

Copyright Protection of a Garden: *Kelley v. Chicago Park District* Holds that Gardens Are Not Artwork Subject to Intellectual Property Protection

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I. OVERVIEW

Chapman Kelley, a renowned artist known for paintings of flowers and landscapes, received a “permit” to create a wildflower display in a prominent park in downtown Chicago.<sup>1</sup> In 1984, Kelley created “Wildflower Works I” for the city, a display comprising two elliptical flower beds that spanned approximately one and a half acres of the park.<sup>2</sup> The display was promoted as “living landscape art,” with Kelley recognized as the artist, and remained a popular attraction for several years until it began to deteriorate due to forces of nature.<sup>3</sup> In 1988, the Chicago Park District gave Kelley a ninety-day notice of termination of his permit.<sup>4</sup> Kelley sued the Park District in federal court, alleging that the termination of his permit violated the First Amendment.<sup>5</sup> In exchange for Kelley’s dismissal of the suit, the Park District granted a temporary permit to maintain the display, which was thereafter formally extended each year until 1994.<sup>6</sup>

Following the lapse of the permit, Kelley and his group of volunteers (known as “Chicago Wildflower Works, Inc.”) continued to maintain the garden.<sup>7</sup> In 2004, Park District officials notified Kelley that they were reconfiguring Wildflower Works, which entailed reshaping the beds into rectangles and drastically reducing the size of the display.<sup>8</sup> After the Park District accordingly modified the garden, Kelley sued the organization for violation of his moral rights under the Visual Artists

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1. Kelley v. Chi. Park Dist., 635 F.3d 290, 292 (7th Cir. 2011).  
2. *Id.* at 293.  
3. *Id.* at 293-94.  
4. *Id.* at 294.  
5. *Id.*  
6. *Id.*  
7. *Id.*  
8. *Id.* at 294-95.

Rights Act of 1990 (VARA).<sup>9</sup> Under VARA, artists who create specific types of visual art, such as paintings or sculptures, have certain rights of integrity and may prevent any modifications of their works that would be “prejudicial” to their “honor or reputation.”<sup>10</sup> Kelley asserted that the radical reconfiguration of Wildflower Works constituted an “intentional distortion” of his work, and therefore violated his “right of integrity” under VARA.<sup>11</sup> As a result, Kelley averred that the display should be protected from such destruction.<sup>12</sup> While the district court concluded that Wildflower Works could be classified as a painting or sculpture for the purposes of VARA, the court held that Kelley’s claim was without merit because Wildflower Works lacked the requisite originality for copyright protection and because site-specific artwork like Kelley’s display is excluded from VARA protection.<sup>13</sup> Kelley appealed the district court’s judgment, and the Park District cross-appealed the court’s decision that the Park District was liable for breach of contract.<sup>14</sup>

Because the Park District did not appeal the district court’s finding that Wildflower Works was a painting or a sculpture, the appeals court focused on whether the garden was copyrightable.<sup>15</sup> The appeals court disagreed with the district court’s finding that the garden lacked sufficient originality, but held that it was unable to be copyrighted on other grounds.<sup>16</sup> The United States Court of Appeals for the Seventh Circuit *held* that a garden cannot receive copyright protection because it does not satisfy the requirements of authorship and stable fixation required by the Copyright Act. *Kelley v. Chicago Park District*, 635 F.3d 290, 292 (7th Cir. 2011).

## II. BACKGROUND

Kelley’s VARA claim stemmed from the long-standing tradition in civil jurisdictions that artists have certain moral rights pertaining to their works.<sup>17</sup> These moral rights differ from traditional copyright protections in the United States in that they are noneconomic and are personal to the

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9. *Id.* at 295.

10. *Id.* at 291-92, 295 (citing 17 U.S.C. § 106A(a)(3)(A) (2006)).

11. *See id.* at 291-92.

12. *Id.* at 292.

13. *Id.*

14. *Id.* at 295.

15. *See id.* at 302. *But see id.* at 301 (casting doubt on the district court’s holding by stating that the words “painting” and “sculpture” were intended to limit VARA’s scope, and suggesting also that the district court’s interpretation was “infinitely malleable”).

16. *Id.* at 303.

