Site-Specific Works and the Visual Artists Rights Act
Modeling a More Flexible Approach on the Building Exception

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"Art is not democratic. It is not for the people." [1]
--Richard Serra

Introduction

A real estate developer hired a sculptor, David Phillips, to create and install a group of sculptures with an aquatic theme in a public park facing Boston Harbor.[2] Known for his reverence for natural beauty, Phillips created "fifteen abstract bronze and granite pieces and twelve realistic bronze sculptures of various aquatic creatures, including frogs, crabs, and shrimp."[3] The park—its paths and landscaping—was designed to incorporate the sculptures, with the largest one, an abstract spherical work carved out of granite, at the center of the park.[4] Phillips conceived of the dozens of sculptures as an "integrated work of visual art" which, if rearranged or relocated, would lose much of its artistic meaning.[5] The sculptures were integrated in their relationships to each other as well as within the entire park, and the finished product—the park itself—was, the artist claimed, a site-specific work of art. That is, the work's placement in its location was as much a part of the work as the stone and metal the sculptures were made from. Site-specific works, unlike "plop art" (portable works that may be situated anywhere), thus cannot be moved without being artistically altered.

Within a year of the sculptures' installation, the developer decided the arrangement was not meeting the needs of those who used the park. A landscape artist was hired to redesign the park, and planned to reroute various paths, add more plants, and relocate a number of the abstract and aquatic-themed sculptures within the park. Phillips believed that this redesigned park would

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[1] *Culture Shock: Flashpoints: Visual Arts: Richard Serra's* Tilted Arc, PBS, http://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/tiltedarc_a.html [hereinafter *PBS Article*].
[2] Phillips v. Pembroke Real Estate, 459 F.3d 128, 130 (1st Cir. 2006).
[3] *Id.*
[4] *Id.*
[5] *Id.*, at 131 (quoting Phillips v. Pembroke Real Estate, 288 F. Supp. 2d 89, 98 (D. Mass. 2003)).

constitute a destruction of his site-specific work. The developer had complied with the contractual terms governing the artist's commission and had paid the artist in full. But another right was at stake: the artist's moral right in his creation, regardless of the fact that he did not own it or the property on which it stood. Philips sued the developer under the Visual Artists Rights Act (VARA) to enjoin the rearrangement of the waterfront park.

Since 1991, when VARA took effect,[6] American artists have had a cause of action against "any intentional distortion, mutilation, or modification" of their work "which would be prejudicial to [their] honor or reputation."[7] This right to protect elements of authorship, even after selling a work and relinquishing physical control of it, is known as one of an artist's moral rights; specifically, it is an element of the integrity right. VARA is America's first and only federal moral rights statute, and it confers a limited set of moral rights on a limited variety of works. The statute allows, for example, a sculptor to sue a collector who purchases a bronze and then repaints it in garish colors. It allows artists to retain some rights in certain works of high art even after a work becomes someone else's property.

The question of whether and how VARA might apply to site-specific works is unsettled. David Phillips argued that his sculptures were site-specific because their location was paramount to their artistic meaning. Thus, he argued, relocating the sculptures constituted an actionable distortion or even destruction under VARA.[8] But while VARA explicitly protects sculptures, it makes no mention of site-specific works. The First Circuit Court of Appeals affirmed a decision to reject Phillips's claim, holding that VARA categorically excludes site-specific works from all of its protections. Under *Phillips*, an artist cannot enjoin removal of a site-specific work; she also cannot enjoin defacement, an owner's refusal to properly attribute the work, or any other moral

[6] NIMMER ON COPYRIGHT § 8D.06 (Matthew Bender & Co. 2011).
[7] 17 U.S.C. § 106A (a) (2) (West 2010) (establishing artists' rights of attribution and integrity).
[8] Phillips, 459 F.3d at 130.

rights violation. The First Circuit's decision remains the most definitive decision by a federal appeals court on this question.

Today, courts, scholars, and practitioners disagree over VARA's applicability to site-specific works, and over the First Circuit's judgment in *Phillips*.[9] In 2011, a three-judge panel on the Seventh Circuit declined to decide the issue, but accused the *Phillips* court of taking an "all-or-nothing" approach and suggested that VARA could protect site-specific works to some extent, even if it did not protect them from relocation.[10] Many moral rights protections, after all, can be enforced regardless of whether or not a work is site-specific. The question in *Phillips* was whether VARA permitted the developer to rearrange the sculptures within the park. The court could have found that VARA did not enjoin such rearrangement, while noting that the statute could still theoretically apply to other cases involving the work—it might, for example, protect the sculptures from being spray-painted or melted down.

This Paper argues that such an approach is the most reasonable reading of VARA, and that the First Circuit's decision in *Phillips* was unnecessarily broad. Courts should apply VARA's general protections to site-specific works, except in cases of removal or relocation. As far as removal is concerned, the attitude of the First Circuit is reasonable. VARA's statutory text,

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[9] *See* Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 274 n. 62 (2009) (theorizing, in part based on the *Phillips* holding, that, had the controversy over Richard Serra's *Tilted Arc* occurred after VARA took effect, a court still would probably have found that VARA did not protect the work from removal); Lauren Ruth Spotts, Note, Phillips *Has Left VARA Little Protection for Site-Specific Artists*, 16 J. INTELL. PROP. L. 297, 317 (2009) (arguing that VARA does not cover site-specific works, but that "site-specific artists should be granted moral rights" in new legislation); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06 pt. 4 (Matthew Bender & Co. 2011) (reporting that the *Phillips* holding is the most definitive current law on the question); Donn Zaretsky, *This Copyright Confusion Ought To End*, THE ART NEWSPAPER (October 2011), *available at* http://www.theartnewspaper.com/articles/This-copyright-confusion-ought-to-end/24663) (arguing that courts should not find that VARA excludes site-specific works from moral rights protection). For pre-*Phillips* examinations of VARA's applicability to site-specific works, see Rebecca J. Martel, *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, 105 (2003) (arguing that VARA provides "little or no protection for" site-specific works); 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, 206 (2001) (arguing that "conceptual destruction" of site-specific works should constitute a violation of VARA).

[10] Kelley v. Chi. Park Dist., 635 F.3d 290, 307 (7th Cir. 2011).

its legislative history, and general American principles of intellectual property law and real property policy suggest that, as the *Phillips* court argued, enjoining removal of site-specific works would be an unreasonable reading of VARA. At the same time, however, nothing in the statute suggests that VARA does not protect site-specific works from other violations of their artistic integrity. Likewise, nothing in the statute suggests that site-specific artists should lose their right of attribution. This Paper argues that the First Circuit was wrong to categorically exclude site-specific works from all VARA protections, merely because cases concerning works' site-specificity are less easily resolved.

Although clear disagreement exists as to whether VARA protects site-specific works, there has been no recent targeted analytical examination of the issue.[11] There may not yet be a vast body of case law, but this question has wide implications for American moral rights law, and, by extension, American copyright law and policy. Because the *Phillips* decision is the only federal appellate holding on VARA's applicability to site-specific works, and because it is, this Paper argues, overly restrictive, courts should be alerted to the problem so that future cases are not resolved according to the precedent set in *Phillips*.

This Paper examines VARA's applicability to site-specific art, concluding that, while the statute cannot reasonably be read to prevent the removal of site-specific works, it should be applied to give such works other moral rights protections. Part One summarizes the history of moral rights law in America, then closely examines VARA's statutory text and legislative history, noting that these texts are inconclusive on the question of site-specific works but do not leave courts no authority to allow them moral rights protections at all. Part Two contrasts the *Phillips* holding with the Seventh Circuit's more flexible reading of VARA's applicability to

[11] The most direct analysis of VARA and site-specific art was published in 2009, before the Seventh Circuit forcefully called *Phillips* into doubt. *See* Spotts, *supra* note 9.

site-specific works, and concludes that the *Phillips* approach is unnecessarily drastic, denying VARA's protections to works it was meant to cover. Part Three posits an optimal theory of VARA and site-specificity, proposing that courts extend the statute's building exception, which establishes a limited and case-specific protection scheme for works incorporated into buildings, to apply to all site-specific works. Such a solution would respect the integrity and attribution rights of artists, while acknowledging that full protection of site-specific works would unduly infringe on the use of land by property-owners and the public. This Paper concludes by noting that, while the traditional purposes of moral rights laws are at odds with the American incentives-based approach to intellectual property, VARA should be read on its own terms, which are rooted in the European moral rights tradition of respecting works of art as an extension of the artist's personality. A middle-ground approach to VARA and site-specific works is the most reasonable reading of the statute; it also best serves the interests of artists, property owners, and the public.

