

Artists Beware: The Effect of the First Circuit’s Refusal To Apply VARA to Site-Specific Art

I. OVERVIEW.....	395
II. BACKGROUND.....	396
III. THE COURT’S DECISION.....	401
IV. ANALYSIS.....	403
V. CONCLUSION.....	405

In August 2006, the United States Court of Appeals for the First Circuit refused to extend protection to site-specific art under the Visual Artists Rights Act (VARA).¹ Their opinion was the first articulation on the applicability of VARA to works of site-specific art and their ruling could potentially have far-reaching effects. Following the court’s opinion, works of art that are categorized as “site-specific” art will no longer enjoy the same protection under VARA as other categories of movable art, distinguishing them from other types of artwork generally protected by VARA.²

I. OVERVIEW

David Phillips brought suit against Pembroke Real Estate, Inc. to prevent the removal of his sculptural works from a Boston area park under the Visual Artists Rights Act of 1990 and the Massachusetts Art Preservation Act (MAPA), the state statute equivalent of VARA.³ In 1999, Phillips entered into a contractual agreement with Pembroke to create multiple sculptural works for installation in South Boston’s Eastport Park, including artistic installments into the granite walls and walkways of the park, in addition to other landscape design elements.⁴ In 2001, Pembroke embarked on a renovation of the park and called for the removal and relocation of some of Phillips’ sculptures.⁵ Phillips objected to the renovation plan and subsequently filed suit.⁶ Phillips claimed that each sculptural work within the park was to be considered a site-specific work, such that the works were “meaningful only if they remain in

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

2. See *id.*

3. See *id.*

4. See *id.* at 130-31.

5. See *id.* at 131.

6. See *id.*

Eastport Park, the location for which they were created.”⁷ Phillips also argued that the removal of his sculptures would not qualify as a “public presentation” under the exception provided by 17. U.S.C. § 106A(c)(2).⁸ Additionally, Phillips asserted that the artworks were pieces of integrated art, such that “*any* modification of *any* of the interrelated Parts of the Park [would] have an impact on related works” and would violate his rights under VARA.⁹ Phillips indicated that “if necessary, he would assert that the Park as a whole, including the work of the other artists, was a single work of integrated art.”¹⁰

On August 21, 2003, the United States District Court for the District of Massachusetts issued a temporary restraining order preventing Pembroke from removing or altering any of Phillips’ sculptures in the park under MAPA’s broad protection for site-specific art.¹¹ Following the district court’s ruling, both parties filed appeals regarding whether VARA and MAPA applied to site-specific art such as Phillips’ sculptures.¹² On appeal, Phillips argued that the court should adopt a “dual regime” reading of VARA, stating that the public presentation exception of VARA only applies to “plop-art” and integrated art, or movable art—categories of art which, by definition, exclude site-specific art.¹³ The First Circuit *held* that VARA does not apply to site-specific art whatsoever and denied Phillips’ claim for relief under VARA. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 129 (1st Cir. 2006).

II. BACKGROUND

VARA was passed in 1990 in response to a growing call for the granting of “moral rights” to artists.¹⁴ These moral rights are granted to protect artists’ interests in creations of visual art, specifically in protecting artists’ names and maintaining the physical integrity of artists’ works.¹⁵ While moral rights existed as a doctrine of European law for many years, it did not enter the U.S. legal sphere until 1979, and the

7. *Id.* at 135.

8. *See id.*

9. *Id.*

10. *Id.*

11. *See id.* at 131.

12. *See id.* at 129.

13. *See id.* at 141-42.

14. See Patrick Flynn, Annotation, *Validity, Construction, and Application of Visual Artists Rights Act (17 U.S.C.A. §§ 101 et seq.)*, 138 A.L.R. FED. 239, 239-40 (1997).

15. See 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, 207 (2001).

doctrine was not codified until 1990, when VARA was enacted.¹⁶ Moral rights are divided into two categories: the right of attribution and the right of integrity.¹⁷ The United States Court of Appeals for the Second Circuit indicated in *Carter v. Helmsley-Spear, Inc.* that VARA

protects both the reputations of certain visual artists and the works of art they create. It provides these artists with the rights of “attribution” and “integrity” These rights are analogous to those protected by Article 6 *bis* of the Berne Convention, which are commonly known as “moral rights.” The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.¹⁸

The right of attribution is thus related to the artist’s right to maintain control over the use of his name in conjunction with his artwork.¹⁹ For example, the right of attribution allows the artist to prevent others from using the artist’s name to sell artworks that are not his own creations.²⁰ An artist’s right of integrity enables the artist to protect his own “reputation and honor” by protecting the physical integrity of his artworks.²¹ Additionally, the legislative history of VARA also indicates that, in the case of visual art of “recognized stature,” the artist also has the right to prevent the destruction of his work.²²

The statute itself states that “the author of a work of visual art” shall have the right subject to the exceptions provided in 17 U.S.C. § 113(d), “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his honor or reputation.”²³ He also has the right to prevent any destruction of a work of recognized stature; indeed, “any intentional or grossly negligent destruction of that work is a violation of the right.”²⁴ However, § 106A(c)(2) provides an exception: “The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.”²⁵ Additionally, there is an exception to

16. *See id.* at 213.

