revolution.[33] These rights were later codified into law in 1957.[34] Stemming from personality, rather than property, rights, this set of rights protects artists' non-economic interests in their creations: the right of attribution, divulgation, the right to repent, and most importantly, for site-specific works, the right of integrity.[35] Moral rights in France are "perpetual, inalienable, and imprescriptible."[36]

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[32] *Id*.
[33] *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, 207 (2001) and Cheryl Swack, "Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States," 22 Colum.-VLA J.L. & Arts 361 (1998).
[34] Garson, supra note 35, at 208.
[35] *Id.* at 209–10.
[36] *Id.* at 207.

Imbedded in the theories of Kant and Hegel, moral rights stem from the idea that artists imbue their artwork with their unique creativity and genius, and this intangible aspect of the artwork deserves legal recognition separate form an artwork's economic value.[37]

Importantly, French courts have held that this set of moral rights, specifically the artist's right of integrity, protects an artist against the decontextualization of his or her artwork, if the alteration would result in the conceptual destruction of the work.[38] Notably, in *Fersing v. Buffet*, the Paris Court of Appeals held that the when the owner dismantled Bernard Buffet's composition, which consisted of six panels on all sides of a refrigerator making one complete work, to sell the component parts as individual works, this action constituted a violation of the Buffet's right of integrity to the work.[39] Similarly, in *Léger c. Reunion des Theâtres Lyriques Nationaux*, the court held that Fernand Leger's moral rights in the stage sets he created for the opera Bolivar prevented the producer from removing the sets from the opera without Léger's consent.[40] In *Dubuffet c. Renault*, France's Supreme Court of Cassation held that Dubuffet was entitled, per his moral right of integrity, to complete an in progress site-specific sculpture for the courtyard of the Renault company's new headquarters even though Renault wished to cancel the commission.[41]

Many other European countries, like Germany and Italy, followed France's example by enacting moral rights statutes, and some of these countries' courts have also explicitly stated that

[37] Swack, supra note 35, at 371–72.
[38] Garson, supra note 35, at 211.
[39] CA Paris, May 30, 1962, D. Jur. 1962, 570; Cass. chs. exprops., 6 juillet [July 6], 1965, Gaz. Pal. 1965, 2, pan. jurispr. 126, construed in Garson supra note 35, at 212.
[40] Tribunal civil de la Seine, 1955, 6 R.I.D.A. 146, construed in in Garson supra note 35, at 212.
[41] Judgment of 23 mars 1977 (Dubuffet c. Renault), Trib. gr. inst. Paris, 1977 R.I.D.A. 191, aff'd, Judgment of 2 juin 1978, Paris, 1979 D.J. 14, rev'd, Judgment of 8 janvier 1980, Cass. 1e civ., 1980 D.J. 89, construed in Swack, supra note 35, at 397.

the right of integrity protects against the recontextualization of site-specific work.[42] For example, the Spanish Supreme Court held in a 2013 case that the right of integrity can extend to the location of the work when the artwork was specifically created for that spot.[43] Per this holding, the Court decided that Andrés Najel's sculpture could not be moved from its commissioned location in the center of a traffic circle, even though the municipality wanted to relocate the work after turning the traffic circle into a pedestrian plaza.[44]The Court understood that the work was created for that exact location, and its relocation would "substantially interfere with the [public's] understanding of the work" and with "the dialogue between the author and the public through the work of art."[45]

In 1971, countries came together to harmonize their moral rights statutes in the Berne Convention for the Protection of Literary and Artistic Works, which was the first international instrument to recognize an author's moral rights.[46] Specifically, the Berne Convention added Article 6bis, which established the minimum standards among member states for artists' moral rights.[47] Article 6bis grants artists, "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[48] While the Convention does not explicitly address site-specific works, Article 2 provides broad protection for various artistic works, including "works of drawing, painting, architecture, sculpture…works of applied art…

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[42] 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, 175 (2007)
[43] James M. Beck, A Potato Firmly Planted: Moral Rights and Site-Specific Art, MEDIA INST. (Feb. 26, 2013), https://www.mediainstitute.org/2013/02/26/a-potato-firmly-planted-moral-rights-and-site-specific-art.
[44] *Id.*
[45] *Id.*
[46] Overview of the Berne Convention for the Protection of Literary and Artistic Works, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne (last visited Dec. 19, 2024).
[47] *Id.*
[48] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

three-dimensional works relative to geography, topography, architecture or science."[49] However, the text goes on to clarify that "it shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected."[50] Although many European nations swiftly adopted the Convention's moral rights protections into their domestic law, the United States delayed even joining the Berne Convention 1988.[51]

The law governing site-specific works in the United States

Pre-Visual Artists Rights Act

Without a moral rights statute to rely on, American artists (and their lawyers) found creative ways to attempt to protect the non-economic aspects of artworks, of course, including, the integrity of site-specific works. In 1988 – the same year that the US joined the Berne convention, but two years before the United States enacted legislation to protect artists' moral rights – artist Richard Serra brought such a case, seeking protection for his site-specific sculpture *Tilted Arc*.[52] In this case, Serra raised the relevant claims available to him: breach of contract, copyright violation, trademark violation, violation of the New York State moral rights statute, and violation of his First and Fifth Amendment rights.[53]