I. Introduction to VARA and Site-Specific Art

This Part examines the history of moral rights in America, the text of VARA, and the statute's legislative history for clues as to how the statute should apply to site-specific art. Section A discusses the eventual adoption, in 1990, of an American moral rights statute. Prior to the enactment of VARA, Congress had avoided passing moral rights legislation largely because of the vast differences between American intellectual property law, which is founded on economic principles; and the European concept of moral rights, which is fundamentally non-economic. Section B closely examines VARA itself, interpreting the various sections of the statute that could be construed to exclude site-specific works, and also of those which seem to

partially protect site-specific works. Section C discusses VARA's legislative history, which is not illuminating on the issue of site-specific works but does not rule out the possibility that they are within its scope.

A. The Adoption of the Visual Artists Rights Act

American intellectual property law does not easily lend itself to moral rights. The term "moral rights," deriving from the French *droit moral*, collectively refers to an artist's right to control aspects of the use of his or her work, even after title to the work has been transferred to a new owner. The European system, in which moral rights originated, is based on the idea that an artist invests his or her personality in the work of art, that the work thus becomes an extension of the artist's self, and that destruction or modification by another party would violate the artist's personal dignity.[12] The purpose of traditional European moral rights regimes is thus to legally protect authors' and artists' personal, non-economic rights in their works. These regimes typically give artists a cause of action against those who deface or destroy a work, refuse to attribute it to the artist, or take any number of other actions against a work that would, by extension, harm the artist. Importantly, moral rights, traditionally conceived, are conceptually distinct from economic rights. This tradition of non-economic, personal rights is embodied by the Berne Convention for the Protection of Literary and Artistic Works, a seminal international

[12] *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355-56 (2006) (noting that moral rights regimes are premised on the "presumed intimate bond between authors and their works, which are almost universally understood to be an extension of the author's personhood"); Monroe E. Price, *Resuscitating a Collaboration with Melville Nimmer: Moral Rights and Beyond*, *in* 3 OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY 3 (Benjamin N. Cardozo School of Law 1998) ("Moral rights . . . have to do with the personal and continuing involvement of the author or painter in a work of art, even after property owner shifts."). For further discussion of the distinction between American and European moral rights history, and for a comparison of the differing structures of moral rights regimes, see generally Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 96 (1997).

agreement on copyright protection; the Berne agreement adopts moral rights protections which exist "[i]ndependently of the author's economic rights."[13]

The American intellectual property tradition is not based on respect for the dignity of artists, but instead is couched firmly in terms of economic incentives. Conceptually, American copyright law does not mesh well with Europe's non-economic model of moral rights or, by extension, with VARA itself. VARA is a descendant of the Berne Convention—it was passed within two years of American accession to Berne—and Berne in turn came from traditional European moral rights regimes. The original purpose of these regimes, protection of the artist's personal rights in her work, is a concept foreign to the American copyright system. The constitutional basis of American copyright law is the following provision: "To promote the progress of science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[14] American copyright law, in theory, protects authors' rights to the extent that such protections will encourage further useful creation, but not to recognize an artist's personal investment in her work. The Copyright Act hews close to this justification for protection, covering original works of authorship for a limited time, and permitting fair uses of works.[15] Copyright case law has traditionally observed this

[13] Berne Convention for the Protection of Literary and Artistic Works art. 6*bis* (1), Sept. 9, 1886, most recently amended Sept. 28, 1979.

[14] U.S. CONST. art. 1 § 8 cl. 8. Until the late nineteenth century, significant debate existed as to whether works of visual art were constitutionally protected at all, since the originalist meanings of "science" and the "useful arts" were, roughly, "knowledge" (including written works) and scientific or mechanical achievements, respectively. Thus, the origins of the Copyright Act, 17 U.S.C. (West 2010), are said to be in the Constitution's reference to "science," and the origins of the Patent Act, 35 U.S.C. (West 2010), are said to be in the reference to the "useful arts." For many years, the copyright-eligibility of works of visual art was seriously questioned, and it took many years for copyright law to expand to its current inclusiveness of different kinds of works of art. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony 111 U.S. 53 (1884) (holding that photographs may receive copyright protection).

[15] 17 U.S.C. § 102 (a) (West 2010) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression."); 17 U.S.C. § 107 (West 2010) (codifying the fair use defense).

economic directive, denying protection to works that did not strictly conform to the Copyright Act's subject-matter requirements, even where significant personal labor had been expended.[16]

Some moral rights regimes are more robust than others, protecting more rights in a greater variety of artworks. The most traditional European regimes typically recognize four categories of moral rights: the artist's right to be attributed, or to remain anonymous, when her work is displayed; her right to protect the work's integrity by preventing its destruction, mutilation, or distortion; her right to disclose her work to the public; and her right to withdraw or alter a previously disclosed work.[17] France, a moral rights stronghold, recognizes all four categories of moral rights.[18] The right to prevent destruction, mutilation, or distortion is known as the integrity right. The Berne Convention has long adopted a moral rights regime recognizing, at minimum, the attribution and integrity rights.[19]

The United States held out against moral rights for many years, but eventually, in 1990, passed VARA. The road to adopting this legislation overlapped with the decision to sign on to the Berne Convention. The United States initially resisted joining Berne, largely because the Convention's centerpiece is its moral rights protections.[20] Eventually, though, accession to Berne began to seem necessary, as American lawmakers faced pressure from European countries as well as at home.[21] Even after the United States signed on to Berne, in 1988,[22] lawmakers resisted adding a moral rights law to the Copyright Act. They argued instead that, while Berne was not

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[16] *See, e.g.*, Feist Publ'ns v. Rural Tel. Serv., 488 U.S. 340 (1991); Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
[17] *See* Rigamonti, *supra* note 12, at *356*.
[18] *See* Amy Adler, *supra* note 9, at 268 (discussing the greater protections of European moral rights regimes, especially France's).
[19] Berne Convention, *supra* note 13 art. 6*bis* (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 honour or reputation.").
[20] *See, e.g.*, Adler, *supra* note 9, at 266.
[21] *Id.*
[22] The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

self-executing, its moral rights requirements would be fulfilled by existing protections, such as the Lanham Act's false attribution prohibitions.[23] But many were unconvinced, and concerned that, without accompanying moral rights legislation, membership in the Berne Convention lacked international credibility.[24] At the same time, moral rights became more popular in America, as scholars came to admire the artists' rights regimes in Europe and those enacted domestically by state governments, beginning with California in 1979.[25] Within a year of the United States's accession to Berne, Congress drafted VARA; it was passed in 1990.[26]

Because VARA occupies the uneasy position of a non-economic moral rights statute within an economic copyright regime, it has repeatedly been mischaracterized as conforming to the American approach to copyright. A statement from the Register of Copyrights in VARA's legislative history conflates the European non-economic origins of moral rights with the American constitutional purpose of copyright: "The theory behind moral rights is that they result in a climate of artistic worth and honor that encourages the author" to create.[27] Instead of acknowledging that VARA—whose language is extremely similar to that of Berne—is based on non-economic moral rights regimes, the copyright official attempts to marry American economic-rights-based copyright law ("encourages the author") with European personality-based moral rights ("artistic worth and honor"). A few years later, this characterization was reverently

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[23] 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, 477-78 (1990).
[24] Adler, *supra* note 9, at 266.
[25] *Id.*; *see also* NIMMER, *supra* note 9, § 8D.06.
[26] *See* Adler, *supra* note 9, at 267.
[27] *The Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 1 (1989) [hereinafter *Subcommittee Hearings*] (statement of the Honorable Ralph Oman, Register of Copyrights at 3). This quotation from the legislative history bears out the uneasiness with which moral rights were adopted by the Congress. *See, e.g.*, NIMMER, *supra* note 9, at § 8D.06. While it is certainly possible that a climate of "artistic worth and honor" might encourage some artists to create, the historical purpose of European moral rights legislation has nothing to do with incentives, and Congress's ultimate purpose in adopting VARA was, at best, due to a combination of forces including a desire for American compliance with the Berne Convention and an appreciation "the unique importance" of works of visual art. *See* Ginsburg, *supra* note 23, at 478-79.

cited by the Second Circuit in the first major VARA opinion.[28] The oft-ignored reality is that VARA's origins are completely separate from the Copyright Act's, deriving from Europe's personality-rights approach. VARA, thus, does not fit as snugly into the American conception of copyright as the Second Circuit suggests, but is best understood as a conceptually separate carve-out within the Copyright Act.

