

OFF OF THE PEDESTAL AND INTO THE FIRE:
HOW *PHILLIPS* CHIPS AWAY AT THE RIGHTS OF
SITE-SPECIFIC ARTISTS

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Beginning at least with the last third of the 20th century, and continuing through the present, the notion of sculpture has undergone a radical redefinition. In essence, sculpture has come off [of] its pedestal, functioning in the space in and around its site, and playing an integral role in defining that space.

—Daniel Ranalli, Professor of Art History at Boston University¹

The Visual Artists Rights Act is of the utmost importance to professional artists who build their future on the integrity and authenticity of . . . [art] in public and private collections and to the public for preserving its cultural legacy Any distortion of such works is automatically a distortion of the artists' reputation and cheats the public of an accurate account of the culture of our time Artists . . . must sustain a belief in the importance of their work if they are to do their best. If there exists the real possibility that the fruits of this effort will be destroyed after a mere ten to twenty years the incentive to excel is diminished and replaced with a purely profit motivation. The Visual Artists Rights Act mitigates against this and . . . protects our historical legacy.

—Weltzin Blix, Sculptor, testifying before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice²

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1. *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 95 (D. Mass. 2003). Professor Ranalli testified as an expert on behalf of artist David Phillips.

2. H.R. REP. NO. 101-514, at 6 (1990).

I'm not sure if I've helped artists or hurt artists in this battle . . . It was probably very naïve of me to think that artist rights would prevail over real estate and power.

— David Phillips, Artist³

I. INTRODUCTION

What does a herd of Black Angus cattle in New York have in common with city planners in Sarasota, Florida? Both are unexpected interlopers into the world of site-specific art. Art is site-specific when its locality or surrounding environment plays an integral role in the meaning and interpretation of the work.⁴ Because site-specific art is designed for particular locations, removal from a specific location arguably mutilates or destroys the integrity of the work, whether or not the actual art piece is physically altered.⁵

When called upon to resolve conflicts over site-specific art, the United States' legal system has faced a balancing act between the rights of artists who wish to protect the integrity and creativity of their work and the rights of property owners—both public and private—who do not want to have their use of real property hindered by the placement of artwork.

In the recent case of *Phillips v. Pembroke Real Estate, Inc.*, the U.S. First Circuit Court of Appeals held that the Visual Artists Rights Act of 1990 (VARA) did not apply to site-specific art.⁶ Was this the correct decision? What role will this decision play in defining the rights of site-specific artists? Will that court's reasoning influence the treatment of site-specific art by other courts?

Unfortunately, the First Circuit appears to have missed the mark when it ruled that site-specific art was wholly unprotected by VARA. Instead of removing an entire genre of visual art from VARA's protection, the court should have merely applied the statute using the standards and guidelines provided by Congress to determine whether the legislation protected artist David Phillips' site-specific work. Artists who create site-specific art should not be excluded from the legislative cloak of protection afforded by VARA merely because of their chosen art form. In short, the *Phillips* decision sets a bad precedent for the future of fledgling artistic moral rights in this country.

3. Geoff Edgers, *U.S. Court of Appeals Deals Blow to Artist's Fight Against Fidelity*, BOSTON GLOBE, Aug. 24, 2006, at E6.

4. Rebecca J. Martel, Comment, *The Should-It-Stay or Should-It-Go Spotlight: Protection of Site-Specific Art Under VARA*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 101, 112 (2003).

5. Jill R. Applebaum, Comment, *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, 213-14 (1992); Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 454 (1994).

6. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

Part II of this Note will explore the site-specific art movement to gain a better understanding of the legal issues that can arise when site-specific artists choose to forever tie their work to fixed locations. Next, Part III will look at the development of both foreign and domestic legal treatment of visual art to examine the types of protections that exist for visual artists. This Note will then address the *Phillips* decision in Part IV and explain why the First Circuit's decision stripped site-specific artists of more than just the ability to prevent removal of their work from a specific location. Part V will discuss the legal future of site-specific art in light of the *Phillips* ruling and suggest ways that artists and property owners can better deal with the hurdles that arise when site-specific art is designed and installed on real property.

II. THE SITE-SPECIFIC ART MOVEMENT

Parties unexpectedly affected by site-specific art can range from bovines to city planners. In Garrison, New York, a one-hundred-and-forty-acre farm recently became the site of an exhibit featuring thirty-five site-specific art pieces.⁷ The exhibit shared space with a herd of Black Angus cattle that roamed the farm. The cows responded to the *objets d'art* with curiosity and a healthy appetite:

A silver, spaceshiplike sculpture made by Gregory Slick has been dented by the cows; a series of large, rust-covered Styrofoam balls made by Grace Knowlton gets nudged around almost daily. A three-part sculpture of a peace sign by Justin Allen keeps being upended. One piece, a sculpture of decorative grasses by Pat Laltrella, has been eaten twice, and the area where the sculpture once was now sits barren.⁸

“In our prospectus to the artists, we made it clear that the pieces had to be cow friendly—no cables, no pointy edges, no holes,” said one of the organizers of the exhibit. “What we didn’t realize was that everything also had to be cow proof . . . [The cows are] very curious.”⁹ The exhibit was sited on private land with the permission of the property owner, an environmentalist and prominent community figure.¹⁰ Even with the unexpected bovine interferences, the farm owner has appreciated the site-specific art. In discussing the exhibit, he explained that he “love[s] having an opportunity for people to come up and

7. Abraham Streep, *At a Sculpture Exhibition, the Cows Come Home*, N.Y. TIMES, Sept. 24, 2006, § 14WC, at 12.

8. *Id.*

9. *Id.*

10. *Id.*

walk on the farm and see the beautiful views . . . Some of the art is very ephemeral, and some of it will stay for a long time.”¹¹

More often, site-specific artists encounter interference or criticism from the more human end of the spectrum. This can lead to complicated legal problems, especially when the artist has transferred ownership of the site-specific work. In January 2006, city planners in Sarasota, Florida, held public forums with residents over the fate of “Memory Path,” a site-specific work by artist Athena Tacha.¹² “Memory Path” is a trail of granite slabs spanning the city’s Selby Five Points Park.¹³ The slabs contain etched images illustrating Sarasota’s history.¹⁴