17. *Id.* at 296.

artist, and include the right of attribution and right of integrity.<sup>18</sup> The right of attribution allows the artist to be recognized as the author of his or her work, to prevent the author's work from being attributed to someone else, and to prevent the author's name from being attributed to a "distorted" version of the original work.<sup>19</sup> The right of integrity lets the author prevent his work from being modified in any way that would be "prejudicial to his honor or reputation."<sup>20</sup> These moral rights were introduced into the U.S. judicial system in 1990 with VARA, which grants these moral rights to authors of specific types of visual art.<sup>21</sup> The VARA statute defers to section 101 of the Copyright Act, which defines a "qualifying work of visual art" as "a painting, drawing, print, or sculpture . . . or . . . a still photographic image produced for exhibition purposes only."<sup>22</sup> The statute also includes specific exceptions for audiovisual works, promotional materials, and works for hire, all of which are not subject to traditional copyright protection under the Copyright Act.<sup>23</sup>

The United States Court of Appeals for the Second Circuit examined VARA's protection and scope in *Carter v. Helmsley-Spear, Inc.*<sup>24</sup> When discussing the qualifications for visual art, the court deferred to Congress's notes on the statute, which stated that "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."<sup>25</sup> Further, Congress emphasized, and the Second Circuit reiterated, that "whether a particular work falls within the definition should not depend on the medium or materials used."<sup>26</sup> Rather than focusing on the limitations of VARA on the type of visual art the author has created, the court in *Carter* narrowed VARA's scope by examining the "work for hire" limitation in VARA.<sup>27</sup> The court held that works of art made for commercial purposes by artists employed by a company fall outside VARA's copyright protection, but made no limitation on the statute's breadth based on the medium of the work of art.<sup>28</sup>

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18. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

19. *Id.*

20. *Id.* at 82 (citing Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6 *bis*, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986)).

21. *Id.* at 83.

22. *Id.* at 84 (quoting 17 U.S.C. § 101 (2006) (emphasis omitted)).

23. *Id.* at 84-85.

24. *See id.*

25. *Id.* at 84 (quoting H.R. REP. NO. 101-514, at 11 (1990)).

26. *Id.* (quoting H.R. REP. NO. 101-514, at 11).

27. *Id.* at 85-88.

28. *Id.* at 88.

The next discussion of VARA occurred in *Pollara v. Seymour*, another Second Circuit case that arose in 2003.<sup>29</sup> *Pollara* held that a banner created as a political advertisement qualified as “promotional material” and was thus outside the scope of VARA’s protection.<sup>30</sup> The court stated that the privileges of VARA are “limited depending on the purpose of the work.”<sup>31</sup> The court also noted that the statutory requirement that the work be a picture or sculpture is less significant than the purpose of the artwork, for “Congress could not have intended that every representation by lines . . . or every image in paint would be protected from modification or destruction without the express consent of the person who made it.”<sup>32</sup> Thus, the Second Circuit in *Pollara* also chose not to focus on the literal requirement that a work be a painting or sculpture as stated in VARA, but instead emphasized that visual works should be afforded protection based on their nature and purpose.<sup>33</sup>

The scope of VARA with regards to the “visual art” requirement was also addressed in 2006 in *National Ass’n for Stock Car Auto Racing, Inc. v. Scharle*.<sup>34</sup> In this case, the United States Court of Appeals for the Third Circuit held that drafts of a NASCAR trophy do not constitute visual art.<sup>35</sup> The court reasoned that VARA explicitly excludes “technical drawing[s], diagram[s], [and] model[s],” and drafts of designs fall into that category of material.<sup>36</sup>

VARA was further tested in *Phillips v. Pembroke Real Estate, Inc.*, a case decided by the United States Court of Appeals for the First Circuit in 2006.<sup>37</sup> In *Phillips*, the First Circuit held that “site-specific artwork” (art in which the location of the work is an integral part of the entirety of the work) cannot qualify for VARA protection.<sup>38</sup> The court came to this conclusion by considering VARA’s “public presentation exception.”<sup>39</sup> The exception states that “the modification of a work of visual art which is the result of conservation, or of the public presentation . . . of the work is

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29. *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003).

30. *Id.* at 266.

31. *Id.* at 270.

32. *Id.* at 270 n.2.

33. *Id.* at 271. However, the court maintains its argument that *advertising* is not protected. *See id.*

34. *See Nat’l Ass’n for Stock Car Auto Racing, Inc. v. Scharle*, 184 F. App’x 270, 274 (3d Cir. 2006).

35. *Id.* (internal quotation marks omitted).

36. *Id.*

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

38. *Id.* at 129.