B. VARA's Statutory Text

VARA's text is highly instructive in determining whether the statute can apply to site-specific works. Certain aspects of the statute, notably its limited nature and its failure to explicitly discuss site-specific works, could be seen to suggest that it was not meant to protect them; other aspects, including the building exception and the public-presentation exception, imply that site-specific works may be eligible for a number of VARA protections, though probably not from removal. While the struggle to establish a workable regime for site-specific works under VARA speaks to the ambiguity of the matter, this Section argues that the most reasonable reading of the statute would conclude that VARA may be read to protect site-specific works in some cases.

One argument in favor of excluding site-specific works from VARA protection altogether is that VARA was intended as a limited moral rights statute and courts should be careful not to over-extend its protections. The statute grants the artist

> the right (A) to claim authorship of [his or her] 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; [and] the right— (A) to prevent any intentional distortion, mutilation, or other modification

[28] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995).

> of that work which would be prejudicial to his or her honor or reputation, . . . 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.[29]

Compared to the more robust regimes of France and other European countries, VARA is limited in several ways: first, it confers only the rights of attribution and integrity; second, its integrity right permits artists to enjoin only those modifications which would be harmful to the artist's "honor or reputation"; and third, it protects only a small sub-group of works of high visual art, excluding film, books, and other media.[30] To the first point, VARA does not protect the withdrawal and disclosure rights, but protects only the rights of attribution and integrity. The French system, by contrast, recognizes not only the attribution and integrity rights but also the disclosure and withdrawal rights.[31] Second, VARA's integrity right is limited only to distortions, mutilations, or other modifications which would be "prejudicial" to the artist's "honor or reputation." This restriction, in theory, somewhat limits the rights of the artist even in instances of intentional distortions of his or her work.[32] Neither of these limitations, however, distinguish VARA from the Berne Convention.

The third limitation, however, makes VARA much more restrictive than other moral rights statutes: VARA significantly limits the scope of its subject matter. While the regime endorsed by the Berne Convention protects a wide variety of works of art, including literary

[29] 17 U.S.C. § 106A (3) (A)-(B) (West 2010).
[30] 17 U.S.C. § 106A (West 2010).
[31] Rigamonti, *supra* note 12, at 356.
[32] In practice, however, courts construing VARA rarely invoke the "honor or reputation" clause as a limiting principle; this reluctance is likely grounded in the long-standing doctrine that calls on judges to avoid making aesthetic judgments. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges on the worth of pictorial illustrations . . . ."). *But see* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 825 (2006) (arguing that judges must sometimes make artistic judgments, including in interpreting VARA).

works and films,[33] VARA only applies to works of visual art, as the Copyright Act narrowly defines them. VARA explicitly protects:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer . . . 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 . . . .[34]

Works eligible for VARA protection must be, essentially, unique works of high visual art. The statute explicitly excludes a laundry list of other works that could well be considered art but whose inclusion would expand the American moral rights regime significantly: posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures and other audiovisual works, books, magazines, newspapers, periodicals, databases, "similar publication[s]"—the list goes on.[35] VARA also excludes works made for hire[36] and architectural works.[37] These numerous exclusions ensure that VARA protections only reach unique works of high visual art, which serves the dual purpose of keeping American moral rights law limited and streamlining enforcement.

The second argument in favor of excluding site-specific works from VARA protection is that VARA makes no mention of site-specific works. Works that are integrated into their

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[33] Berne Convention art. 6*bis*. Under the Berne Convention, for instance, "literary and artistic works," including "books, pamphlets and other writings," "dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography," as well as the full spectrum of works of visual art, are protected. *Id.*

[34] 17 U.S.C. § 101 (1), (2) (West 2010).

[35] 17 U.S.C. § 101 (West 2010).

[36] *Id.*

[37] Buildings are not included in the categories of paintings, drawing, prints, sculptures, or still photographs covered in the Copyright Act's definitions of visual art. *Id.* It should be noted that architectural works were given limited copyright protection under the Architectural Works Copyright Protection Act, which was passed in 1990, the same year as VARA. *See generally* Ginsburg, *supra* note 23, at 490-97.

surroundings raise a particular subject-matter question under VARA because they often fall within the protected categories of sculpture and painting, but the fact that they derive artistic meaning from their site-specificity would seem to exclude them. VARA's subject matter exclusions are not exhaustive; unless a work is found to fall within one of the particular categories of protected works of visual art, VARA does not protect it. The *Phillips* court interpreted the absence of site-specific works from VARA's statutory text as a clear indicator of Congress's intent that such works receive no protection: "If VARA actually established such a complicated, dual regime, we would expect that the phrase 'site-specific,' or some equivalent, would appear in the language of the statute. There is no such phrase anywhere."[38] While the absence of site-specific works in the statutory text and history does not, of course, necessarily weigh in favor of finding that site-specific works are protected, the argument that it means they must be excluded is unpersuasive. After all, many site-specific works are at least in part protected works such as paintings or sculptures, and the statute does not explicitly exclude works that are site-specific.[39] Nevertheless, the First Circuit found this logic persuasive in holding that VARA does not apply to site-specific works at all.

Other elements of the statutory text, however, suggest that VARA does in fact protect site-specific works, at least in part. The most important provision in support of this reading is the statute's building exception, which carves out middle ground for partially protecting works incorporated in or made part of a building but ultimately permitting their removal. The building exception provides:

> In a case in which . . . a work of visual art has been incorporated in or made part of a building in such a way that removing the work

[38] Phillips, 459 F.3d at 142.
[39] Notably, the statute does exclude other general categories of works, such as works made for hire.

> from the building will cause the destruction, distortion, mutilation, or other modification of the work . . . and . . . the author consented to the installation of the work in the building either before the effective date [of VARA], or in a written instrument . . . then the [integrity right] shall not apply.[40]

As Professor Jane C. Ginsburg has noted, the building exception "establishes a dual regime, dividing building-incorporated artworks that cannot be removed from the buildings without causing 'destruction, distortion, mutilation or other modification of the work,' from incorporated artworks that can be removed without substantial damage."[41] The moral rights of artists whose works can be removed are protected, except to the extent that protecting them would prevent removal or relocation. A sculpture incorporated into a building, but which can be removed without physical damage, may be relocated but may not be melted down and reformed. Under the statutory interpretation canon *expressio unius est exclusio alterius* the building exception, by excluding certain aspects of building-incorporated works from VARA protection, suggests that the aspects not mentioned in the exclusion are protected.