As mentioned above, in 1979, the General Services Administration commissioned Serra to create an outdoor sculpture to be installed on the plaza at 26 Federal Plaza in lower Manhattan.[54] In 1981, Serra completed and installed *Tilted Arc*, a site-specific sculpture

[49] *Id.*
[50] *Id.*
[51] Rebecca Stuart, A Work of Heart: A Proposal for A Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards, 47 Santa Clara L. Rev. 645, 648 (2007).
[52] *See* Serra v. U.S. Gen. Servs. Admin., 667 F. Supp. 1042 (S.D.N.Y. 1987), aff'd, 847 F.2d 1045 (2d Cir. 1988).
[53] *Id.*
[54] Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1046-47 (2d Cir. 1988).

consisting of an arc of steel 120 feet long, 12 feet tall, and several inches thick that bisected Federal Plaza.[55] Serra explained that the work "was designed for the Federal Plaza and is artistically inseparable from its location."[56] Federal employees and community residents, however, complained that the sculpture interfered with their use of the plaza, created safety hazards, attracted graffiti, and was aesthetically unappealing.[57] After a public hearing and despite defenders of the work, the GSA decided to relocate the sculpture.[58] Serra then brought suit in the district court.[59] The court did not decide on the state law contract, copyright, and trademark claims but did hold that the planned relocation did not violate Serra's first or fifth Amendment rights.[60]

While the district court dismissed the trademark class on sovereign immunity grounds, the court explained in dicta that "the identifying mark of the art in any relocated site would remain the same. The purpose of a trademark is to give notice of who was the producer of the art."[61] This dicta goes against the holding of the Second Circuit in the 1976 case *Gilliam v. American Broadcasting Companies*, in which the court recognized an artist's right to integrity in his or her work through a Lanham Act analysis.[62] The court explained that "to deform his work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done. In such a case, it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final

[55] *Id.* at 1047.
[56] *Id.*
[57] *Id.* at 1048.
[58] *Id*.
[59] *Id.* at 1045.
[60] *Id.* at 1051.
[61] Serra v. U.S. Gen. Servs. Admin., 667 F. Supp. 1042, 1051 (S.D.N.Y. 1987), aff'd, 847 F.2d 1045 (2d Cir. 1988)
[62] Gilliam v. Am. Broad. Companies, Inc., 538 F.2d 14, 24 (2d Cir. 1976).

product by which to evaluate the work. Thus, an allegation that a defendant has presented to the public a garbled, distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act."[63]

On an appeal, the Second Circuit, solely addressing Serra's first and fifth amendment claims, upheld the District Court's decision.[64] Regarding Serra's first amendment rights in the sculpture, the court bluntly stated, "Serra has already had six years to convey his message through the sculpture's presence in the Plaza…the relocation of the sculpture after a lengthy period of initial display does not significantly impair Serra's right to free speech…notwithstanding that the sculpture is site-specific and may lose its artistic value if relocated, Serra is free to express his artistic and political views through the press and through other means that do not entail obstructing the Plaza."[65]

After this decision, artists had little hope of turning to the constitution for protection of site-specific works. The Second Circuit also suggested that intellectual property was not a viable avenue of protection. Of course, artists could still attempt to protect against the relocation of a site-specific works via contract. Additionally, as Serra sued under New York Arts and Cultural Affairs Law § 14.03, which prohibits the public display of an artwork "in an altered, defaced, mutilated or modified form ... without the artist's consent,"[66] many other states, led by California,[67] enacted statutes similar in language to the Berne Convention to provide artists with

[63] Gilliam v. Am. Broad. Companies, Inc., 538 F.2d 14, 24–25 (2d Cir. 1976)
[64] Serra, 667 F. Supp. at 1051–52.
[65] Serra, 847 F.2d at 1050.
[66] Serra, 667 F. Supp. at 1051–52 and N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney 2024).
[67] Cal. Civ. Code § 987 (2024).

moral rights protection that did not exist at the national level.[68] As with Berne, none of these statutes explicitly address the niche category of site-specific art.