Produced over fifteen years ago, “Memory Path” has not aged well. Some of the pieces are cracked and broken—“[t]he patched-up stone gives it the look of a shabby graveyard, and the significance of most of the pictured people and places is unexplained. Some are upside-down or sideways, too.”¹⁵ Other pieces are faded beyond recognition.¹⁶ The dilapidated “Memory Path” soon found itself at the center of controversy. The city wanted to give the park a new look—a goal driven by efforts to develop the downtown area.¹⁷ City officials were faced with the decision of whether to repair and keep the work as it was originally designed, relocate it within the park, or remove it completely from the park. The artist, Tacha, considered “Memory Path” to be unique in her body of work and understandably wanted a say in how the city would deal with the site-specific piece.¹⁸

As the two above examples show, site-specific art does not always hold up in its surrounding environment as well as the artist planned. Additionally, site-specific art can be found on both private (the farm in Garrison, New York) and public property (the park in Sarasota, Florida), which can make its legal treatment complicated depending on the goals and wishes of the parties involved.

Site-specific art developed out of the “land art” movement in the 1960s, where artists aimed to “de-com[m]odify” visual art and sought to remove it from the “sterile context” of fine art museums.¹⁹ One

11. *Id.*

12. Mike Saewitz, *Another Dispute over Art for City—Officials Want to Move Memory Path, but the Artist Is Protesting*, SARASOTA HERALD TRIB., Jan. 31, 2006, at B1.

13. *The Art of Compromise: Acceptance of Offer Would Be Best for Public Art*, SARASOTA HERALD TRIB., July 20, 2006, at A10.

14. *Id.*

15. *Id.*

16. Saewitz, *supra* note 12.

17. *Id.*

18. *Id.*

19. Francesca Garson, Note, *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, 235 (2001).

pioneer of the site-specific art movement described its genesis as a time when “[t]hings were shifting radically Artists were finding new spaces, and galleries were tangential. We said then, ‘Painting is dead.’”²⁰

The overriding goal of site-specific artists is to orchestrate relationships between their work, the surrounding environment, and viewers.²¹ These relationships, not just the physical objects made by the artist, then become the substance of the piece.²² Another way of understanding site-specific art is to see it as a form of “integrated art,” where a piece of art is made from two or more objects that must be presented together for the work to be whole and have complete meaning.²³ Site-specific art exists when one of these integrated objects consists of the physical location of the work.²⁴ Site-specific art can be found indoors or outdoors. Interior works may use videos, sounds, photography, paintings, and even live performances.²⁵ Exterior site-specific art can blend in and conform to the surrounding space or alter and intrude into the location.²⁶ The media used for outdoor works can be materials found at the site (such as leaves, flowers, branches, and rocks)²⁷ or foreign material brought in to provide contrast with the surrounding area.²⁸

Site-specific art is often encountered in the context of works commissioned to enhance the visual appeal of public buildings and outdoor locations.²⁹ Because site-specific art relies so heavily upon its location, the meaning and completeness of a site-specific work is arguably threatened every time there is a change to that surrounding environment. In the absence of express contractual terms between an artist and a commissioning entity, artists turn to the courts to protect the integrity of their site-specific works when faced with encroaching development or proposed modifications.

20. Elizabeth Cook-Romero, *When Jupiter Aligns with Art*, SANTA FE NEW MEXICAN, Mar. 24, 2006, at A46 (quoting artist Nancy Holt).

21. Garson, *supra* note 19, at 235.

22. *Id.*

23. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 129 (1st Cir. 2006).

24. *Id.*

25. Fredric Koepfel, *Site Specific and Sensitive—Displays of Art Incorporate the Time and Place and Space Continuum*, MEMPHIS COM. APPEAL, Mar. 2, 2007, at G34.

26. *Id.*

27. Elizabeth Langton, *Students Create Art from Nature at Arboretum: Organic Sculptures Use Material from Site*, DALLAS MORNING NEWS, Nov. 17, 2006, available at 2006 WLNR 20056066.

28. See Barbara Isenberg, *NY Public Art Turns a Corner, and Some Heads*, L.A. TIMES, Aug. 27, 2006, at 40 (describing a site-specific work located in a plaza near Central Park consisting of a building fragment filled with toothpicks, towels, plants, and other random items).

29. Carrie Jones, Comment, *Site-Specific Art Parks on Moral Ground: Distilling Old Whine in New Battles over the Visual Artists Rights Act*, 9 COMP. L. REV. & TECH. J. 355, 380 (2005).

III. SITE-SPECIFIC ART AND THE LAW

A. *The Berne Convention for the Protection of Literary and Artistic Works*

For over a century, artists outside the United States have received and benefited from developed legal protections that address more than the economic rights set forth in copyright and trademark laws. The Berne Convention for the Protection of Literary and Artistic Works, initially drafted in 1886, is “[a]n international copyright treaty providing that works created by citizens of one signatory nation will be fully protected in other signatory nations.”³⁰ In addition to protecting basic copyright and trademark rights (identified as “economic rights”), Article 6*bis* of the Berne Convention recognizes the broad “moral” rights³¹ of artists:

(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have 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.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.³²

Although the Convention was passed over a century ago, participation in the Convention has exploded in just the past few decades. As of November 2007, the World Intellectual Property Organization, which administers the Berne Convention, reports that 163 countries

30. BLACK’S LAW DICTIONARY (8th ed. 2004).

31. The “moral” rights referred to throughout the paper are distinguishable from “economic” rights, which are often the rights protected by copyright law. “Moral” rights thus are very different from an artist’s right to protect their ability to profit financially from their creativity. For a good discussion of the background and development of artists’ “moral” rights, see Applebaum, *supra* note 5, at 190-96.

32. Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), available at http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf [hereinafter Berne Convention].

are contracting parties under the treaty.³³ When the United States joined the Convention in March of 1989, there were roughly half as many participating countries as there are today.³⁴

The Berne Convention has been viewed by the United States as an executory treaty,³⁵ which requires implementing legislation to give effect to the Convention and provide a cause of action under the domestic laws of a country.³⁶ Article 36, addressing the application of the Convention, obliges signatory nations to adopt necessary measures, stating:

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.³⁷

When the United States joined the Convention in 1989 via passage of the Berne Implementation Act, it had yet to pass implementing legislation that would expressly recognize the artistic moral rights recognized under the Berne Convention. This implementing legislation came a year later in the form of the Visual Artists Rights

33. World Intellectual Property Organization, Statistics, Berne Convention of Sept. 9, 1886, http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en (last visited Nov. 1, 2007).