At the same time, the building exception's dual structure establishes that, in cases of conflict between real property owners and artists, property owners retain much of their right to use their real property as they wish. While VARA is silent on the precise issue of site-specific art, the fact that the building exception prioritizes the interests of building owners over artists' moral rights indicates that the law would protect property interests over moral rights in other cases as well. Therefore, the drafters likely did not intend to protect site-specific works in cases where their protection would preclude property owners from making desired changes, or would

[40] 17 U.S.C. § 113 (d) (1) (A)–(B) (West 2010).
[41] *See* Ginsburg, *supra* note 23, at 485-86. The statute also requires that owners notify artists if they plan to remove a protected work. 17 U.S.C. §113 (d) (2).

limit the use of real property. Because the building exception applies to a subset of site-specific works of art, it is probable that the drafters assumed that courts might apply the logic of the building exception to the broader category of site-specific works, and that site-specific works are eligible for some moral rights protections.

Courts and commentators, notably the trial court in *Phillips*, have also applied VARA's public-presentation exception to site-specific works.[42] The public-presentation exception allows art-owners some leeway in displaying works as they see fit: "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, . . . unless the modification is caused by gross negligence."[43] Based on this exception, the *Phillips* trial court held that "VARA provides no protection for a change in placement or presentation" even for a site-specific work.[44] While this is a reasonable reading of the public-presentation exception, it is not perfectly applicable to site-specific works, since the site itself becomes part of such a work. The "lighting and placement" issues contemplated by the statute differ substantially from the integrated aspects of, say, David Phillips's waterfront park and aquatic sculptures.[45] In this way, site-specific works fit more comfortably within the framework of the building exception. Nevertheless, a logical and internally consistent reading of VARA might permit courts to view certain site-specific elements of works as analogous to public presentation, if only for the purposes of applying the statute. Such an interpretation would not preclude VARA protection for other aspects of site-specific works.

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[42] *See* Phillips v. Pembroke Real Estate, 288 F. Supp. 2d 89, 100 (D. Mass. 2003) [hereinafter Phillips I]. *See also* NIMMER, *supra* note 6, at § 8D.06 ("The legislative history confirms that 'removal of a work from a specific location comes within the exclusion because the location is a matter of presentation.'") (citation omitted).
[43] 17 U.S.C. § 106A (c) (2) (West 2010).
[44] Phillips I, 288 F. Supp. 2d at 100.
[45] 17 U.S.C. § 106A (c) (2).

C. VARA's Legislative History

Not entirely correctly, the *Phillips* court notes that the VARA legislative history is silent on the issue of site-specific art. The developer in *Phillips* argued, and the court accepted, that "[t]he term 'site-specific' does not appear anywhere in VARA or in its legislative history. It is not a legal concept."[46] In fact, the VARA legislative history is not completely silent on the question, but it is ambiguous. The Congressional Report disposes of site-specificity without much ceremony, noting that the public-presentation exception would allow removal of site-specific works as long as a work could be removed without physical damage: "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 [prohibited by the integrity right]."[47]

This declaration does not altogether exclude site-specific works from the statute's protections. Rather, it suggests that one should read into VARA's public-presentation exception permission to separate a site-specific work into two conceptual parts: the aspects of the work that are physically separable from the site (in *Phillips*, for example, this could be conceived of as each individual sculpture, or as the sculptures in their arrangement relative to one another), and the elements of the work that are inseparable from the site (the special arrangement of the sculptures in the waterfront park overlooking Boston Harbor, and probably the entire park itself,

[46] Brief for Defendant-Appellee at 10-11, Phillips v. Pembroke Real Estate, 459 F.3d 128, 130 (1st Cir. 2006) (No. 05-1970), 2005 WL 4050464.

[47] H.R. REP. NO. 101–514, at 16, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927. In a way, this public-presentation exception allows for an opposite outcome to the building exception—works can be moved only if no damage will occur, whereas the building exception permits removal in either case but specifies that the artist need not be notified and given the opportunity to extract the work from the building in cases where the work cannot be removed without damage. *See also* NIMMER, *supra* note 6, at § 8D.06 (asserting that the absence of site-specific works from the discussions in Congress is conclusive in finding that they are not protected).

harbor view and all). To an artist like Phillips, this concept of removability is problematic.[48] Many creators of site-specific works, and perhaps the art world at large, would doubtless take offense at the suggestion that such works could be separated from their sites. To them, the site of a work of art is as much a part of the work as the materials that formed the sculptures, and to move the work to another location would be equally destructive as to spray-paint it turquoise. But surely protecting works from at least some distortions would be better for artists than no VARA protection at all. Removing the artistic importance of site-specificity from the equation, courts could develop a legal concept of site-specificity as a type of public presentation that would be covered by the exception. The fact that the Congressional Report alludes to this possibility suggests that VARA should not exclude site-specific works altogether.

Although the legislative history does, then, lightly refer to possible applications of VARA to site-specific works, its lack of a direct approach to such cases is strange. The inextricability of site-specific works and their locations could not have been a foreign concept to Congress as it debated VARA, because at the same time the most notorious site-specific work of the 1980s was being debated in the Southern District of New York. *Tilted Arc*, an enormous curved sheet of raw steel, was installed by Richard Serra in New York City's Federal Plaza in 1981.[49] The sculpture effectively cut the public square in half, forcing pedestrians, especially those who worked in the area, to walk around it. The installation brought a flurry of immediate controversy. Commissioned by the United States General Services Administration (GSA), *Tilted Arc* was intended to be permanent and was accordingly installed into the existing steel and concrete

[48] *See* Reply Brief of Plaintiff at 1-2, Phillips v. Pembroke Real Estate, 459 F.3d 128, 130 (1st Cir. 2006) (No. 05-1970), 2006 WL 1497546 ("The site is an integral part of the artwork, and the work cannot be removed without destroying it."); Richard Serra, *The Tilted Arc Controversy*, 19 CARDOZO ARTS & ENT. L.J. 39, 42 (2001) ("I reiterated my position that to remove the work would be to destroy it.").
[49] *PBS Article.*

substructure of the plaza.[50] To many New Yorkers, it was an eyesore, and a prominent campaign was mounted urging its removal and relocation.

Serra, buttressed by experts from the art world, vehemently opposed the removal of the work. He scoffed at initial plans to relocate *Tilted Arc*, and warned that if the sculpture were relocated he would remove his name from it.[51] "Relocation," he would later write, would have transformed Tilted Arc "into an exchange commodity in that it would annihilate the site-specific aspect of the work. My sculpture would become exactly what it was not intended to be: a mobile, marketable product."[52] In his suit against the GSA, Serra sought to enjoin the removal of *Tilted Arc* based on a variety of legal theories, among them breach of contract, trademark violation, copyright infringement, and violation of his First and Fifth Amendment rights.[53] But without a moral rights statute, his case was a long shot. Serra lost, and *Tilted Arc* was hauled off to a scrap yard.[54]

Because Serra and the GSA were waging their battle in federal court while Congress debated the passage of VARA, some have assumed that the lack of mention of *Tilted Arc* in the VARA legislative history suggests that VARA was not intended to protect site-specific works.[55] The defendant in *Phillips* argued, and Judge Lipez of the First Circuit found persuasive, that "[t]he fact that Congress said nothing about site-specific art when it enacted VARA in the wake of the 'Tilted Arc' controversy shows that Congress had no intention to protect the placement of

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[50] *See* Serra, *supra* note 48, at 40.
[51] *See PBS Article*. It is noteworthy that, in threatening to remove his name from the work, Serra was exercising a right analogous to the attribution right that VARA, once passed, would confer as a moral right.
[52] Serra, *supra* note 48, at 41.
[53] Serra v. U.S. Gen. Serv. Admin., 664 F. Supp. 798 (S.D.N.Y. 1987).
[54] *See PBS Article*.
[55] Phillips, 459 F.3d at 141-42 (noting that the fact that Congress must have known of the *Tilted Arc* controversy, but failed to include site-specific works in the statutory text, weighs against finding any VARA protections for site-specific works); *accord* NIMMER, *supra* note 6, § 8D.06 ("Inasmuch as [VARA] did not explicitly redress [the *Tilted Arc*] situation, it would seem that Congress did not wish to embrace site-specific art within its protection.").

site-specific art."[56] Others are less certain about what the absence might mean. Professor Ginsburg has suggested the ambiguity was intentional, but does not elaborate as to probable reasons for it.[57] It seems that whatever Congress's intention was, it is less obvious than *Nimmer* or the *Phillips* court indicate. The absence of site-specific works from the legislative history and the statute itself could have a number of other meanings. One possibility is that Congress intended to leave the issue open to allow individuals and courts to work through the best solutions case-by-case (in which no general rule, under VARA, would apply).[58] Another possible reading is that the drafters may have believed that the existing provisions of VARA—the building exception, public-presentation exception, and built-in subject-matter limitations such as the requirement that an actionable modification be damaging to an artist's honor or reputation—would be applied piecemeal to cases involving site-specific works. Keeping both of these frameworks in mind, Parts Two and Three of this Paper will examine approaches courts can take to VARA in cases concerning site-specific works.