39. *Id.* at 140-41.

not a destruction” of the artwork.<sup>40</sup> The court reasoned that site-specific artwork is inherently destroyed when removed from its location, and therefore the statute would not logically “protect site-specific art and then permit its destruction by removal from its site pursuant to the statute’s public presentation exception.”<sup>41</sup> Due to the apparent contradiction in the statute, the court in *Phillips* restricted VARA by concluding that “VARA does not apply to site-specific art *at all*.”<sup>42</sup>

In addition to determining whether a work of art can invoke VARA’s protection, a court must also decide whether the work of art qualifies for copyright protection.<sup>43</sup> In the landmark Case *Feist Publications, Inc. v. Rural Telephone Services. Co.*, the United States Supreme Court addressed the statutory requirement of originality in a copyrighted work.<sup>44</sup> The Court held that to be “original” and qualify for copyright protection, the work must be “independently created by the author . . . and . . . possess[] at least some minimal degree of creativity.”<sup>45</sup> Noting that “[t]he standard of originality is low,” the Court suggested that the telephone directory in the case, which was found to be uncopyrightable, may have qualified for copyright protection if it had been arranged “in an original way.”<sup>46</sup> Accordingly, the Court concluded that a work does not have to be “novel” to be considered original; it simply must have a minimal “creative spark” to qualify for copyright protection.<sup>47</sup>

### III. COURT’S DECISION

In the noted case, the Seventh Circuit concluded that Wildflower Works was a sufficiently original artwork, but that it could not qualify for copyright protection due to issues of fixation and authorship.<sup>48</sup> The court disagreed with the district court’s holding that VARA excludes all site-specific art.<sup>49</sup> The court ultimately held that a living garden cannot be copyrighted and that the Park District was entitled to judgment.<sup>50</sup>

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40. 17 U.S.C. § 106(A) (2006).

41. *Phillips*, 459 F.3d at 143.

42. *Id.* (emphasis added).

43. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

44. *Id.*

45. *Id.* at 1287.

46. *Id.* at 1296.

47. *Id.* at 1297.

48. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 292, 303 (7th Cir. 2011).

49. *Id.* at 306-07.

50. *Id.* at 292. The circuit court also strongly advised that a garden does not qualify as either a “painting” or a “sculpture” under VARA. The court stated that the Park District’s failure to appeal the district court’s decision that the garden is a painting or sculpture was “an astonishing omission,” noting that VARA’s phrasing requires an actual painting or sculpture, “[n]ot

The district court held that Wildflower Works could not qualify for copyright protection because it lacked originality, noting that Kelley “was not ‘the first person to ever conceive of and express an arrangement of growing wildflowers in ellipse-shaped enclosed area[s].’”<sup>51</sup> However, the circuit court discussed the holding of the Supreme Court in *Feist*, observing that the district court’s narrow interpretation mistook originality for novelty, which the Court in *Feist* explicitly said was not required by the Copyright Act.<sup>52</sup> The Seventh Circuit noted that under *Feist*, “Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”<sup>53</sup> The court concluded that Kelley’s display “plainly possesses more than a little creative spark” and thus passed the Supreme Court’s minimal threshold of originality for copyright protection.<sup>54</sup>

However, the court declared that the true copyright issue with regard to Wildflower Works was the difficulty of establishing authorship and fixation, two elements required under the Copyright Clause to obtain copyright protection.<sup>55</sup> A living garden, the court held, cannot satisfy these requirements.<sup>56</sup> The Copyright Clause explicitly protects “writings” of an author, and, according to the Nimmer’s Copyright Treatise, “unless a work is reduced to tangible form it cannot be regarded as a ‘writing’ within the meaning of the constitutional clause authorizing federal copyright legislation.”<sup>57</sup> Essentially, according to the Seventh Circuit, the prerequisites of authorship and fixation do not allow all conceptual art to be copyrighted.<sup>58</sup> To warrant copyright protection, a work must be in a tangible form capable of being reproduced.<sup>59</sup> The Seventh Circuit described a garden as comprised of elements that “are alive and

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metaphorically or by analogy, but *really?*” In contrast, the Copyright Act requires only “pictorial” or “sculptural” works, so the Seventh Circuit believed the use of “painting” and “sculpture” were meant as nouns of limitation in VARA. However, because the Park District did not appeal this issue, the court moved to the analysis of copyright protections of a garden. *Id.* at 300-02.

51. *Id.* at 302 (quoting *Kelley v. Chi. Park Dist.*, No. 04 CO 7715, 2008 WL 4449886, at \*6 (N.D. Ill. Sept. 29, 2008)).

52. *Id.*

53. *Id.* at 302-03 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1287 (1991)).