Year	No. of Signatory Countries
1970	58
1980	70
1990	83
2000	147
2007	163

Id.

34. *Id.*

35. Eric M. Brooks, Comment, “*Tilted Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*,” 77 CAL. L. REV. 1431, 1441-42 (1989).

36.

[This] Court distinctly recognised the distinction between an executory treaty, as a mere contract between nations, to be carried into execution by the sovereign power of the respective parties, and an executed treaty, effecting of itself the object to be accomplished, and defined the line between them thus: “Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract; when either of the parties stipulate to perform a particular act; the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.”

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 746-47 (1838) (quoting Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

37. Berne Convention, *supra* note 32, art. 36.

Act of 1990, discussed below in Part III.C.2. Even with the United States' entry into the Berne Convention, artistic rights in this country differ greatly from those exercised in Europe, where the Berne Convention originated.

B. European Treatment of Site-Specific Art

An artist's moral rights, which Article 6*bis* of the Berne Convention protects, are French in origin.³⁸ France explicitly recognizes the doctrine of *le droit moral*, which evolved as a natural and personal right rather than a pure legal right.³⁹ The bundle of rights conferred upon artists by *le droit moral* includes the right to share their work with the public, the right to amend a published work or withdraw it from the public eye, the right of acknowledgement or attribution for creation, and notably, the right to maintain and preserve the integrity of their artwork.⁴⁰ This acknowledgment of an artist's moral right in his or her work stems from the view that artistic creation is sparked by an artist's soul, thus there is a special link between an artist and his or her work.⁴¹ In France, all "works of the mind" receive equal protection.⁴² Accordingly, site-specific art is protected under French law to the same extent as other creative works.⁴³

Illustrative of France's protective stance towards artists is the case of Jean Dubuffet's struggle to have an ambitious site-specific sculptural project completed.⁴⁴ Dubuffet designed an environmental sculpture for the courtyard of the Renault company's new headquarters.⁴⁵ The company, under the direction of a new president who was not enthusiastic about the project, halted work halfway through the project.⁴⁶ Dubuffet sued, claiming that the moral right of integrity entitled him to have the work, *Salon d'Ete*, completed.⁴⁷ France's Supreme Court of Cassation ultimately ruled that, even though Renault had already paid Dubuffet for his design, the artist still had an interest in exercising his right of integrity in the work; he could legally compel completion of the project.⁴⁸ In the end, Dubuffet did not exercise this right since he did not wish "to impose by constraint the

38. JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 420 (5th ed. 2007).

39. Applebaum, *supra* note 5, at 183-84.

40. *Id.* at 183.

41. *Id.* at 184.

42. *Id.* at 187.

43. *Id.* at 214.

44. MERRYMAN ET AL., *supra* note 38, at 443. See also 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, 397 (1998).

45. MERRYMAN ET AL., *supra* note 38, at 443.

46. *Id.*

47. Swack, *supra* note 44, at 397.

48. MERRYMAN ET AL., *supra* note 38, at 443.

completion of a work in a place where it has been so disrespectfully treated.”⁴⁹

Because France recognizes *le droit moral* as covering all artistic works equally, any disputes arising over site-specific work would be dealt with in a manner consistent with any other art form. This differs greatly from the treatment of site-specific art in the United States, where the right of integrity was only given effect in 1990 when Congress passed the Visual Artists Rights Act (VARA). The protections of this Act do not apply to every situation involving an artistic work of creation—instead, for a piece of art to receive protection under VARA, it must first meet the statutory definition of a work of visual art.⁵⁰

Germany and Italy, like France, have long-established laws protecting an artist’s moral right of integrity. German law gives an artist protection against any distortion of his or her work that would “prejudice his lawful intellectual or personal interests in the work.”⁵¹ Italian law recognizes a right against “distortion, mutilation or any other modification thereof capable of prejudicing his honour or reputation,” yet this right has some qualifications when it involves works of architecture (where modifications are sometimes needed in the course of construction or after completion).⁵² In some cases, the artist may be entrusted with the design and execution of these necessary modifications.⁵³ Additionally, an artist is not entitled to intervene and prevent any modifications for which the artist had notice of and gave consent.⁵⁴ In contrast to European countries like France, Germany, and Italy, the United States is a newcomer to recognizing and defining the moral rights of visual artists.

C. Domestic Treatment of Site-Specific Art

1. Prior to the Passage of VARA: *Serra v. U.S. General Services Administration*

Prior to the passage of VARA, the most publicized and controversial case in the United States focusing upon a piece of site-specific art involved Richard Serra and his work “Tilted Arc.”⁵⁵ The sculptural piece was a one-hundred-and-twenty-foot long, twelve-foot tall, steel

49. Swack, *supra* note 44, at 397.

50. See *infra* notes 81-83 and accompanying text (discussing the qualifications for a piece of art to receive the protections of VARA).

51. Germany, Law of 9 Sept. 1965, Art. 14, reprinted in MERRYMAN ET AL., *supra* note 38, at 426.

52. Italy, Law of 22 Apr. 1941, Art. 20, No. 633, reprinted in MERRYMAN ET AL., *supra* note 38, at 426.

53. *Id.*

54. *Id.* Art. 22.

55. *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988).

arc designed for the Federal Plaza in lower Manhattan.⁵⁶ Serra executed a contract with the General Services Administration (GSA) that, in addition to setting forth the basic terms of the commission, stated that “all designs, sketches, models, and the work produced under this Agreement . . . shall be the property of [the United States].”⁵⁷

Soon after installation of the arc, GSA began receiving complaints about the appearance and obstructive size of the work.⁵⁸ Public hearings were held to determine whether the work should be removed.⁵⁹ Complaints at the hearings ranged from the aesthetic—the work was ugly and destroyed the coherence and openness of the plaza⁶⁰—to the scientific—the large structure could amplify the damage from a bomb blast.⁶¹

The GSA Administrator ultimately decided to relocate the work, triggering a lawsuit by the artist.⁶² Since there was no recognized moral right of integrity in the United States at the time, Serra’s claims were grounded in the First Amendment’s Free Speech Clause, the Fifth Amendment’s Due Process Clause, federal trademark and

56. *Id.* at 1046-47.