17. *See id.* at 209.

18. *Phillips*, 459 F.3d at 133 (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995)).

19. *See Garson, supra* note 15, at 210.

20. *See Flynn, supra* note 14, at 239-40.

21. *See id.*

22. *See Phillips*, 459 F.3d at 133 (citing H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917).

23. 17 U.S.C. § 106A(a)(3)(A) (1990).

24. *Id.* § 106A(a)(3)(B).

25. *Id.* § 106A(c)(2).

the statute in § 113(d) for works that are installed in buildings, these artworks being deemed outside the scope of VARA.²⁶

Moreover, VARA specifically covers works of visual art, which are defined as including “a painting, drawing, print, or sculpture, existing in a single copy [or] limited edition.”²⁷ Also existing within the context of visual art is the notion of site-specific art.²⁸ For works of art that are deemed site-specific, the location and environment surrounding the actual constructed material of art becomes an essential part of the work, such that the location becomes part of the art itself, and the removal of the art effects its destruction.²⁹

In choosing to enact VARA, the United States Congress codified the doctrine of moral rights that had previously only existed under the Berne Convention.³⁰ Legal scholars have indicated that the legislature was reticent to grant such rights to artists in the United States, as is evident in the legislative history surrounding VARA’s enactment.³¹ The reservations regarding moral rights related to the common law ideas of free alienability and absolute ownership; congressmen were concerned that enabling artists to hold owners of their art liable for the art’s subsequent use would grant the artists control over property owned by another.³²

Moreover, the doctrine of moral rights has been contrasted with copyright law, as copyright provides economic incentives for the artist to create the work in order to achieve greater public access to the work.³³ However, moral rights have been criticized for being wholly related to “personality” and the artist’s individual interest in his work, rather than existing for the public benefit.³⁴ Congress was sluggish in adopting the concept of moral rights because of a perceived possible negative commercial effect on the country’s art market.³⁵ It follows that if owners of artwork could not do what they pleased with the art, they might be less likely to commission or purchase contemporary art, and conversely, artists might be less apt to create art if they could not retain any moral rights in their works.³⁶

26. *See id.* § 113(d).

27. *See id.* § 101.

28. *See* Garson, *supra* note 15, at 230.

29. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 134 (1st Cir. 2006).

30. *See* Garson, *supra* note 15, at 214.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.* at 215.

These concerns were reflected in the judiciary's early resistance to acknowledge not only moral rights related to visual art eventually granted by VARA, but moral rights of any sort.³⁷ For example, in dealing with the right of integrity, the New York County Supreme Court refused to recognize artists' moral rights in *Crimi v. Rutgers Presbyterian Church*.³⁸ After Rutgers Presbyterian painted over a fresco that Crimi created years earlier, Crimi brought suit, challenging that the destruction of his work was a violation of custom and infringed upon his limited proprietary interest in the work as it related to his honor and reputation as an artist and his right to prevent the mutilation or destruction of his work.³⁹ The New York County Supreme Court ultimately indicated that because the fresco was completely destroyed, Crimi would not have an action under the moral rights doctrine, because destruction, as opposed to distortion, could do nothing to harm Crimi's reputation.⁴⁰ Moreover, the court emphasized that even if Crimi could argue that his moral rights had been violated, the moral rights doctrine was not recognized under U.S. law at that time.⁴¹ *Crimi* is illustrative of the general reluctance to recognize any kind of moral rights prior to the enactment of VARA.⁴²

However, following *Crimi*, the judiciary began opening up to the recognition of moral rights in the United States, as evidenced by several federal court opinions.⁴³ In *Gilliam v. American Broadcasting Cos.*, the British comedians of *Monty Python* fame sued to prevent the defendant from airing an edited version of their sketch comedy show originally produced for the BBC.⁴⁴ The comedians brought suit under section 43(a) of the Lanham Act, contending that the vigorous editing of the program obliterated its "iconoclastic verve," thus impairing the comedians' right of integrity.⁴⁵ The Second Circuit held that, although the Lanham Act dealt with trademark, its application in this case was appropriate to prevent the presentation of a "garbled, distorted version of the plaintiff's work" to the public, thereby recognizing an artist's moral right in his work, although outside the purview of the Copyright Act.⁴⁶