54. *See id.* at 303.

55. *Id.*

56. *Id.* at 302-06.

57. *Id.* at 303 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[B] (2004)).

58. *Id.* at 304.

59. *See id.* at 304-05.

inherently changeable, not fixed.”<sup>60</sup> The variability of a living, constantly changing garden, the court argued, provides difficulties in the determination in choosing a point at which the artwork is “fixed,” which then proves impossible in claiming copyright protection.<sup>61</sup> The “essence of a garden is its vitality,” so it cannot be considered a “writing” for the purposes of copyright law.<sup>62</sup>

In its analysis of fixation, the court considered the district court’s comparison to a 43-foot flowering topiary called “Puppy,” but ultimately concluded that the analogy was “inapt.”<sup>63</sup> The court found that “Puppy” was different from Wildflower Works in that “Puppy” consisted of a metal frame covered in blossoming flowers with an internal irrigation system, such that the work itself was “fixed and stable.”<sup>64</sup> While the court did not offer an opinion as to whether “Puppy” would satisfy the fixation requirement, it distinguished “Puppy” from Wildflower Works by stating that “Puppy” was “quintessentially” not a garden.<sup>65</sup>

In addition to the fixation problem, the Seventh Circuit also held that a garden does not satisfy the authorship requirement of the Copyright Act.<sup>66</sup> The court cited the analysis of William Patry, which states that “authors of copyrightable works must be human; works owing their form to the forces of nature cannot be copyrighted.”<sup>67</sup> This assertion formed the court’s main basis of reasoning that a garden cannot qualify for copyright, because a garden “originates in nature, not in the mind of the gardener.”<sup>68</sup> The court acknowledged that an artist or landscape designer does indeed create the initial arrangement of a garden, including the plants that comprise the garden and their location within the space, but the court stated nonetheless that this “is not the kind of authorship required for copyright.”<sup>69</sup> The court then explained that “when a landscape designer conceives of a plan for a garden and puts it in writing—records it in text, diagrams, or drawings on paper or on a digital-storage device—we can say that his intangible intellectual property has been embodied in a fixed and tangible ‘copy’” which would thus satisfy the fixation and authorship requirements of the Copyright Clause.<sup>70</sup> However, the court

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60. *Id.* at 304.

61. *See id.* at 305.

62. *See id.*

63. *Id.*

64. *Id.*

65. *See id.* at 305-06.

66. *Id.* at 304.

67. *Id.* (citing 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3.19 n.1 (2010)).

68. *Id.*

69. *Id.*

70. *Id.* at 305.

held that the garden itself is not copyrightable because it simply owes more to natural forces than to the artist.<sup>71</sup>

#### IV. ANALYSIS

In determining the copyright protection limits of a garden, the Seventh Circuit reached several sound conclusions of law but arguably overlooked several key factors in its analysis. First, the court seemed to recognize the need for a landscape artist or author of a garden to have copyright protection at some stage of their creative process, but limited this protection to written garden plans only.<sup>72</sup> Second, the authorship argument against copyright protection for a garden is fairly arbitrary and provides additional difficulties when determining at what point a work is the product of nature or of a human author.<sup>73</sup> Finally, the discussion is extremely limited when viewed in light of the few VARA decisions other courts have reached.<sup>74</sup>

In its opinion, the Seventh Circuit suggests that while a garden itself may not be copyrightable because of authorship and fixation issues, the preliminary written plans for the garden may constitute a tangible writing that would qualify for copyright protection.<sup>75</sup> This assertion is, in theory, beneficial to a landscape designer or artist, but ultimately does not afford the artist protection under VARA. As reiterated in *National Ass'n for Stock Car Auto Racing*, VARA protection does not extend to technical drawings or diagrams.<sup>76</sup> Drafts of a garden or landscape would fall under this category. Thus, according to the Seventh Circuit's interpretation, there would be no opportunity for artists in this situation to protect their works under VARA because the works in the planning stages would not be covered, nor would the execution of the artwork.

The authorship argument that the court makes in *Kelley* also proves problematic in determining when natural forces overwhelm the authorship of the human artist. For example, the court held that Wildflower Works is ultimately a work of nature because “[m]ost of what we see and experience in a garden—the colors, shapes, textures, and scents of the plants—originates in nature, not in the mind of the

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71. *Id.* The court also noted that the holding in *Phillips* that excluded all site-specific artwork from VARA protection is questionable, stating, “There are a couple of reasons to question this interpretation of VARA.” This issue, however, was also not presented on appeal, so the court refrained from making a “dispositive” ruling on the matter. *Id.* at 306-07.