57. *Id.* at 1047.

58. *Id.*

59. MERRYMAN ET AL., *supra* note 38, at 784.

60. Douglas C. McGill, *Office Workers and Artists Debate Fate of a Sculpture*, N.Y. TIMES, Mar. 7, 1985, at B1.

“Good morning, my name is William Toby,” said Mr. Toby, regional administrator of the Health Care Financing Administration, and one of the first speakers. “During my 17 years of employment in this building, nothing has offended me and my staff more than the erection of this huge, rusted metal barrier. I am here today to recommend its relocation to a better site - a metal salvage yard.”

In tone and substance, Mr. Toby’s remarks reflected the views of many other employees of the Federal building, public officials and some neighborhood residents, who spoke in favor of the Government’s removal of the sculpture.

The piece, they said, is not only ugly and a target for graffiti, but has also effectively ended the use of the plaza, at Foley Square, for concerts and other public gatherings.

Id.

61. *Id.*

Vickie O’Dougherty, a General Services Administration employee whose specialty is building security, testified at the hearing that the protection of Federal buildings against terrorist attacks has been an increasing concern of the agency, and that the “Tilted Arc” increases the potential damage that would result from a bomb.

“The sculpture could vent an explosion both upward and toward the building,” Miss O’Dougherty said. “If there were to be an explosion, we can expect a great deal of danger in terms of glass shattering.”

Id.

62. *Serra*, 847 F.2d at 1048.

copyright laws, and state law.⁶³ None of these claims proved successful.

In response to the First Amendment claim, the Second Circuit Court of Appeals first noted that the government owned the art; therefore it, not Serra, the work's creator, was the "speaker" of the expressive ideas behind "Tilted Arc."⁶⁴ The court then found that, assuming Serra did retain any First Amendment interest in the display of "Tilted Arc," the removal of the work was a permissible time, place, and manner restriction since the GSA had the authority and a significant interest in keeping the Plaza free from obstruction.⁶⁵ Additionally, relocation of "Tilted Arc" would not prevent Serra from expressing his ideas in alternate ways. Importantly, the court noted that "[n]otwithstanding 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."⁶⁶ Lastly, the court found that the decision to remove the work was not impermissibly content-based.⁶⁷ It accepted GSA's explanation that the decision was based on the functional reason of maintaining the open space of the Plaza.⁶⁸

Regarding Serra's due process claims, the court found that the artist had no protected property interest in having "Tilted Arc" remain in the Plaza.⁶⁹ The court acknowledged that even though Serra would possibly suffer injury or harm to his reputation as a result of the sculpture's removal or relocation, it was not an injury to a constitutionally protected property or liberty interest.⁷⁰

Underlying the Second Circuit's analysis of Serra's claims was the contractual agreement outlining the terms of the commission.⁷¹ Since the contract relinquished ownership of the artwork to the government, the court concluded that Serra had bargained away his right to control the duration and location of "Tilted Arc."⁷² The Second Circuit affirmed the trial court's denial of relief, clearing the way for the site-specific sculpture to be severed from its location, irrespective of the work's meaning and the artist's wishes.⁷³ "Tilted Arc" was cut into several pieces and removed from the Plaza.⁷⁴ It sat in an outdoor

63. *Id.*

64. *Id.* at 1049.

65. *Id.*

66. *Id.* at 1050.

67. *Id.*

68. *Id.*

69. *Id.* at 1052.

70. *Id.*

71. *Id.* at 1049.

72. *Id.*

73. *Id.* at 1052.

74. Daniel B. Schneider, *F.Y.I.*, N.Y. TIMES, Apr. 9, 2000, § 14, at 2.

government parking lot for ten years and, in September of 1999, was finally moved to a storage building in Maryland.⁷⁵

Although Serra did not win the legal battle over “Tilted Arc,” the lawsuit illustrated the legal issues faced by site-specific artists when the viewing public does not “take” to a piece of art. These issues were hovering in the background when Congress drafted VARA.

2. *The Visual Artists Rights Act of 1990*

To give effect to the moral rights recognized under the Berne Convention, the United States Congress passed legislation amending the Copyright Act of 1976 to recognize two specific types of artistic rights.⁷⁶ The amendment, called the Visual Artists Rights Act (VARA),⁷⁷ grants artists the moral rights of integrity and attribution. These rights may be waived but are nontransferable.⁷⁸ Aside from a

75. *Id.*

The General Services Administration, which had commissioned “Tilted Arc” in 1979 for \$175,000, plucked the sculpture from its site on March 17, 1989, and stored it in three stacked sections in an outdoor government parking lot in Brooklyn, at Third Avenue and 29th Street. Interviewed at the time, Mr. Serra said, “If they ever use the name ‘Tilted Arc,’ or my name in connection with those three steel plates, I’ll sue them.”

The toppled arc sat in the lot for 10 years. “Passing motorists probably didn’t even know it was there,” said Renee Miscione, a spokeswoman for the General Services Administration. Last September, the three 50-ton sections were moved by flatbed truck to a storage building in Middle River, Md., where they were unloaded and stacked by an oversized 80-ton forklift. The move cost \$36,000. Ms. Miscione said the pieces would remain in “indefinite storage.”

Ms. Miscione said that because of the unusual history of the work, “Tilted Arc” is of potential interest to scholars. “The G.S.A. will not destroy or discard the pieces,” she said. “However, we will honor Richard Serra’s wishes, and we will not erect it anywhere else.”

Id.

76. Jones, *supra* note 29, at 357.

77. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended at 17 U.S.C. §§ 101-501 (1990)).

78. 17 U.S.C. § 106A(e) (2000).

(e) TRANSFER AND WAIVER.—

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual

few exceptions, VARA applies to works of visual art created after June 1, 1991, VARA's effective date.⁷⁹ The right of integrity, as set forth in VARA, encompasses an artist's ability:

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.⁸⁰

Before an artist can claim protection under VARA's right of integrity, however, the work must meet several important qualifications. Primarily, it must qualify as a work of visual art, as defined by the Act.⁸¹ This definition includes paintings, drawings, prints, photographs (produced "for exhibition purposes only"), or sculptures, exist-

art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

Id.