37. See *id.* at 214-15.

38. See 89 N.Y.S.2d 813, 815 (Sup. Ct. N.Y. County 1949).

39. See *id.* at 816-17; see also Garson, *supra* note 15, at 218.

40. See *Crimi*, 89 N.Y.S.2d at 816-17.

41. See *id.* at 818.

42. See Garson, *supra* note 15, at 218-19.

43. See *id.* at 219.

44. See 538 F.2d 14, 17 (2d Cir. 1976).

45. See *id.* at 18.

46. See *id.* at 24.

It is notable that the *Gilliam* decision, if brought under VARA today, would not be actionable because the *Monty Python* sketch show would not qualify as a work of visual art as defined in 17 U.S.C. § 101. Moreover, while neither *Crimi* nor *Gilliam* deal with the issue of site-specific art in the context of VARA, these cases reflect the shift in Congress's recognition of the moral rights doctrine that ultimately led to the enactment of VARA. As evidenced by *Crimi* and *Gilliam*, the courts' willingness to recognize moral rights before the enactment of VARA was somewhat sluggish and possibly reflective of the common law mentality of the promotion of free alienability and complete ownership over property.⁴⁷

Nonetheless, moral rights were indeed recognized through the enactment of VARA in 1990. However, the issue of VARA's applicability to site-specific art has remained relatively unlitigated within the courts until Richard Serra requested the recognition of moral rights for his site-specific art in *Serra v. United States General Services Administration*.⁴⁸ In that case, the Second Circuit affirmed the district court's dismissal of artist Serra's suit against the General Services Administration (GSA) for removing his *Tilted Arc* sculpture from Foley Square in New York City.⁴⁹ This 1988 case, while involving issues of site-specific art, occurred before the enactment of VARA.⁵⁰ Initially, at the district court level, Serra argued that *Tilted Arc* was a work of site-specific art, and its location at Foley Square constituted a part of the artwork.⁵¹ Thus, the separation of the constructed material from the square effected a total destruction of the work.⁵² However, the district court dismissed this case based on the GSA's qualified immunity as a governmental organization.⁵³ On appeal, Serra's lawyers apparently urged him to forego his previous moral rights argument, as moral rights were not yet recognized under U.S. law.⁵⁴

Thus, while the courts have generally moved slowly toward the recognition of moral rights, the enactment of VARA indicated their willingness to recognize moral rights in some contexts. However, the

47. See *id.*; *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 819 (Sup. Ct. N.Y. County 1949).

48. See Garson, *supra* note 15, at 239; *Serra v. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988).

49. See *Serra*, 847 F.2d at 1046.

50. See 17 U.S.C. § 106 (2000); *Serra*, 847 F.2d at 1045.

51. See *Serra v. Gen. Servs. Admin.*, 677 F. Supp. 1042, 1045 (S.D.N.Y. 1987).

52. See *id.*

53. See *id.* at 1051.

54. See Garson, *supra* note 15, at 221.

question of whether VARA gives protection to site-specific art remained largely unanswered until the First Circuit's decision in *Phillips*.

III. THE COURT'S DECISION

In the noted case, the First Circuit denied the moral right of integrity provided by VARA to works of site-specific art.⁵⁵ First, the court found unpersuasive and imprudent the district court's characterization that VARA applied to site-specific art but was limited under the public presentation exception to § 106A(c)(2).⁵⁶ Additionally, the court rejected Phillips' contention that the terms of the public presentation exception should be interpreted not to apply to site-specific art under a "dual regime" reading of the statute.⁵⁷ Subsequently, the court dismissed this reading of the statute and ultimately held that VARA does not apply to site-specific art whatsoever.⁵⁸

The court first addressed the district court's characterization that VARA did indeed apply to site-specific art, but the public presentation exception provided by § 106A(c)(2) allowed the removal of site-specific art.⁵⁹ Because site-specific art, by definition, integrates its location as an element of the work, and the removal of the art from its location destroys the work as a whole, the court indicated that the district court must have held that VARA recognized site-specific art as a type of integrated art and concluded that VARA treats the two categories of art in the same way.⁶⁰ However, integrated art is different from site-specific art, in that integrated art is not destroyed by removal from its location.⁶¹ The district court held that VARA applies to site-specific art because it treated site-specific art in the same way as integrated art, even though the two categories of art are inherently different; the court then allowed the art's removal under the public presentation exception.⁶² The First Circuit dismissed this reading of VARA, indicating that either VARA recognizes site-specific art or it does not.⁶³ To hold that VARA protects site-specific art under its general provisions and then permits its destruction under the