Limited case law exists related to these state moral rights laws because VARA preempted these statutes soon after their inception. The case law that does exist holds that state law right of integrity would not cover site-specific works. In *Phillips v. Pembroke Real Estate*, the Supreme Judicial Court of Massachusetts decided on the issue: "to what extent does the Massachusetts Art Preservation Act Mass. Gen. Laws ch. 231, § 85S (1984) protect the placement of 'site specific' art?"[69] The court answered that MAPA did not protect against the conceptual destruction or decontextualization that may result from the removal of a site-specific work. The court looked to state legislative history and interpreted the statute to favor real property owners' rights over an incumbrance created by an artwork. [70]

Visual Artist Rights Act (VARA)

In 1988, the United States finally entered the Berne Convention,[71] and in 1990, Congress enacted the first federal moral rights statute, the Visual Artist Rights Act (VARA), which sits within the Copyright Act.[72] The legislative history states VARA's purpose to protect "both the reputations of certain visual artists and the works of art they create."[73] The legislative history also emphasizes the public benefit of protecting these rights. As Representative Robert W. Kastenmeier emphasized in his floor statement, "we should always remember that the visual arts

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[68] *See* Christopher J. Robinson, Note, The "Recognized Stature" Standard in the Visual Artists Rights Act, 68 Fordham L. Rev. 1935 (2000).
Cambra E. Stern, A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights, 51 UCLA L. Rev. 849, 885 (2004)
[69] Phillips v. Pembroke Real Est., Inc., 443 Mass. 110, 112 (2004).
[70] *Id*.
[71] Stuart, supra note 53, at 648.
[72] See *Jane C. Ginsburg*, Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990, 14 Colum.-VLA J.L. & Arts 477 (1990).
[73] 1990 U.S.C.C.A.N. 6915, 0.

covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest."[74] Similarly, Representative Markey noted, "artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist."[75]

VARA provides artists with the rights of "attribution" and "integrity" for the life of the author.[76] The statute states "the author of a work of visual art …shall have the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right… the rights conferred by subsection (a) shall endure for a term consisting of the life of the author." Importantly, VARA explicitly preempts state moral rights statutes that are equivalent to the rights conferred by VARA, but states may provide greater moral rights protection. For example, some states provide moral rights protection beyond the life of an artist, as in California's moral rights statute.[77]

VARA does not explicitly mention site-specific works, nor does it explicitly exclude them. VARA broadly defines a work of visual art per the Copyright Act as "a painting, drawing, print, or sculpture."[78] The legislative history advises that "the courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition....whether a particular work falls within the

[74] 0 U.S.C.C.A.N. 6915, 6915.
[75] 1990 U.S.C.C.A.N. 6915, 6916.
[76] 17 U.S.C.A. § 106A
[77] 17 U.S.C.A. § 301 (West) and Cal. Civ. Code § 987(g)(1).
[78] 17 U.S.C.A. § 101 (West).

definition should not depend on the medium or materials used." It further clarifies that "the term 'sculpture' includes, but is not limited to, castings, carvings, modelings, and constructions."[79] However, the Act specifically excludes "works made for hire," a category that would encompass many commissioned public works.[80]

VARA contains two exceptions that courts have discussed in relation to site-specific works. The statute contains a public presentation exception: "the modification of a work of visual art which is the result of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification."[81] VARA also includes a building exception, which could be read to apply to site-specific works within an architectural context: "In a case in which – (A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and (B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply."[82]

The drafters were likely aware of the tricky moral rights question raised by site-specific art because of the closely preceding case *Serra v. U.S. Gen. Servs. Admin*, but Congress chose

[79] 1990 U.S.C.C.A.N. 6915, 6921.
[80] 17 U.S.C.A. § 101 (West)
[81] *Id.*
[82] 17 U.S.C.A. § 113 (West)

not to resolve this question in the statute.[83] The closest the legislative history comes to addressing this issue is in passage attempting to expound on the bounds of the "public presentation exception."[84] The comments using extreme examples explain that "generally, the removal of a work from a specific location comes within the exclusion because the location is a matter of presentation, unless the work cannot be removed without causing the kinds of modifications described in proposed subsection 106A(a)(3). Under subsection (c)(2), 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. For example, Representative Markey described the actions of two Australian entrepreneurs who cut Picasso's 'Trois Femmes' into hundreds of pieces and sold them as 'original Picasso pieces.' This is clearly not a presentation question. On the other hand, the Committee believes that the presentation exclusion would operate to protect a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time."[85]

Post-VARA

Following VARA's enactment, artists began to bring VARA claims, including claims to protect site-specific art. In an early VARA case, *Board of Managers of Soho Int'l Arts Condominium v. City of N.Y*, a federal trial court interpreted VARA to exclude site-specific art, stating that the purpose of the statute "is not ... to preserve a work of visual art where it is, but rather to preserve the work as it is."[86] In another early case, *Carter v. Helmsley-Spear, Inc.* the

[83] Ginsburg, supra note 75, at 486.
[84] 1990 U.S.C.C.A.N. 6915, 6927.
[85] 1990 U.S.C.C.A.N. 6915, 6927
[86] Board of Managers of Soho Int'l Arts Condominium v. City of N.Y., U.S. Dist. Ct. No. 01 Civ. 1226 DAB, 2003 WL 11403333 (S.D.N.Y. June 17, 2003)2003 WL 11403333 (S.D.N.Y. June 17, 2003) as cited in Philbrook.