72. *Id.* at 304.

73. *Id.* at 304-05.

74. *See id.* at 300-01.

75. *Id.* at 305.

76. 184 F. App'x 270, 276 (3d Cir. 2006).



gardener.”<sup>77</sup> However, the court noted that the sculpture “Puppy,” a “43-foot flowering topiary . . . may be sufficient” for copyright protection.<sup>78</sup> Similar to Wildflower Works, “Puppy” is a structure composed of “thousands of blooming flowers” within a frame.<sup>79</sup> The court’s distinction between the works will make it difficult for courts in the future to draw a line between a topiary structure, like “Puppy,” and a garden set within steel borders on the ground, like Wildflower Works. Likewise, while nature may surely control aspects of a garden, a gardener familiar with bloom cycles and the flowers he is planting certainly has a definite view of how the final display of his flowers will appear. This horticultural control is reinforced in the noted case by Kelley’s careful maintenance of the garden over the twenty years that the work was on display in Chicago.<sup>80</sup> As other plants were introduced to the display and started encroaching on his original vision, Kelley and his team of volunteers vigorously attempted to maintain the integrity of the display that Kelley had originally envisioned.<sup>81</sup> This illustrates how Kelley’s specific creative choices shaped the appearance of the display. While Wildflower Works certainly owes a bit of its physicality to the forces of nature, the garden is clearly a product of Kelley’s authorship.

The court refrained from ruling on the scope of VARA in this case because Park District did not appeal certain issues, but the court did discuss at length its interpretation of “visual art” as applied to VARA.<sup>82</sup> The court appears to believe strongly in narrowing the scope of VARA by limiting it to works that are “paintings” and “sculptures” as opposed to simply “pictorial” or “sculptural” artworks.<sup>83</sup> This is extremely narrow and largely ignores the previous interpretations of other circuit courts, which arguably all broaden the scope of VARA’s protection. For example, the court in *Carter* chose not to limit the scope of “visual art,” instead relying on Congress’s note that courts should utilize their common sense when determining what qualifies as visual art.<sup>84</sup> Likewise, the Second Circuit held in *Pollara* that the limitations of VARA should be more concerned with the nature and purpose of the artwork than the specific medium of the work.<sup>85</sup> In that regard, Wildflower Works

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77. *Kelley*, 635 F.3d at 304.

78. *Id.* at 305-06.

79. *Id.* at 305.

80. *See id.* at 294.

81. *Id.*

82. *Id.* at 300-01.

83. *Id.* at 301.

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

85. *Pollara v. Seymour*, 344 F.3d 265, 269-70 (2d Cir. 2003).

was clearly promoted as art for the city of Chicago.<sup>86</sup> The Park District declared that the display was “living landscape art” and “natural canvases” of artwork.<sup>87</sup> If the court in *Kelley* had maintained the persuasive reasoning from *Pollara*, they may have concluded that, although not literally a painting or sculpture, the display was meant to be portrayed as artwork. Similarly, the extent of the Copyright Act has also been interpreted extremely broadly, as was the case in *Feist*.<sup>88</sup> These holdings suggest that protections should generally be granted to authors and artists unless their work neatly falls within the exceptions listed in the respective statutes.

Perhaps the court in *Kelley* could have chosen to comment on the scope of VARA by instead focusing on the “public presentation exception” articulated in section 106(A)(c)(2) of the Copyright Act.<sup>89</sup> The exception states that “[t]he 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.”<sup>90</sup>

According to the Park District, Wildflower Works was becoming a nuisance to the city because of its difficulty to maintain and would potentially interfere with future plans to construct an adjacent park.<sup>91</sup> According to this public presentation exception, Wildflower Works would have been legitimately modified if the changes served the public good in this manner. The court could have limited its holding to permit modification of the garden without violating moral rights instead of suggesting that gardens be categorically excluded from copyright protection. The court’s broader holding could have dire consequences for copyright law. By arguing that VARA’s scope should be limited by literal interpretation of the nouns in the statute, the court risks preventing eligible works of conceptual art from receiving proper intellectual property protections in the future. As a result, the court’s needless broad holding could have dire consequences for copyright law.

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86. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 293 (7th Cir. 2011).

87. *Id.*

88. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1285 (1991).

89. *Kelley*, 635 F.3d at 299.

90. 17 U.S.C. § 106A (2006).

91. *Kelley*, 635 F.3d at 294.

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