79. Pub. L. No. 101-650, § 610 (stating an effective date of six months after the date of enactment, which was Dec. 1, 1990).

(b) APPLICABILITY.—The rights created by section 106A of title 17, United States Code, shall apply to—

(1) works created before the effective date set forth in subsection (a) but title to which has not, as of such effective date, been transferred from the author,

And;

(2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3) of such title) of any work which occurred before such effective date.

Id.

80. 17 U.S.C. § 106A(3) (2000).

81. *Id.* § 101.

A "work of visual art" is—

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

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

Id.

ing in a single copy, or produced in limited edition of two hundred copies or fewer.⁸² Expressly excluded from VARA's definition of a "work of visual art" are objects such as maps, posters, books, merchandising or advertising items, and works made for hire.⁸³ Additionally, if an artist wishes to prevent a modification, distortion, or mutilation of a work, the artist must show that it would be "prejudicial to his or her honor or reputation."⁸⁴ If an artist seeks to prevent destruction of a piece of his or her work, the artist must show that it is a "work of recognized stature."⁸⁵

VARA contains several exceptions that play prominent roles in the conflicts between site-specific artists and property owners. Congress recognized several common practices of the artistic community and inserted exceptions to address the nonstatic existence of visual art⁸⁶—outside sculptures may erode due to the elements or materials used; conservation efforts may be necessary to counteract the aging

82. *Id.*

83. *Id.*

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Id.

84. *Id.* § 106A(a)(3)(A).

85. *Id.* § 106A(a)(3)(B).

86. H.R. REP. NO. 101-514, at 17 (1990).

process of a painting; artwork may need to be moved to accommodate new works or to better display the piece.

For site-specific art, the most important of these exceptions is the “public presentation” exception:

(c) Exceptions.—

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.⁸⁷

This exception allows for the modification of a work of visual art, including changes to the lighting and placement of the work. A congressional committee report discussed the application of this exception:

Under [the exception], galleries and museums continue to have normal discretion to light, frame, and place works of art. However, conduct that goes beyond presentation of a work to physical modification of it is actionable. 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.⁸⁸

Likewise, Congress foresaw problems involving artwork attached to or physically incorporated into buildings and included a “building exception.”⁸⁹ Because of real property interests and the legal conflicts

87. 17 U.S.C. § 106A(c).

88. H.R. REP. NO. 101-514, at 17.

89. 17 U.S.C. § 113(d) (2000). The “building exception” states:

(d)(1) 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.

that could arise when art is “built” into a structure, the building exception provides property owners with guidelines for determining when the right of integrity applies to incorporated works and gives detailed notice provisions for owners to follow before a work is removed from a building.⁹⁰

With regard to site-specific art, the closest that Congress came to expressly addressing its treatment under VARA was the following statement in a committee report: “Generally, the removal of a work from a specific location comes within the [public presentation] 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).”⁹¹ The modifications addressed by that proposed subsection were any intentional or negligent acts or omissions which resulted in “destruction, distortion, mutilation, or other modification . . . which would be prejudicial” to the artist’s reputation or honor.⁹²

Since the passage of VARA, courts have addressed several aspects of the legislation, such as the meaning of recognized stature,⁹³ whether a work is made for hire,⁹⁴ and to what extent artwork attached to buildings was protected under VARA.⁹⁵ It was not until *Phillips v. Pembroke Real Estate, Inc.* that a federal appellate court

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author’s rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner’s intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

Id.

90. *Id.*

91. H.R. REP. NO. 101-514, at 17.

92. 17 U.S.C. § 106A(a)(3) (2000).

93. *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (affirming a district court’s finding that a large metal sculpture was of recognized stature such that it was protected by VARA); *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004) (finding that a six thousand pound swan sculpture was not of recognized stature under VARA since it was kept in the sculptor’s backyard (which was not visible to the public), no expert testified as to the artistic merit of the piece, and it was never displayed so that it could receive review by the artistic community).

94. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995) (finding that a large walk-through sculpture installed in a lobby was a work made for hire).

95. *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ. 1226 DAB, 2003 WL 21403333, at *7-10 (S.D.N.Y. June 17, 2003) (discussing VARA’s “building exception” and its application to a three-dimensional piece of artwork attached to a twelve-story condominium building).

was faced with the direct application of VARA's right of integrity to a work of free-standing site-specific art.

IV. POST-VARA: *PHILLIPS V. PEMBROKE REAL ESTATE, INC.*

After the passage of VARA, courts began to address the scope and applicability of the statute.⁹⁶ Left unanswered until 2006 was the question of how and if VARA applied to site-specific art. The U.S. First Circuit Court of Appeals ruled in *Phillips v. Pembroke Real Estate, Inc.* that VARA did not apply to or protect site-specific art at all.⁹⁷

This important site-specific art dispute arose in Massachusetts, where a three-year legal battle was waged over a grouping of sculptural works by David Phillips.⁹⁸ The pieces were sited throughout a one-acre park in South Boston.⁹⁹ Fidelity Investment originally paid Phillips \$575,000 to design the park, which is located outside of Pembroke Real Estate, a company owned by Fidelity.¹⁰⁰ The artist's nautical-themed design for the park was comprehensive. The court described the project in detail:

Phillips created approximately twenty-seven sculptures for the Park, comprised of fifteen abstract bronze and granite pieces and twelve realistic bronze sculptures of various aquatic creatures, including frogs, crabs, and shrimp. Under the "Eastport Park Stonework Agreement", Phillips was responsible for the design and installation of stone walls, granite stones inlaid into the Park's walkways, and other landscape design elements. Most of Phillips' work in the Park is organized along the diagonal axis running from the northeast to the southwest corner, at the center of which is his large spherical sculpture entitled "Chords", the centerpiece of the Park, which Phillips personally carved from granite.