Second Circuit in dicta acknowledged that a sculptural work under VARA could include many separate sculptural components.[87]

Phillips v. Pembroke Real Est., Inc was the first appellate court opinion to directly address the question of whether VARA protects site-specific works.[88] In 1999, Pembroke Real Estate, the lessee of parkland owned by Massachusetts Port Authority, commissioned artist David Phillips to work on the park.[89] Phillips created approximately twenty-seven sculptures for the park and designed the stone walls, the granite stone walkway, and other landscape design elements of the park.[90] In 2001, Pembroke decided to alter the park and wanted to remove/relocate Phillips' sculptures and change the landscape design.[91] Phillips filed suit in federal district court, seeking injunctive relief under VARA, as well as under MAPA as discussed earlier.[92] Phillips argued that "his sculptures and the related stonework are works of visual art designed specifically for Eastport Park and they reflect and enhance the Park's location adjacent to Boston Harbor and are inseparable from it."[93]

While the court acknowledge that Phillips' work was site-specific, describing that "Phillips' sculpture has a marine theme that integrates the large granite stones of the park with his sculpture and the granite sea walls of Boston Harbor into one interrelated visual work of art. Therefore, Phillips used the harborside location at Eastport Park as one medium of his art. To move Phillips' integrated work of visual art to another location (particularly a non-marine one) would be to alter it physically."[94] However, the district court interpreted VARA's "public

[87] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 88 (2d Cir. 1995)/
[88] Phillips v. Pembroke Real Est., Inc., 459 F.3d 128, 130–32 (1st Cir. 2006)
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id.*
[94] *Id.*

presentation exception" to exclude any protection for the placement of artworks, extending to the location of site-specific works.[95] As such, the court held the per VARA, Pembroke could move Phillips' work from the Park.[96]

Reviewing the district court's decision *de novo*, the First Circuit upheld the district's court's decision that VARA did not protect site-specific works although with different reasoning.[97] The First Circuit could not accept that Congress intended to include site-specific works among those protect by VARA only to categorically exclude them with the public presentation exception.[98] Phillips argued that the court should understand the public presentation exception to apply only to artwork that can be moved, what Phillips called "plop-art," but not to art that is permanently affixed in such a way that the mere act of moving it would destroy it.[99] Phillips supported this reading by pointing out that the statute already creates different categories of protection for different types of work through the "building exception," which lays out specific rules that apply to art attached to buildings.[100] The court found no basis in VARA's text that the statute could correctly read as having this dual regime: one set of rules that apply to "plop-art" and another that apply to site-specific works.[101] After rejecting the district court's and Phillips' reasoning, the First Circuit held that the correct reading of the clash between site-specific work and the public presentation exception is that "VARA does not apply to site-specific art at all."[102] To soften the blow, the court explained, "we do not denigrate the value or importance of site-specific art, which unmistakably enriches our culture and the beauty of our

[95] Phillips, 459 F.3d at 137.
[96] *Id.*
[97] *See* Phillips v. Pembroke Real Est., Inc., 459 F.3d 128, 143 (1st Cir. 2006).
[98] Phillips, 459 F.3d at 141.
[99] *Id.* at 140.
[100] *Id.* at 142.
[101] *Id.*
[102] *Id.* at 143.

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."[103]

This damning holding established the controlling precedent regarding site-specific art. District courts have since followed this rule.[104] However, in the 2011 case *Kelley v. Chicago Park Dist*., the Seventh Circuit questioned the First Circuit's holding, noting that "there is reason to doubt…that all site-specific art is excluded from VARA."[105] *Kelley* presents a very similar set of fact as *Phillips.* In Kelley, artist Chapman Kelley, with permission from the Chicago Park District, created *Wildflower Works* at the north end of Grant Park in Chicago.[106] This public, site-specific work featured two giant flower beds that each contained a variety of native wildflowers edged with borders of gravel and steel.[107] In 2004, the city modified the garden by reducing its size and reconfiguring the shape of the beds as well as the flowers planted within them.[108] Kelley then sued the Park District for violating his "right of integrity" under VARA.[109]

The district court found for the Park District.[110] Citing *Phillips v. Pembroke*, the court held that *Wildflower Works* was site-specific art, so VARA did not apply to this category of art.[111] However on appeal, the Seventh Circuit disagreed.[112] The court found that VARA did not

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[103] *Id.*
[104] *See* Urbain Pottier v. Hotel Plaza Las Delicias, Inc., 379 F. Supp. 3d 130 (D.P.R. 2019); Massachusetts Museum Of Contemp. Art Found., Inc. v. Buchel, 593 F.3d 38 (1st Cir. 2010); Kammeyer v. United States Army Corps of Engineers, No. EDCV15869JGBKKX, 2015 WL 12765463, at *5 (C.D. Cal. Oct. 9, 2015); Kleinman v. City of San Marcos, No. A-08-CA-058-SS, 2008 WL 11429402, at *6 (W.D. Tex. Aug. 25, 2008), aff'd in part, vacated in part, 597 F.3d 323 (5th Cir. 2010).
[105] Kelley v. Chicago Park Dist., 635 F.3d 290, 306 (7th Cir. 2011).