II. Divergent Judicial Interpretations

Federal courts have only recently begun to evaluate the question of whether VARA applies to site-specific works, but already they have manifested deep confusion on the issue. In the only federal appellate opinions to directly address this question, the First and Seventh

[56] Brief for Defendant-Appellee at 7, Phillips v. Pembroke Real Estate, 459 F.3d 128, 130 (1st Cir. 2006) (No. 05-1970), 2005 WL 4050464. Others, including some practitioners, do not find this lack of discussion confusing. *See* Zaretsky, *supra* note 9 ("There is no distinction in the language of the statute between site-specific and non-site-specific works.").
[57] Ginsburg, *supra* note 23, at 486-87.
[58] The legislative history confirms that such a flexible approach to subject matter might be reasonable, and that it might permit site-specific works to receive protection under VARA. See H.R. REP. NO. 101–514, at 16, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921 ("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.").

Circuits have expressly disagreed on the statute's meaning.[59] While the First Circuit held that VARA excludes all site-specific works, the Seventh Circuit argued that such a complete bar against any moral rights protection for site-specific works probably goes too far.[60] This Part summarizes the arguments in the First and Seventh Circuit cases and concludes with a critique of the First Circuit's holding, arguing that courts should follow the more measured and flexible reasoning of the Seventh Circuit.

In 2006, the First Circuit held in *Phillips* that VARA categorically excludes site-specific works from moral rights protection.[61] Unable to cite precedent, the *Phillips* court relied on logic and policy concerns. The court's reasoning attempted a logical proof: since the placement and location of a site-specific work is essential to the work's integrity, moving such a work necessarily destroys it; since any relocation destroys a site-specific work (and because enjoining removal would be extremely inefficient), the statute must not protect site-specific works at all.[62] Criticizing the opinion of the lower court, which had held that VARA could apply to site-specific works but that removal constituted a permissible modification under the public-presentation exception, the First Circuit reasoned:

> By definition, site-specific art integrates its location as one of its elements. Therefore, the removal of a site-specific work from its location necessarily destroys that work of art . . . . By concluding that VARA applies to site-specific art, and then allowing the removal of site-specific art pursuant to the public presentation

[59] Kelley, 635 F.3d 290; Phillips, 459 F.3d 128. At the trial level, federal courts in other jurisdictions have also struggled with the issue. Bd. of Managers of Soho Int'l Arts Condo v. City of N.Y., No. 01 Civ. 1226(DAB), 2003 WL 21767653, at *3 (S.D.N.Y. July 31, 2003) (noting that "nowhere in VARA does the statute make any legal distinction between site-specific or free-standing works" in regards to "site-specific" art).
[60] Kelley, 635 F.3d 290; Phillips, 459 F.3d 128.
[61] 459 F.3d 128.
[62] Phillips, 459 F.3d at 140.

> exception, the district court purports to protect site-specific art under VARA's general provisions, and then permit its destruction by the application of one of VARA's exceptions. To us, this is not a sensible reading of VARA's plain meaning. Either VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all.[63]

The court concluded that if VARA recognized site-specific art an untenable "dual regime" would result in which VARA theoretically protected works that, in practice, almost always could be destroyed, in that they could be relocated under the public presentation exception.[64] This logical problem, coupled with policy concerns, led the court to conclude, "VARA does not apply to site-specific art at all."[65] The central logic of the *Phillips* opinion is that site-specific art cannot be moved without being destroyed, so if VARA protected site-specific works then many real property uses would be inefficiently hampered, and such a drastic enforcement of VARA could not have been intended. The court, however, makes the rather obtuse assumption that no VARA cases would arise concerning site-specific works except those that directly implicate works' location. The proof collapses when one considers the many other ways that a site-specific work could be protected by VARA.

A three-judge panel on the Seventh Circuit, while declining to decide the issue, argued in 2011 that the First Circuit's "all-or-nothing approach to site-specific art may be unwarranted . . . Site-specific art—like any other type of art—can be defaced or damaged," and VARA may protect it from many types of distortions.[66] *Kelley v. Chicago Park District* concerned the city of

[63] *Id.*
[64] *Id.* at 143.
[65] *Id.*
[66] Kelley, 635 F.3d at 306.

Chicago's decision, after several years, to "discontinue" a "permanent 'Wild Flower Floral Display'" by a well-known painter and wildflower-installation artist in a public park.[67] While the Seventh Circuit ultimately held on other grounds that the installation did not qualify for VARA protection,[68] the court criticized the First Circuit's approach in *Phillips* for ignoring the many ways a site-specific work could be damaged or destroyed that would not involve the work's placement in its particular location: "Site-specific art is not *necessarily* destroyed if moved; modified, yes, but not always utterly destroyed. Moreover, some of VARA's protections are unaffected by the public-presentation exception," including even some violations of the right of integrity.[69] For example, the court notes, site-specific works could be defaced or damaged in ways that do not relate to their site-specificity at all. Indeed, as one practicing art lawyer noted in *The Art Newspaper*, "Someone could go into the park at night and splash red paint all over Kelley's wildflower installation or shave a swastika into it. Isn't that exactly the kind of thing the statute was meant to prohibit?"[70] Likewise, the author's attribution right would be wholly unaffected by the relocation of a work. The Seventh Circuit left open the possibility that VARA protects many, though not all, moral rights interests for site-specific works.

In this vein, the Supreme Judicial Court of Massachusetts (SJC), in a limited holding on a certified question from the First Circuit in *Phillips*, articulated a more nuanced view than the federal court on the question of whether the state moral rights law, the Massachusetts Art Preservation Act (MAPA), applied to site-specific works. The court ruled that "MAPA does not protect the crafted components of site-specific art against the conceptual destruction or decontextualization that may result from the removal of those components from the physical

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[67] *Id.* at 293-94.
[68] *Id.* at 306 ("Because Kelley's garden is neither 'authored' not 'fixed' in the senses required for basic copyright [eligibility], it cannot qualify for moral-rights protection under VARA.").
[69] *Id.*
[70] Zaretsky, *supra* note 9.

environment in which they have been placed, if they can be extracted from their surroundings without physical damage to them."[71] In other words, the state court narrowly tailored its holding to exclude from MAPA protections only the site-dependant aspects of site specific works. It left open the possibility that site-specific works could receive some moral rights protection.[72]

The SJC's proposed interpretation of MAPA resembles VARA's building exception as it would operate if applied to site-specific works generally—it protects the physical aspects of integrated works but permits their removal.[73] As the Seventh Circuit opinion noted, the building exception grants significant but limited protections to building-incorporated works, essentially protecting their integrity up to but not including their site-specificity. The *Kelley* court argued that the building exception's "presence in the statute suggests that site-specific art is not categorically excluded from VARA," since it requires private individuals and courts to weigh the competing interests that arise in disputes over building-incorporated works—which are a subset of or variation on site-specific works.[74] To extend similar VARA protections to site-specific works—that is, to protect their integrity in general but exclude modification by removal from protected moral rights—would be a reasonable reading of the statute, and would not substantially differ from the SJC's reading of MAPA.