Phillips designed a bronze medallion with Zodiac signs, which crowns an S-shaped circular granite path, also of Phillips' design; outlying sculptures off of the main axis (many bronze crabs, frogs, and shrimp and a large seashell); and the curve motifs. He worked with a stone mason to choose and place the rough lichen-covered, Maine-quarried stone, and he selected the large granite stones that he used as part of his sculptures to mirror the large granite stones along Boston Harbor. Phillips' work in the Park is unified by a theme of spiral and circular forms.¹⁰¹

96. See *supra* notes 93-95 and accompanying text.

97. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006).

98. Edgers, *supra* note 3.

99. *Id.*

100. *Id.*

101. *Phillips*, 459 F.3d at 130-31.

Within a year of completion, Fidelity hired a landscaper to redesign the park for improved accessibility.¹⁰² The company believed that there were conceptual problems with the design.¹⁰³ Importantly, the original stone found throughout the park created maintenance problems.¹⁰⁴ With the redesign, the company sought to simplify walkways and add more shade-conducive plants.¹⁰⁵ The new design called for moving several of the large bronze and granite sculptures designed and sited by Phillips.¹⁰⁶ Phillips brought suit against Pembroke Real Estate, Inc., the Fidelity-owned local real estate company that leases the parkland from the Massachusetts Port Authority.¹⁰⁷ He was granted a preliminary injunction prohibiting the removal or alteration of the site-specific works in the park.¹⁰⁸

Phillips argued that any redesign of the park requiring the relocation or removal of some or all of his site-specific work would violate his statutory rights under VARA and the Massachusetts Art Preservation Act (MAPA).¹⁰⁹ While the case was on interlocutory appeal in the First Circuit, the district court certified a question to the Supreme Judicial Court of Massachusetts about the application of MAPA to site-specific art.¹¹⁰ The state court ruled that MAPA did not protect the artist against removal of the type of art at issue.¹¹¹ Although MAPA prohibits the physical destruction of artwork,

[it] does not protect [the work] against the conceptual destruction or decontextualization that may result from the removal of those components from the physical environment in which they have been placed. If the crafted components of site-specific art can be extracted from their surroundings without physical damage to them, the statute is not violated by their removal.¹¹²

In light of the state court's decision on the state law issue, the district court vacated the injunction.¹¹³ It entered judgment concluding that the federal law, VARA, applied to site-specific art but it was possible for Phillips' work to be removed from the park since Pembroke's wish to redesign the park fell under the public presentation exception.¹¹⁴ Phillips appealed to the First Circuit and challenged the

102. Edgers, *supra* note 3.

103. *Phillips*, 459 F.3d at 131.

104. *Id.*

105. *Id.*

106. Edgers, *supra* note 3.

107. *Phillips*, 459 F.3d at 129-30.

108. *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 93 (D. Mass. 2003).

109. *Phillips*, 459 F.3d at 129.

110. *Phillips v. Pembroke Real Estate, Inc.*, 819 N.E.2d 579, 580 (Mass. 2004).

111. *Id.* at 580-81.

112. *Id.* at 581.

113. *Phillips*, 459 F.3d at 132.

114. *Id.* at 132.

lower court's application of VARA's public presentation exception to allow modification or removal of Phillips' site-specific artwork.¹¹⁵

The First Circuit's analysis of Phillips' VARA claim focused on what it considered to be a flaw in the district court's ruling: VARA applied to site-specific art, but allowed the removal of Phillips work under the public presentation exception.¹¹⁶ To the First Circuit, it did not make sense that VARA would apply to site-specific art yet allow it to be removed from the statute's protection via an exception.¹¹⁷ The circuit court framed the question at issue as "[e]ither VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all."¹¹⁸

Phillips' arguments on appeal likewise attacked the district court's decision for allowing modification of his work under the public presentation exception.¹¹⁹ The artist agreed with the lower court's ruling that VARA applied to site-specific art, but he challenged the ruling that the public presentation exception allowed the removal of his work from the park.¹²⁰ On appeal, the artist claimed that the words "presentation" and "placement" were ambiguous with regard to location.¹²¹ Relying upon the construction canon of *noscitur a sociis*,¹²² he claimed that the use of the word "lighting" related to "placement" such that both words should be read to mean nonpermanent changes in public presentation.¹²³ Underlying the nonpermanent interpretations of "lighting" and "placement" was the notion that the object must be moveable for the public presentation exception to apply.¹²⁴ The First Circuit did not agree with Phillips' logic—it saw this interpretation of the public presentation exception as creating a "dual regime."¹²⁵ Under this interpretation, VARA and its terms would mean one thing when applied to moveable art (that is, art that is not site-specific) and would have a different meaning when applied to site-specific art that is nonmovable.¹²⁶ The court took the position that if VARA had been intended to cover site-specific art in a manner that differed from its application to other types of art, then the statute would have expressly discussed site-specific art and explained

115. *Id.*

116. *Id.* at 140.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. "A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." BLACK'S LAW DICTIONARY (8th ed. 2004).

123. *Phillips*, 459 F.3d at 141.

124. *Id.*

125. *Id.*

126. *Id.*

how to differentiate between art forms that would be covered by site-specific protection and those that would not be covered.¹²⁷

The First Circuit ultimately ruled that VARA does not apply to site-specific art at all.¹²⁸ It based this decision on the logic that VARA would not “protect site-specific art and then permit its destruction by removal” under the statute’s public presentation exception.¹²⁹ It affirmed the district court’s ruling that Phillips’ work could be removed from the park, but rejected the district court’s approach to using the public presentation exception.¹³⁰ The First Circuit did not reach the application of the exception since it found that site-specific art was wholly unprotected by VARA.¹³¹

V. WHY COURTS SHOULD APPLY VARA TO SITE-SPECIFIC ART

Unfortunately, the *Phillips* court missed the mark when it ruled that VARA does not apply to or protect *any* site-specific art. The First Circuit’s approach in *Phillips* obliterates site-specific artists’ ability to claim not only the right of integrity, but also the right of attribution afforded by VARA. In one fell swoop, the court removed a specific art form from the protection of the broadly drafted legislation. Instead, the First Circuit should have recognized that the statute does not discriminate based on art form. VARA covers a broad range of visual arts, including site-specific art, and its application should be dealt with on a case-by-case basis using the standards and exceptions established by Congress.