[106] *Id.* at 293.
[107] *Id.*
[108] *Id.* at 294.
[109] *Id.*
[110] Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008).
[111] *Id*. at *4-5 (citing Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006)).
[112] Kelley v. Chi. Park Dist., 635 F.3d 290, 306-07 (7th Cir. 2011).

protect Kelly's work on separate grounds: because the work did not meet the basic copyright requirements of authorship and fixation.[113] However, the court addressed in dicta the site-specific nature of the work.[114] The court accepted the district court's factual finding categorizing the work as site-specific but questioned on three grounds the holding that this categorization would exclude the work from VARA protection.[115]

Firstly, the court noted that the term "site-specific" appears nowhere in the statute, and nothing in the definition excludes, explicitly or implicitly, site-specific art from qualifying as a "work of visual art" under the statute.[116] As such, the court explained that the public-presentation exception does not need to be read as eliminating the protection VARA grants to creators of site-specific art.[117] The court instead interpreted that "the exception basically provides a safe harbor for ordinary changes in the public presentation of VARA-qualifying artworks; the artist has no cause of action unless through gross negligence the work is modified, distorted, or destroyed in the process of changing its public presentation."[118] So, in contrast to *Phillips*' argument that posited that the public presentation exception would not apply to site-specific art, the Seventh Circuit suggests that the public presentation exception applies to all "works of art," including site-specific works. As with any other artwork if the lighting of a site-specific work is altered that change might be exempt under VARA but a more significant medication, such as relocating a site-specific work, could violate the work's integrity.

Secondly, the court pointed out that "Phillips's all-or-nothing approach" to site-specific art does not make sense when reading VARA in its entirety.[119] Even if arguendo the statute does

[113] *Id.* at 304-05.
[114] *Id.* at 306.
[115] *Id.* at 306-07.
[116] *Id.* at 306.
[117] *Id.*
[118] *Id.* at 306-07.
[119] *Id.* at 307.

not protect a site-specific work's location, the statute would still protect the other non-location specific aspects of a site-specific work.[120] For example, as the court explains "the integrity of a site-specific work can be violated in ways that do not implicate the work's location or manner of public presentation; site-specific art—like any other type of art—can be defaced and damaged in ways that do not relate to its public display. And the public-presentation exception does nothing to limit the right of attribution, which prevents an artist's name from being misappropriated."[121]

Finally, the court interpreted VARA's "building exception" to encompass certain site-specific works.[122] As explained above, the "building exception" applies to works "incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work."[123] So, a site-specific work, for example a mural, that is incorporated into the architecture itself would be included in the building exception. The court argued that because some site-specific works fit neatly into this exception, Congress may have intended for this exception to also help negotiate the tension between site-specific artist and property owner.[124]

Since *Kelley*, some district courts have followed, or at least mentioned, the Seventh Circuit's VARA interpretation, rather than the First Circuit's, in cases addressing site-specific art.[125] Most recently, the case *Miss v. Edmundson Art Found., Inc.* once again cited *Phillips*.[126] In

[120] *Id.*
[121] *Id.*
[122] *Id.* at 307.

[123] 17 U.S.C. § 113(d)(1)(A) (2022).
[124] Kelley, 635 F.3d at 307.
[125] *See* Tobin v. The Rector, No. 17 CIV. 2622 (LGS), 2017 WL 5466705, at *5 (S.D.N.Y. Nov. 14, 2017), aff'd sub nom; Tobin v. Rector, Church-Wardens, & Vestrymen of Trinity Church, in City of New York, 735 F. App'x 32 (2d Cir. 2018); Oliver v. Meow Wolf, Inc., No. CV 20-237 KK/SCY, 2023 WL 5002462, at *15 (D.N.M. Aug. 3, 2023); Lew v. City of Los Angeles, No. 220CV10948DDPPLAX, 2023 WL 5985491, at *4 (C.D. Cal. Sept. 13, 2023); Jackson v. Curators of Univ. of Mo., No. 11-4023-CV-C-MJW, 2011 WL 5838432, at *4 (W.D. Mo. Nov. 21, 2011), vacated, No. 11-4023-CV-C-MJW, 2012 WL 3166654 (W.D. Mo. May 15, 2012).
[126] Miss v. Edmundson Art Found., Inc., No. 4:23-CV-00340, 2023 WL 8631423, at *1 (S.D. Iowa Dec. 19, 2023).

the 1990s, the Des Moines Art Center asked Mary Miss to create an outdoor environmental artwork around Greenwood Pond.[127] Today, due to the impact of weather and the deterioration of wood used in the work, the artwork is in poor condition, and both the artist and the Des Moines Art Center are unhappy with the work in its current state.[128] However, while the Des Moines Art Center wants to solve the issue by demolishing the work, Miss wants to the work to be restored. Miss sought relief in part under VARA.[129] The court seemed to lean in the direction of *Phillips* explaining "the Site is not what Congress had in mind when it granted moral rights protections to artists for their "sculptures," and therefore, the Court concluded that Miss has little chance of prevailing on her VARA claim.[130] However, the court hedged, and in a footnote put this disclaimer: "because it is holding that the Site is not a "sculpture," the Court does not need to decide whether to follow the First Circuit's blanket conclusion in Phillips v. Pembroke Real Estate, Inc., that 'VARA does not protect site-specific art.'"[131]

The Second Circuit's holding in another recent case *Kerson v. Vermont L. Sch., Inc.,* gives site-specific artists little hope that courts might overturn *Phillips*.[132] The Second Circuit held that placing a wall in front of an mural meant to permanently conceal the work does not modify or destroy the work under the language of VARA.[133] Given this shocking holding, it is hard to imagine that the court would proceed to decide that moving the location of a site-specific work qualifies as a "modification" or "destruction" under VARA.