III. Against the "All-or-Nothing" Approach

[71] Phillips v. Pembroke Real Estate, 819 N.E.2d 579 (Mass. 2004).
[72] The "all-or-nothing" approach of the Phillips court, it could be argued, is traceable to Phillips's own arguments in litigation. Because Phillips argued that only an injunction against removal would save his work, he received no protection for the work at all. Perhaps if Phillips had argued that moving the work would drastically modify, but not totally destroy, the work, the court would not have found his position so untenable.
[73] The SJC's reading of MAPA would actually protect site-specific works to a greater extent than the building exception would, because it implies that, if a work were so integrated that removing it would physically damage it, removal might be precluded.
[74] Kelley, 635 F.3d at 307.

This Part examines the interests of artists, property owners, and the public to determine a better approach to site-specific works under VARA. Section A discusses various ways that protecting some aspects of site-specific works might help or harm artists or property owners, examining the effect protection might have on artists' incentives to create, property owners' incentives to commission new works, and the principle that courts should generally avoid unduly burdening real property interests. Section B focuses this analysis on the possibility of modeling an approach to site-specific works on VARA's building exception, and concludes that such an approach, though imperfect, would be an efficient compromise, respect all the interests at stake, and provide the most reasonable reading of the statute.

A. The Interests at Stake

VARA necessarily pits the interests of property owners against those of artists by giving visual artists a cause of action against the owners of their work. The statute recognizes that, while property owners may generally do whatever they please with their belongings, moral rights are not transferable.[75] Compared to other works, site-specific works pose a greater potential inconvenience to owners, because they tend to be large and their installation limits other potential uses of the owner's property. To best serve the interests of artists, VARA should protect works of visual art to the extent that doing so is reasonable and accords with the statute. At the same time, however, the statute may not require protecting all aspects of site-specific works; as the Seventh Circuit points out, these works would not always "necessarily be

[75] They are, however, subject to waiver, and are in fact waived frequently. *See* 17 U.S.C. § 106A ("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."); Serra, *supra* note 48, at 49 (noting that GSA contracts post-VARA were amended to include a waiver of moral rights). For a discussion of whether default protection under VARA should be changed to an "opt-in" mechanism, see Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997).

destroyed if moved,"[76] and as the First Circuit points out, forcing real property owners to protect such works would be extremely inconvenient and result in inefficient uses of land.[77] The optimal interpretation of VARA must weigh the interests of artists, property owners, and the public.

A basic assumption of VARA and moral rights theory in general is that a primary concern for artists is the potential destruction or illegitimate modification of their work. Serra and Phillips passionately argued that site-specific works by definition integrate their locations into the entire concept of the work of art, and that therefore the site-specific aspects of a work are so essential that, once relocation is on the table, the work may as well be completely destroyed. Artists in favor of this reading of the statute might argue that protecting site-specific works in their entirety is not impossible, since French courts have done exactly that. *Dubuffet c. Régie Nationales des Usines Renault* concerned a site-specific sculpture garden[78] by Jean-Philippe Dubuffet, a celebrated French sculptor, which was to be installed at the Renault corporate headquarters.[79] In the mid-1970s, Renault decided to halt the installation, and the artist sued under the French moral rights law. The French Supreme Court of Cassation ordered the president of Renault to complete the installation. The artist, Dubuffet, ultimately decided not to complete the work, citing Renault's displeasure at being forced to complete it.[80] Still, the fact that the court was willing to enjoin construction shows that the breadth of moral rights support in France extends to enjoining removal of site-specific works.

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[76] *Id.* at 306.
[77] Phillips, 459 F.3d at 142 ("[T]he creation of a dual regime . . . has potentially far-reaching effects . . . . Once a piece of art is considered site-specific, and protected by VARA, such objects could not be altered by the property owner absent consent of the artist. Such a conclusion could dramatically affect real property interests and laws.").
[78] JOHN HENRY MERRYMAN, STEPHEN K. URICE & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 443 (2007).
[79] *See* Stina Teilmann, *Justifications for Copyright: The Evolution of* le droit moral, *in* NEW DIRECTIONS IN COPYRIGHT LAW 73, 82-83 (Fiona Macmillan ed., 2005).
[80] *See* MERRYMAN, *supra* note 78, at 443.

While it may be true that moving site-specific works sometimes destroys them, it is also true that protecting them entirely would place an enormous burden on property owners. Such a regime, even if one exists in France, seems simply untenable in America, and to interpret VARA as inventing one would be both inefficient policy and a misreading of the statute's purpose. The Seventh Circuit, in advocating a more flexible approach that would protect some aspects of site-specific works, does not seriously contemplate an interpretation of VARA that would enjoin removal of site-specific works; nor does the Supreme Judicial Court of Massachusetts in its *Phillips* companion holding. Even Jean Dubuffet, who after winning his case declined to finish the work he had fought for, seems to have acknowledged that protecting a site-specific work that the site's owner no longer wants is extremely anti-progressive.[81] In addition to this important policy concern, VARA's provisions related to land use suggest that courts should not read the statute as forcing property owners to maintain site-specific works in their original locations. The fact that VARA does not protect architectural works indicates that such a result is not the statute's purpose. Protecting site-specificity would inhibit the efficient use of land and buildings and would alter behavior, stunting the marketplace for commissioned works.

An available middle-ground approach, as the building exception and cases applying it demonstrate, is to read VARA as exempting modification or destruction by removal, while still protecting other moral rights that have nothing to do with removal.[82] Indeed, a middle-ground approach might well serve the interests of many artists—at least of those who do not share Serra's purist feelings about his own site-specific works. This approach acknowledges the needs of property owners; it also could benefit artists in the long run. Artists might want courts to take

[81] The *Phillips* court also hangs its decision largely on this point. Phillips, 459 F.3d at 142 (discussing the interests of real property owners).

[82] *See* Bd. of Managers of Soho Int'l Arts Condo v. City of N.Y., No. 01 Civ. 1226(DAB), 2003 WL 21767653, at *3 (S.D.N.Y. July 31, 2003) (permitting removal of a sculpture attached to a building's exterior as permissible under the building exception). *See also* examples in Zaretsky, *supra* note 9 and text accompanying note 70.

this approach to VARA for two reasons. First, in some instances modifying a work may have the positive result of artistic innovation. In her essay *Against Moral Rights*, Amy Adler argues that "there is an artistic value in modifying, defacing, and even destroying unique works of art. In fact, these actions may reflect the essence of contemporary-art making."[83] Surely the removal of the work could change it; it might even destroy the old work as it originally existed.[84] But it might not always be the travesty that Serra describes, turning a work of high art into nothing but a "marketable product."[85] Indeed, in *Phillips*, the artist's own insistence on the purity of the site-specific work contributed to the court's drastic holding, since the court's logic depended on their finding that removal constituted destruction and thus could not be permissible under the public presentation exception. Second, restricting art-owners could have a negative effect on the market for site-specific works. Extremely restrictive moral-rights policies might chill the market for site-specific work commissions. Because artists want to continue to sell art, they may ultimately be harmed if buyers, knowing their risks under VARA, are hesitant to commission new site-specific works.