In defining what was covered by VARA, the statute provides a broad definition for works of visual art. Nowhere does the statute attempt to limit the protections of VARA based on art-form or style. Instead, its application is limited by only a handful of clear definitions, specific exceptions and flexible standards that accommodate the dynamic world of visual art. If a work falls within the broad definition of a work of visual art, then VARA applies to it and a court must then determine if the exceptions and standards apply to the specific situation:

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. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls

127. *Id.* at 142.

128. *Id.* at 143.

129. *Id.*

130. *Id.*

131. *Id.*

within the definition should not depend on the medium or materials used.¹³²

Congress intentionally drafted several standards for evaluating whether a specific work was protected by VARA's right of integrity. For a work of visual art to be protected from distortion, mutilation, or modification, the artist must show that the proposed changes "would be prejudicial to [the artist's] honor or reputation."¹³³ To prevent destruction of a work, the artist must show that the piece is "a work of recognized stature."¹³⁴ Both of these standards require a court to analyze case-by-case whether the work should receive protection under the right of integrity.

Prior to passage of VARA, the appropriateness of these two standards—"honor or reputation" and "recognized stature"—were discussed. As initially introduced in H.R. 2690, VARA established a *per se* standard of protection for works of a "recognized stature."¹³⁵ However, a congressional committee recognized that interjecting such a stiff, inflexible standard into the world of visual art would create battles of experts over whether a work was of the appropriate stature and importance.¹³⁶ Instead, the rigid standard was replaced with the more accommodating and adaptable "honor and reputation" standard.¹³⁷ The committee report stated that "the formulation for determining whether harm to honor or reputation exists must of necessity be flexible."¹³⁸ This standard of honor and reputation would allow a finder of fact to look at the way in which the work would be modified and examine how it would affect the professional reputation of the artist. This concern with the inclusion of a more flexible standard like an individual artist's reputation and not the harder to achieve "stature of the work" standard was rooted in the nature of the ever-changing world of visual art. The committee remarked that, historically, many masterpieces, styles, and art forms had not been appreciated at the time they were created.¹³⁹ Under a flexible standard based on the individual artist's reputation, an artist would not need to prove a certain standing in the artistic community before claiming the right of integrity embodied in VARA:

An artist's professional and personal identity is embodied in each work created by that artist. Each work is a part of his/her reputation. Each work is a form of personal expression (oftentimes

132. H.R. REP. NO. 101-514, at 11 (1990).

133. 17 U.S.C. § 106A(a)(3)(A) (2000).

134. *Id.* § 106A(a)(3)(B).

135. H.R. REP. NO. 101-514, at 15.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

painstakingly and earnestly recorded). It is a rebuke to the dignity of the visual artist that our copyright law allows distortion, modification and even outright permanent destruction of such efforts.¹⁴⁰

This focus on individual artists and their individual works shows that VARA was to be interpreted and applied on a case-by-case basis and was not intended to exclude specific forms or styles of art, since certain styles of art may not have yet achieved positive recognition in the artistic community. Therefore, at its threshold, VARA should cover all works that fall under the broad definitions found in section 101. The rights found in VARA then should be applied on a case-by-case basis using both the flexible standards and the limited exceptions that address very specific circumstances, notably the public presentation and the building exceptions.

This is where the First Circuit failed in *Phillips*. It equated VARA's coverage of a type of art to the protection of that type of art.¹⁴¹ The court did not seem to recognize that VARA could apply to a piece of site-specific art and not necessarily protect it in every situation.¹⁴² Additionally, the court erroneously emphasized that under the plain language of VARA, site-specific art was not protected,¹⁴³ and furthermore, "the concept of site-specific art [was] never mentioned by name" in the legislative history of the statute.¹⁴⁴ The court's reasoning about the plain language of the statute did not adequately address that the broad statutory definition of a "work of visual" is based on the physical form of a work (such as a painting, sculpture, or drawing), not the genre or style.

Importantly, the court did not address that VARA codifies more than just a cause of action based in the right of integrity. With its ruling that VARA does not protect site-specific art at all, the First Circuit denied site-specific artists the ability to exercise the right of attribution, the other moral right established by the legislation.

The moral right of attribution can be equally important to a site-specific artist as the right of integrity. The right of attribution in VARA states that an artist:

- (1) shall have the right—
 - (A) to claim authorship of that work, and
 - (B) 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;
- (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion,

140. *Id.*

141. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

142. *See id.*

143. *Id.*

144. *Id.* at 143 n.12.

mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation;¹⁴⁵

Thus, if a site-specific artist is unable to prevent modification of their work, then under the right of attribution, the artist could prevent the use of their name in connection with the distorted work.

A key flaw in the *Phillips* decision is that it did not recognize that the public presentation exception would not be triggered in every site-specific art situation—not all cases would involve modification by removal from a location. Illustrative of this concept is the site-specific work mentioned previously in Part II—Athena Tacha’s “Memory Path.” The work, consisting of granite slabs that tell the history of a city through placement and pictures, fell into a state of disrepair.¹⁴⁶ The artist, Tacha, alleged that the problems arose due to a lack of maintenance and repair.¹⁴⁷ Thus, the “modifications” and “distortions” of the work arose not from the city’s attempt to move the work, but from the negligence of the city in failing to maintain the work. Although VARA contains an exception to the right of integrity when the modification is due to the passage of time or the inherent nature of the materials,¹⁴⁸ the issue of whether the damage to “Memory Path” falls under this exception or was caused by negligence or intentional disrepair would be an issue for a finder of fact to determine. If a court were to follow the First Circuit’s ruling that VARA does not apply to site-specific art at all, any recovery under VARA would be blocked. Tacha would not even be able to exercise her right of attribution to keep her name from being associated with the ruined piece.

Another one of Tacha’s site-specific works that encountered problems, “Marianthe,” was designed in 1985 for a branch campus of the University of South Florida (USF).¹⁴⁹ The property was sold years later to nearby Edison College.¹⁵⁰ Like “Memory Path,” “Marianthe” suffered from maintenance and repair problems. Cracks had appeared, allowing rain water to seep in and rust the supporting metal rods.¹⁵¹ In 1999, Edison College notified Tacha that “Marianthe” would be removed from the campus since it had become an unstable and dangerous structure.¹⁵²

145. 17 U.S.C. § 106A(a) (2000).