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[127] *Id.*
[128] *Id.* at *2.
[129] *Id.* at *3.
[130] *Id.* at *4.
[131] *Id.* at *4 n.2.
[132] Kerson v. Vt. L. Sch., Inc., 71 F.4th 82 (2d Cir. 2023).
[133] *Id.* at 90.

Site-specific solutions

With the current lack of legal clarity surrounding this issue, legal scholars have proposed different avenues for granting site-specific works clear protection. These suggestions fall into a few different categories: correcting the First Circuit's interpretation; amending VARA to specifically address site-specific works; or relying on rights outside of VARA — such as contract and other intellectual property rights — to enforce moral rights.

In addition to the *Kelley* dicta, scholars have pointed out the flaws in the First Circuit's argument. In her article, *Off of the Pedestal and into the Fire: How Phillips Chips Away at the Rights of Site-Specific Artists*, Rachel Nordby argues that the First Circuit misinterpreted VARA by failing to heed legislative history's instruction that the statute should be broadly applied to the types of art listed.[134] She explains that the court should have recognized that VARA's broad definition could cover site-specific art.[135] Helen Vera, in her article *Site-Specific Works and the Visual Artists Rights Act Modeling a More Flexible Approach on the Building Exception*, also argues that courts should not base future decisions on the First Circuit's holding.[136] Instead, she suggests that courts can use VARA's building exception as a model for how to apply the statute to site-specific works to balance the property owners' rights while still protecting the artist's moral rights.[137]

Other scholars instead looked to Congress to amend VARA to clarify that VARA protects site-specific art. The First Circuit in *Phillips* did suggest that only Congress, not the

[134] 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, 192 (2007).
[135] Id. at 193.
[136] Helen Vera, *Site-Specific Works and the Visual Artists Rights Act: Modeling a More Flexible Approach on the Building Exception*, 28 Yale J.L. & Human. 429, 431 (2016).
[137] *Id.* at 432.

courts, could amend the language in VARA to provide this sort of protection.[138] In line with Nordby's thinking, Emma Stewart in her article *United States Law's Failure to Appreciate Art: How Public Art Has Been Left Out in the Cold*, argues that Congress should amend the definition of visual art in VARA to encompass "a wide and flexible array of artistic techniques, styles, and mediums" and to explicitly include site-specific works.[139] Lang Chen, in her article *My Art Versus Your Property: A Proposal for Vara Application to Site-Specific Art*, proposed a sensible solution that instead of the court arbitrarily deciding what works VARA protects, the courts or Congress should amend VARA to include a balancing test that courts could use to weighing the property owner and artist's interest to define VARA's scope of protection.[140] Chen recommends that this test should include factors like the "removability of the artwork; the burden on the property owner; the good faith conduct and attitude of the parties; the artists' intention; and the public voice."[141] Going a step further, Lauren Ruth Spotts, in *Phillips Has Left Vara Little Protection for Site-Specific Artists,* proposes a compromise of sorts that Congress amend VARA to include a separate section addressing site-specific art, similar to the building exception, that would give these works protection while creating certain limits to protect property owners.[142] Francesca Garson and Kristin Robbins both suggest that Congress amend VARA to include a waiver provision for site-specific in public spaces, like the waiver in the "building exception," but with a guarantee a minimum display time provision.[143]

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[138] Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006).
[139] Emma G. Stewart, *United States Law's Failure to Appreciate Art: How Public Art Has Been Left Out in the Cold*, 97 Denver L. Rev. 573, 595 (2020).
[140] Lang Chen, *My Art Versus Your Property: A Proposal for VARA Application to Site-Specific Art*, 35 Cardozo Arts & Ent. L.J. 485, 507 (2017).
[141] *Id.* at 508.
[142] Lauren Ruth Spotts, *Phillips Has Left VARA Little Protection for Site-Specific Artists*, 47 J. Marshall L. Rev. 1445, 1463-64 (2014).
[143] 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, 405 (2007); Francesca Garson, *Before That Artist Came Along, It Was Just a*