There are also practical (as opposed to theoretical) reasons that most interests would be best served by a middle-ground interpretation of VARA's applicability to site-specific works. In the broadest terms, an "all-or-nothing" approach can confuse moral rights enforcement and ultimately fail to serve the interests of artists, buyers, and the public at large. A recent spate of graffiti on public murals in Los Angeles has been met with inaction by officials at Caltrans, the agency on whose property many murals appear. The reason for this inaction is ironic. Although Caltrans enforces a general policy of painting over graffiti, the agency has refused to paint over

[83] Adler, *supra* note 9 at 279.
[84] Indeed, another negative outcome for artists might be that, aware of the protections entailed in incorporating site-specific works into property, property owners would commission such works less frequently, fearing litigation should they ever change their minds and decide to move the works.
[85] Serra, *supra* note 48, at 41.

graffiti that defaces public art, since the cleaning process would involve repainting the murals. Caltrans has cited

> fear[s of] artists invoking copyright laws, particularly the Visual Artists Rights Act and the California Art Preservation Act [CAPA], which forbid the defacing or destruction of public art without the permission of the artist. "There are two laws—one state and one federal—that specifically mandate that once an artist creates a piece, no one but the artist is allowed to touch it," says Vincent Moreno from Caltrans . . . . Artists' copyright lawsuits have proved costly in the past—in 2008, the US government and contractors had to pay Kent Twitchell $1.1m after his famed *Monument to Ed Ruscha*, painted on the side of a building owned by the US Department of Labor, was painted over while the building was undergoing repairs. The artist was not given the 90-day notice as required by law should the owner of a building decide to paint over a mural.[86]

The Caltrans policy regarding these murals is astonishingly counter-productive, ignoring the central purpose of both moral rights statutes—to protect the artist's original expression. On the one hand, inherent in the Caltrans policy is the presumption that murals, which are site-specific, are covered by both moral rights laws. On the other hand, anxiety over the meaning of the laws is

[86] *See* Emily Sharpe, *Vandals Target Los Angeles' Murals*, THE ART NEWSPAPER (October 2011), *available at* http://www.theartnewspaper.com/articles/Vandals-target-Los-Angeles-murals/24657. In response to bad publicity, Caltrans eventually engaged a mural restoration company to clean some of the afflicted works. Ed Fuentes, *Restoration of Twitchell's "Jim Morphesis Monument" Begins*, KCET Departures (Nov. 18, 2011), http://www.kcet.org/socal/departures/landofsunshine/arts/murals/restoration-of-twitchells-jim-morphesis-monument-begins.html.

leading the local government to a perverse result. If Caltrans were to undertake a case-by-case approach, instead of its almost robotic all-or-nothing approach, it might have immediately hired a mural-restoration specialist to take on these specialized graffiti-cleaning projects. Certainly the original artists would be more satisfied with that resolution than with the current one.

B. Modeling an Approach on the Building Exception

The building exception is the closest VARA comes to directly addressing site-specific works and, thus, provides guidance as to how courts should address VARA's protections for site-specific works in the future. This Section argues that judges should apply VARA to site-specific works by following the structural and logical setup of the building exception.[87] There are two major reasons that this approach makes the most sense. First, building-specific works and site-specific works present similar problems in enforcing the integrity right, because they are both categories of works whose integrity may depend not only on the materials of the work itself, but also on the work's location relative to real property. Second, the structure of the building exception illustrates how VARA weighs the interests of property owners and those of artists in

[87] Professor Ginsburg has also noted that this would be a reasonable approach, and posits that a case similar to *Tilted Arc* would today be resolved along the lines of the building exception. Ginsburg, *supra* note 23, at 486-87. Ginsburg notes that, because the building exception's "dual regime" protects the integrity of works that are removable (by requiring building owners to give the artist an opportunity to remove the work) but not of those that are not removable, truly site-specific works of art—those that would be destroyed or mutilated by removal from their location, even if the physical aspects of the work remained intact—would fall "outside the ambit of integrity rights." *Id.* Ginsburg notes that site-specific works that would not be totally destroyed by removal receive broader integrity protections under the building exception, because the statute requires owners of those works to remove them from buildings without damaging them, while works whose integrity depends on their attachment to a building cannot be protected to that extent. However, it is easy to see how artists with some knowledge of this technicality in the statute could avoid losing these broader integrity protections: by simply acknowledging that the law only protects some of the integrity of site-specific works, and to assert that their own work would not be destroyed if removed. Then they would maintain the rights that artists receive under the building exception, such as the right to be notified of an owner's plans to remove a work, the opportunity to remove one's work if an owner planned to destroy it, and, of course, the day-to-day integrity rights that have nothing to do with removal. On a related note, Ginsburg has also suggested that the ambiguity resulting from the absence of site-specific works from the text of VARA was anticipated and intentionally left unaddressed by the drafters. *Id.*

favor of property owners, suggesting that, while many aspects of site-specific works should be protected, their owners should still be permitted relocate them.

An approach modeled on the building exception would, in the most straightforward terms, weigh both moral rights and the rights of property owners, providing protection for both, but ultimately prioritize a property owner's right to use her land as she wishes to over the artist's moral right in a site-specific work. By protecting works incorporated into buildings only to the extent that a work can be protected or removed without damaging its physical integrity, the exception shows that VARA's drafters prioritized a property owner's right to renovate a building—more generally, the right to alter one's own property as one sees fit—over an artist's moral rights.[88] At the same time, the building exception still allows for the protection of other moral rights in the work, thus benefiting the artist significantly. Within the confines of developing a rule, the protections that the statute affords in the building exception constitute an equitable compromise. A 2003 decision of the Southern District of New York demonstrates the potentially broad applicability of this logic to all "non-removable" works of art. The court in *Board of Managers of Soho International Arts Condo v. City of New York* held that VARA's building exception permitted a property owner to remove a sculpture that had been attached to the building's exterior. The court suggested that the building exception also explains the statute's more general purpose regarding "non-removable" works of art:

> Clearly, Congress meant to separate works fitting the definition of § 113(d) into two different categories, namely removable and non-

[88] *See, e.g.*, Ginsburg, *supra* note 23, at 486 (characterizing the building exception as VARA's attempt at resolving "the perhaps irreducible conflict between property rights in the building and moral rights in the work in the owner's favor"). Further support of this contention can be found in the fact that VARA explicitly excludes architectural works from moral rights protection. Thus, protecting the site-specific aspects of site-specific works would seem to violate the purpose inherent in VARA's text of not enforcing moral rights when buildings and real property interests are at stake.

> removable "works of visual art." . . . . The statute generally affords lesser protections to "removable" works than "non-removable" ones. Indeed, if an artwork is removable, a building owner need only provide notice to the artist."[89]

Courts faced with VARA claims from site-specific works would be within their discretion to extend the logic of the building exception to broadly apply to any location in which a work may be situated.

Although the building exception ultimately prioritizes real property interests over moral rights by permitting removal, it also provides significant moral rights protections by requiring that owners notify artists of plans to remove works. The building exception includes a provision for providing an artist notice and the opportunity to remove her work if a building's owner plans to renovate in a way that would modify or damage an integrated work.[90] The statute also requires that, ex ante, artists and buyers acknowledge in writing that the work is integrated into the building. This acknowledgement and notice requirement encourages both buyers and artists to consider the possibility of removal ahead of time. If the work is removable, and the artist and buyer have acknowledged in writing that the work is site-specific, it may be removed. This provision, by requiring that property owners give artists the opportunity to remove their works, shows that VARA contemplates an enduring moral right in site-specific works, although it does not extend to removal itself. This recognition suggests that significant weight should be given to the artist's moral rights in cases involving site-specific works.

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[89] Bd. of Managers of Soho Int'l Arts Condo v. City of N.Y., No. 01 Civ. 1226(DAB), 2003 WL 21767653 (S.D.N.Y. July 31, 2003).

[90] See Ginsburg, *supra* note 23, at 486. Ginsburg notes that, in such situations, "one may anticipate that most courts would limit the artist's relief to damages," presumably because to enjoin renovations in such cases would place an inefficient and even unjust burden on property owners. *Id*.

This interpretation of VARA's applicability to site-specific works would provide an incentive against artists insisting, as Phillips did, that their works would be destroyed if removed. Artists who insisted that their works were site-specific in the purest sense—that removing them would destroy them—would receive less protection from the statute.[91] Simply put, if an artist claims her work's removal to another site will destroy it, she loses her moral right in the work; if she agrees that it could be resituated, she maintains all but the location-specific moral rights. As long as the artist does not herself take an "all-or-nothing" approach she has the opportunity to reclaim a site-specific work whose owner wishes to remove it. Under the ideal scenario, then, the work could be resituated in a new site that will either resemble the old one or imbue the work with new meaning.[92] Such an approach may not satisfy artists who insist on total aesthetic purity and site-specificity, but it would protect many physical aspects of site-specific works, and such an outcome suggest that this reinterpretation would be a net benefit to artists' honor and reputation. Certainly, to behold the Sistine Chapel ceiling at the Vatican, or Giotto frescoes in Florentine churches, is a sublime experience. But countless works of site- and building-specific Renaissance art—altarpieces, statues, and frescoes—have been removed from their original church settings and installed in the great museums of the world. It is difficult to imagine any art historian arguing that those works might as well have been thrown away, once the decision was made to remove them from their original settings.