146. See notes 12-18 and accompanying text.

147. Athena Tacha, *The Vagaries of VARA: Can the Law Save Your Art?* (Committee on Intellectual Property of the College Art Association, Session Paper, 2002) (presented at a panel discussion “Beyond Copyright Do Artists Have Rights?,” Feb. 2002), available at <http://www.studiolo.org/CIP/VARA/Tacha/Tacha.htm>.

148. 17 U.S.C. § 106A(c)(1) (2000).

149. Tacha, *supra* note 147.

150. *Id.*

151. *Id.*

152. *Id.*

Tacha claims that the original commissioning entity, USF, failed to follow Tacha's maintenance instructions for "Marianthe," and did not pass on the instructions to Edison Community College.¹⁵³ In addition to providing maintenance instructions, Tacha's contract with USF included an express maintenance clause that stated, "[t]he University shall keep the Sculpture in good condition and repair it and permanently display it"¹⁵⁴ Since "Marianthe" had been designed and created before the passage of VARA, the statutory protections did not apply.¹⁵⁵ However, even if VARA existed when the work was created and installed, under the First Circuit's ruling, Tacha still could have been barred from bringing a cause of action under the statute since her work was site-specific.

Ultimately, Tacha entered into an agreement with the city of Sarasota about "Memory Path." She waived her rights under VARA and agreed to not bring a claim against the city in return for \$50,000.¹⁵⁶ Tacha's experience with the legal problems that can arise when public site-specific art interferes with property rights has inspired pessimism in her opinion on the genre's future: "[u]nfortunately for artists and their art, ours is a society that places priority on change and economic growth, not on permanence or esthetic values. I wonder, what will be left behind as testimony of our public art a millennium, or even a few centuries from now."¹⁵⁷

The First Circuit's ruling has construed VARA as being inapplicable to a whole genre of art because the court did not understand how a statute could apply to a work of art and not protect it. Instead of making an effort to apply the broad terms of VARA, the court ruled that because site-specific art was not expressly mentioned in the statute, the whole genre was completely unprotected by the legislation. The court did not provide satisfactory reasoning for this decision. Ultimately, it should have recognized that, at its threshold, VARA covers all types of art that meet the broad statutory definition of a work of visual art. Upon finding that Phillips' work satisfied this definition, the First Circuit should have then gone on to discern if the flexible standard of "honor and reputation" had been met and whether any of the exceptions applied. Even if the First Circuit had found that Phillips' work could be moved or modified under the public presentation exception, it would have at least recognized that VARA should be applied to situations involving site-specific art,

153. *Id.*

154. *Id.*

155. *Id.*

156. Mike Saewitz, *Commission Rejects Settlement Offer*, SARASOTA HERALD TRIB., Sept. 13, 2006, at B2.

157. Tacha, *supra* note 147.

rather than removing the whole genre from the protection of the moral rights afforded by the statute.

VI. THE FUTURE OF VARA AND SITE-SPECIFIC ART

As the law currently stands, since only one federal circuit court has addressed the applicability of VARA to site-specific art, it is not clear how courts across the country will decide conflicts arising over this art form. If courts take the opposite approach of the First Circuit and consistently construe VARA to apply to and protect site-specific art, then artists and commissioning entities (both public and private) could better address the problems that may arise through contractual terms.

One valid concern the *Phillips* court discussed is the role that artistic moral rights could play in the encumbrance of public and private land.¹⁵⁸ However, since the rights recognized by VARA may be waived, commissioning entities concerned with the long-term placement of site-specific art can request that artists waive their rights under VARA. Artists concerned about the permanence and integrity of their work can refuse to grant such waivers.

The waiver clause of VARA¹⁵⁹ arguably weakens the protections afforded by the legislation since commissioning entities, through control of the purse strings, are often in a better bargaining position.¹⁶⁰ Artists attempting to obtain work that would give prominence to their names might rush to waive these rights in the hopes of securing work. However, if courts are willing to allow site-specific artists to recover under VARA, then artists familiar with the legal problems that can occur with this site-specific art may be less willing to waive their rights. As VARA currently stands, it is viewed as a piece of legislation that “promises much and delivers little.”¹⁶¹ If courts aggressively applied and upheld the rights guaranteed by VARA, then artists would have the ability to make informed decisions concerning waiver provisions and the potential effects of contractual terms on their moral rights.

Artists could additionally insist upon other provisions in the contract, such as a buyout clause, rather than an upfront waiver of all VARA rights. Instead of waiving VARA rights at the outset, an artist could agree to a contractual term where, after the passage of a set number of years, if the property owner wishes to move or modify the work, then the owner would have the option to purchase the artist’s

158. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 142 (1st Cir. 2006).

159. 17 U.S.C. § 106A(e) (2000).

160. See, e.g., *Brooks*, *supra* note 35, at 1459 (discussing the disparate bargaining positions involved in the commissioning of an artistic work).

161. *Jones*, *supra* note 29, at 357.

waiver of his or her right of integrity in the piece. This would allow the artist to delay the decision of waiving his or her VARA rights and would give the commissioning entity an avenue to obtain a waiver of the rights at a later time.

Additionally, if VARA is construed to cover site-specific work, then it would provide “default rules” to apply when a contract is silent about VARA rights. Since VARA provides standards and exceptions as to when the rights of integrity and attribution apply, courts would have a better framework for analyzing cases involving the modification of site-specific art. Artists bringing claims under VARA would have to meet the statutory requirements and show that modifications would interfere with their honor or reputation or that the piece being destroyed is of recognized stature. Defendants in these cases could likewise present evidence showing why these standards have not been met. Without the guidelines of VARA, courts addressing these types of situations will not have a consistent framework to use in making their decisions.

VII. CONCLUSION

The *Phillips* case is the first federal circuit court case addressing the application of VARA to site-specific art. Hopefully, future courts will not follow the First Circuit’s lead when faced with the same issue. Because the visual art world is constantly changing and evolving, newer genres may seek the protections offered by VARA. In the absence of an express directive from Congress, courts should not exclude whole genres of visual art from the protections afforded by the statute. Congress recognized the dynamic world of visual art and intentionally drafted a statute that would have broad application to art found both on and off the pedestal.