Other scholars have simply turned to means of legal protection outside of VARA, employing the tactics that site-specific artists used pre-VARA. Virginia Cascio, in *Hardly A Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under Vara*, suggests that given the lack of clarity in the law, artists should use contract provisions to protect site-specific art.[144] She suggests certain clauses that might be helpful to artists, such as buyout clause that would allow the artist to purchase the work if the property owner wishes to move it; a clause that specifies the number of years the work must be on view in a specific location; or a notice provision that would give the artist adequate warning if the buyer intends to remove or alter the work.[145] Rebecca Martel in *The Should-It-Stay or Should-It-Go Spotlight: Protection of Site-Specific Art Under Vara*, proposes using the trademark protection granted in the Lanham Act. Relying *Gilliam v. American Broadcasting Companies*, Martel suggests that an artist could make a misrepresentation and unfair competition claim under the Lanham act claim if his or her artwork had been modified to the extent that work can no longer fairly considered the artist's work.[146] In *Charging Bull, Fearless Girl, Artistic Composition, and Copyright*, Richard Chused explored the question of whether adding a sculpture near a site-specific work could constitute a copyright violation of the site-specific because the interaction between the two works would create an unauthorized derivate work.[147] He uses the highly publicized *Charging Bull* and *Fearless Girl* controversy to flesh out this question. Di Modica's lawyers actually raised this copyright violation claim in a letter to Mayor Bill de Blasio. While this issue has never actually

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Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork, 11 Cornell J.L. & Pub. Pol'y 203, 206 (2001).

[144] Virginia M. Cascio, *Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under VARA*, 20 DePaul J. Art, Tech. & Intell. Prop. L. 167, 196 (2009).

[145] *Id*. at 196-97.

[146] Rebecca E. Martel, *The Should-It-Stay or Should-It-Go Spotlight: Protection of Site-Specific Art Under VARA*, 13 Wake Forest J. Bus. & Intell. Prop. L. 116, 137-38 (2012) (discussing Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976)).

[147] Chused, Supra note 2 at 161.

been litigated, Chused hypothesizes that if a court addressed this claim, the court would need to examine the proximity of the two works and how each work affected the other.[148]

Finally, Amy Adler in *Against Moral Rights* takes a less popular stance.[149] She argues that Congress should never have enacted VARA because the statute "endangers art in the name of protecting it," as these moral rights do not serve the needs or align with artistic practice of the contemporary artists or the public for whom it provides protection.[150]

A public-centric approach to protecting site-specific art

As the Seventh Circuit, and many of the above-cited scholars have explained, the First Circuit misinterpreted VARA in *Phillips*. The Court twisted the words of the statute to find that the public presentation exception indicates that VARA could not possibly cover site-specific works. However, as explained in *Kelley*, the public presentation exception can just as easily be read to indicate that ordinary presentation concerns, such as lighting and staging artworks in an exhibition, would not implicate VARA protection, but anything beyond ordinary presentation concerns, such as moving a site-specific work from its site, would be governed by VARA. The legislative history backs up the latter interpretation because, as Nordby noted, the legislative history instructs courts to interpret the definition of a work of art broadly. Furthermore, the First Circuit could have easily read VARA's "building exception" to encompass site-specific works (at least site-specific works in architectural settings). However, until another Circuit Court or the Supreme Court decides on this issue, *Phillips* is the only binding precedent on VARA's application to site-specific art. If another court takes up this issue, the court will hopefully

[148] *Id.* at 202-03.
[149] Amy M. Adler, *Against Moral Rights*, 97 Calif. L. Rev. 263 (2009).
[150] *Id*. at 265.

reconsider the *Phillips*' analysis and follow from the dicta in *Kelley* to provide a less convoluted interpretation of VARA that better aligns VARA's broad purpose.

Congress could of course amend VARA to clarify whether *Phillips* or *Kelley*'s interpretation is correct. An amendment including site-specific art in the definitions, as Norby proposes, or the inclusion of a section like the building exception perhaps with a waiver clause, per Chen, Garson, and Robbins, would provide much needed clarity. However, the statute currently uses broad language to encompass a variety of types of art and different media. By including site-specific, which is really a very niche area of art and just a category within the larger categories of art already listed, Congress may give the impression that the list of protected visual art under VARA is now exhaustive, per the statutory canon of interpretation *expressio unius*, further limiting the scope of VARA for many other types of artists and artworks.

However, if arguendo, an appellate court overturns *Phillips* or Congress explicitly grants site-specific works protection under VARA, realistically, the language of VARA, would still exclude many site-specific works. The work for hire doctrine would eliminate from protection many commissioned site-specific works, such as public sculptures. Courts also may not recognize certain conceptual site-specific works as "sculpture or painting," as illustrated in *Miss v. Edmundson*. Site-specific works in buildings would likely fall within the building exception, but this exception ultimately only gives an artist notice of but does not prevent modification or destruction of the work. Importantly, VARA's term only lasts for the life of the artist (and does not include works created before VARA's enactment). Many of the endangered site-specific works that the public has come to appreciate as part of their history and visual landscape, such as the works discussed above, are pre-VARA works outside of VARA's term.