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[91] *Id.*, at 485-86.

[92] There is also room in the law of historic preservation to protect certain site-specific works of art if they are deemed sufficiently important by the appropriate authorities. The National Historic Preservation Act may protect "any district, site, building, structure, or object" included in the National Historic Register; works of art could, then, fall into this category of protection. 16 U.S.C.A. § 470f (West 2010). While a work of art retains its moral rights by simply being created, the higher threshold for protection under historic preservation law would mean that fewer site-specific works would receive protection at their sites. The likely result is that works that had acquired "recognized stature" as extremely important works might be protected in this way. This would take care of some of the inefficiencies that would arise should VARA require all site-specific works to remain in their original locations. Of course, even without historic preservation laws, many private owners of such works would be loath to tear them down. Even if it were not a protected site, Falling Water would probably be in little danger of being demolished in favor of some other building because it has taken on enormous value—value that is tied up in its site-specificity.

The building exception is the most practicable model for a guide to applying VARA to site-specific works. However, other VARA provisions can also be read to protect some site-specific works while limiting the statute's applicability to all aspects of site-specific works. I consider these provisions briefly; each one merits further examination. One option available to courts is to give a flexible and creative interpretation to VARA's limiting requirements, such as the statute's requirement that, for a modification to be actionable, the change must be one that is "prejudicial" to the artist's "honor or reputation."[93] This limitation in the statute has yet to serve as a true limit on VARA's enforcement; courts tend to find that most alterations to works meet the "prejudicial to . . . honor or reputation" requirement.[94] The provision has not historically been seen as a significant hurdle, so for courts to do so would be something of a break with established views, and with legislative history; as the court noted in *Phillips I*, "[t]he legislative history also indicates that '[w]hile no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation.'"[95] It is also unlikely that courts would use this provision as a bar to protection because it would require judges to make aesthetic judgments—a practice which judges have long avoided.[96] Another option courts might have for limiting VARA protections would be to adopt a strict policy with regards to destruction of site-specific works to find that only a small category of extremely prestigious works qualify as works of "recognized stature." However, as with the "prejudicial to . . . honor or reputation" requirement, such an extension of common judicial practice is unlikely; many works have been found to be works of recognized stature, and the general rule is that a work may be a far cry from

[93] 17 U.S.C. § 106A (a) (2) (West 2010).
[94] *Id.*
[95] Phillips I, 288 F. Supp. 2d at 97, *citing* H.R. REP. NO. 101–514, at 14, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6926.
[96] *See* discussion of judicial resistance to make aesthetic judgments, *supra* note 32 and accompanying text.

a masterpiece and still receive this protection.[97] A third option is that courts could also find that site-specific works are ineligible for VARA protections when they are works made for hire—it is conceivable that both Serra and Phillips could have failed on these grounds, and the factors considered by courts in such inquiries are flexible and would allow for significant flexibility in interpretation.[98] Because site-specific works depend on the desires of real property owners and are often installed on commission, it is likely that they are often works made for hire, at least at a higher rate than are works of "plop art." This final option is probably the most viable means, outside the building exception, by which courts could limit VARA's applicability to site-specific works without denying protection categorically.

Conclusion

This Paper argued that the First Circuit's decision in *Phillips* was wrong to categorically exclude site-specific works from all VARA protections. Instead, the court should have read VARA to permit the relocation of such works, while still protecting them from other moral rights violations, such as defacement or refusal to attribute. As the Seventh Circuit suggested in *Kelley*, courts should not base future decisions on VARA's applicability to site-specific works on the First Circuit's holding. To be sure, the confusion in the *Phillips* opinion is understandable, because VARA, a non-economic moral rights regime, is seemingly out of place within a primarily economic copyright system. As a moral rights statute, VARA provides a prominent counterpoint to America's primarily economic copyright law tradition; it does not to blend in easily with the rest of the Copyright Act. Indeed, as courts have recognized, VARA was not

[97] *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994) (articulating a broad test for determining whether a work is one of "recognized stature").
[98] 17 U.S.C. § 101. *See, e.g.*, Carter, 861 F. Supp. 303; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (setting out factors courts should use in determining whether a given work is a work made for hire under the Copyright Act).

passed to bolster American economic-incentives-style Copyright law, but "to comply with the nation's obligations under the Berne Convention," which establishes a European, personhood-based moral rights system.[99] This discord between VARA and the rest of the Copyright Act need not plague all future decisions on the issue of VARA's applicability to site-specific works. Instead, courts can use VARA's building exception as a guide to applying the statute—or refusing to apply it—to site-specific works. As the building exception demonstrates, VARA weighs the interests of property owners against those of artists in a way that is, on net, favorable to property owners, while still protecting moral rights in many cases.

This Paper argued that courts should take a more flexible approach to VARA's applicability to site-specific works. In arguing that VARA should apply to site-specific works as the building exception applies to building-specific works, this Paper examined the history and text of the statute, then analyzed the major case law on the issue, and then considered theoretical and practical implications of modeling an approach to site-specificity on the building exception. Part One introduced American moral rights law—its political and historical background, statutory text, and legislative history. Section A provided an overview of moral rights, then examined America's uneasy acceptance of its own moral rights regime, beginning with late accession to the Berne Convention and the eventual enactment of VARA. Section B went on to closely interpret VARA's statutory text. Passed in 1990, VARA establishes a limited moral rights regime, protecting authors' rights of attribution and integrity for a subgroup of works of high visual art. Section B examined the various elements of VARA that somewhat complicate its enforcement, including the building exception, the public-presentation exception, and various limitations, such as the provision that VARA does not protect works made for hire. Section C discussed VARA's legislative history, which is inconclusive on the issue of site-specificity but

[99] Kelley, 635 F.3d at 291.

does not rule out the possibility that site-specific works could receive some moral rights protections.

Parts Two and Three then went on to discuss the factors that courts do and should consider when applying VARA to site-specific works. Part Two provided a close reading of the First Circuit's *Phillips* opinion, which held that VARA categorically excludes site-specific works from all moral rights protection, then contrasted the logic of that holding with the Seventh Circuit's analysis, in dicta, of the same issue. While the Seventh Circuit argued that protecting site-specific works from removal would probably be unfeasible and contrary to the statute's intent, it pointed out that a number of VARA protections could be afforded to site-specific works without implicating issues of site-specificity, such as the right of attribution and the right to enjoin defacement of a work. The Seventh Circuit's reasoning in making this argument echoed the similarities between the Seventh Circuit's argument and the lower court and related state court opinions in *Phillips*.

Part Three assessed the relative benefits and costs of modeling an approach to VARA and site-specific works on the building exception. Section One examined the interests of artists, art buyers, and the public, noting that, although some artists may insist that site-specific works cannot be moved without being destroyed, site-specific artists' interests would be better served by some VARA protections than by none at all. Section Two considered the possibility of extending the building exception to apply to all site-specific works, and concluded that it would weigh the interests of artists and property owners in a way that was fair and in accordance with the goals of the statute. While this approach would not satisfy the purist claims of some artists that all site-specific works are destroyed when moved, it would protect an array of moral rights

in site-specific works while maintaining a level of practicability and fairness to property owners that VARA's structure generally supports.

The discord between VARA's European-style moral rights regime and the economic justifications of the Copyright Act creates a tension in the options available to courts applying VARA to site-specific works. But this theoretical discord need not be a practical problem. Courts must accept VARA as conceptually separate from the rest of American copyright law, and enforce it on its own terms as equitably as possible. The most equitable system would permit removal of such works—even if removing a given work would destroy it—while still protecting the other moral rights that VARA confers.