Ultimately, while Congress enacted VARA to bring United Sates law in accordance with the Berne Convention, the idea of moral rights creates an inherent tension between the United States' longstanding prioritization of private property rights and a new interest in protecting artists' moral rights. This tension becomes especially apparent with site-specific art because the work's integrity depends on a private owner's real property. As such, it is unlikely that Congress or a US court will ever allow VARA to permanently encumber real-property rights upon creation of a site-specific artwork. However, US law does restrict real property rights in certain situations. Federal, state, and local laws prohibit or limit modifications to recognized historic districts and buildings.[151] Importantly, the Supreme Court held in *Penn Cent. Transp. Co. v. City of New York* that "a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks…without effecting a 'taking' because these restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the…site proper but also other properties."[152]

Unfortunately, these preservation laws often do not extend to artwork, even artwork within historically designated spaces. For example, while the Old Post Office Building, mentioned above, had landmark protection via its listing on the National Register of Historic Places and as part of the Pennsylvania Avenue National Historic Site district, Irwin's work lacked any such protection.[153] Similarly, while Philip Johnson's postmodern AT&T skyscraper has landmark status, a designation that blocked proposed changes to the façade in planned

[151] *See* Robinson, supra note 68.
[152] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138, 98 S. Ct. 2646, 2666, 57 L. Ed. 2d 631 (1978).
[153] Tim Schneider, Did Donald Trump Ruin a High-Concept Artistic Masterwork Inside His DC Hotel?, ARTNET (Feb. 27, 2018), https://news.artnet.com/art-world/donald-trump-robert-irwin-1231517.

renovations by a new owner in 2017.[154] However, a pair of monumental murals created for the site by Dorothea Rockburne had no similar protection from modification or destruction.[155] Admittedly, as Amy Adler stresses, society cannot and should not protect all art.[156] For example, it is up for debate whether Andrés Najel's potato-like sculpture *La Patata* deserved moral rights protection to remain in situ in the center of the traffic circle. Over time, society recognizes particularly significant works, much like it identifies culturally important buildings and districts.[157] These are the artworks that the law should and can more easily justify protecting.

Christopher Robinson, in his article *The "Recognized Stature" Standard in the Visual Artists Rights Act,* proposes legislation that would establish a national registry of highly significant art, modeled after the National Register of Historic Places and the National Film Registry. A panel of experts would choose which works belong on the registry based on a number of factors including a work's aesthetic, art historical, historical, and cultural significance.[158] While new legislation would very likely be necessary to tailor historic protections to the needs of artworks, and specifically site-specific artworks, existing preservation programs may also accommodate site-specific artworks. Just three days ago, on December 17, 2024, Smithson's iconic *Spiral Jetty* entered the National Register of Historic Places – the first piece of land artwork to receive this designation.[159] Jessica Morgan, director of the Dia Art Foundation, commented, "we are delighted that Spiral Jetty has received this important recognition, which will help us spread awareness of the iconic artwork and advocate for its long-

[154] Claire Voon, Dorothea Rockburne Murals in Limbo as the Former AT&T Building Awaits Its Fate, HYPERALLERGIC (Nov. 21, 2017), https://hyperallergic.com/410774/dorothea-rockburne-murals-550-madison/.
[155] *Id.*
[156] Alder, Supra note 149, at
[157] *See* Cathay Y. N. Smith, *Community Rights to Public Art*, 90 St. John's L. Rev. 369, 413 (2016).
[158] Robinson, supra note 68, at 1972–73.
[159] Angelica Villa, Robert Smithson's 'Spiral Jetty' Added to National Register of Historic Places, ARTNEWS (Dec. 17, 2024), https://www.artnews.com/art-news/news/robert-smithson-spiral-jetty-national-register-of-historic-places-1234727996/.

term preservation."[160] Perhaps *Spiral Jetty* will pave the way for future protections of the many other fascinating site-specific works that enhance and activate our surroundings.

Conclusion

The legal protection of site-specific art in the United States remains inadequate and uncertain. While VARA represented an important step toward recognizing artists' moral rights, the statute's application to site-specific works has been hampered by conflicting judicial interpretations and an underlying tension between artistic and property rights. The First Circuit's categorical exclusion of site-specific art from VARA protection in *Phillips*, though questioned by the Seventh Circuit in *Kelley*, has left artists with few reliable legal tools to preserve their site-specific works.

Rather than attempting to protect these works solely through moral rights doctrine, a more promising approach may be to adapt existing historic preservation frameworks to protect significant site-specific artworks. This public-centric approach would recognize that the value of site-specific art extends beyond the artist's rights to encompass broader community interests. Just as historic preservation laws have successfully balanced property rights with the protection of architectural heritage, a similar framework could provide measured protection for site-specific art while offering clearer guidelines for all stakeholders.

The recent addition of Smithson's *Spiral Jetty* to the National Register of Historic Places suggests this approach's potential. As the first piece of Land art to receive this designation, *Spiral Jetty* may pave the way for protecting other significant site-specific works through existing preservation mechanisms. While this approach would not protect all site-specific art, it would help preserve those works that communities have come to recognize as integral parts of their

[160] *Id.*

cultural landscape. In doing so, it would move beyond the current impasse in moral rights doctrine to provide practical protection for works that have become part of our shared cultural heritage.