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

56. See *id.* at 139-40.

57. See *id.* at 141-43.

58. See *id.* at 142-43.

59. See *id.* at 139.

60. See *id.* at 140.

61. See *id.*

62. See *id.*

63. See *id.*

public presentation exception is an unsupportable characterization of VARA's plain meaning.⁶⁴

Next, the First Circuit turned to Phillips' argument advocating a dual regime treatment of VARA. On appeal, Phillips argued that the language of the § 106A(c)(2) public presentation exception suggested it applied only to movable art, and not site-specific art, which is inherently incapable of being moved.⁶⁵ Phillips argued under the doctrine of *nos citur a sociis*, which suggests that the words of a statute must be interpreted in the context of the surrounding language, that the phrase "public presentation, including lighting and placement" within the public presentation exception, exhibited an assumption that the art is movable.⁶⁶ He argued that because "lighting" is a nonpermanent change in public presentation, that "placement" must refer to nonpermanent changes too.⁶⁷ Because these words operate on the premise that the public presentation is nonpermanent, the art must be movable, and therefore, site-specific art is not within the purview of the public presentation exception.⁶⁸

The First Circuit summarized Phillips' argument, stating that Phillips contended that VARA created a dual regime: "[W]ords that mean one thing as applied to non-site-specific art have a different meaning when applied to site-specific art."⁶⁹ Additionally, Phillips cited only one other provision of VARA to support his "dual regime" argument—the building installation exception provided in § 113(d)(1)(A).⁷⁰ Phillips argued that because § 113(d) excludes from VARA works that have been attached to or installed in buildings, and because a similar exception was not explicitly provided for site-specific art, that VARA must also apply to site-specific art.⁷¹

The court responded to Phillips' arguments regarding the public presentation and building exceptions by criticizing his interpretation of the statute.⁷² Phillips argued "that VARA's silence on a subject is actually

64. *See id.*

65. *See id.*

66. *See id.* at 141. Additionally, the public presentation exception to § 106A(C)(2) is repeated here for reference: "The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, or the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." 17 U.S.C. § 106A(c)(2) (2000).

67. *See Phillips*, 459 F.3d at 140-41.

68. *See id.* at 141.

69. *Id.*

70. *See id.*

71. *See id.* at 141-42.

72. *See id.*

evidence that the statute addresses that subject.⁷³ According to the court, “that is an odd way to read the statute.”⁷⁴ The court further indicated that if VARA was to be considered as applicable to site-specific art, one would expect an explicit differentiation between site-specific and nonsite-specific art within the text of the statute.⁷⁵ Moreover, the court noted that upholding Phillips’ characterization of VARA would be to rewrite the statute and potentially affect future property rights of art owners, as owners would not be able to alter property containing site-specific art in any way without the permission of the artist.⁷⁶

Additionally, the court indicated that the United States Supreme Court has emphasized the principle that statutes are to be read to perpetuate the “retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”⁷⁷ In these cases, “[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.”⁷⁸ The court held that Phillips’ argument that VARA’s silence on the subject of site-specific art indicates its application to site-specific art does not constitute “direct address.”⁷⁹ Thus, the court rejected Phillips’ “dual regime” argument.

IV. ANALYSIS

The court’s ruling in *Phillips*, while seemingly correct, could have far-reaching effects. First, while it is true that there is no explicit mention of site-specific art in the statutory language, it is not to be excluded from the purview of VARA simply because the category of art is not mentioned. The statute itself does not make any differentiation between the separate categories of art and simply groups all types of art (integrated, plop-art, and site-specific) into “visual art.”⁸⁰ Thus, the fact that the statute does not separately address site-specific art to protect it or exclude it does not suggest in itself that the category of art is not to be protected by VARA.

Moreover, the court focuses only on Phillips’ “dual regime” argument in refusing to extend VARA to site-specific art.⁸¹ According to

73. See *id.* at 142.

74. *Id.*

75. See *id.*

76. See *id.*

77. *Id.*

78. See *id.* at 142-43 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

79. See *id.*

80. See 17 U.S.C. § 106A (2000).

81. See *Phillips*, 459 F.3d at 143.

the court, Phillips' argument—that silence of the statute actually shows the statute's address of site-specific art—is flimsy reasoning based on improper statutory interpretation.⁸² However, the court focuses so much on Phillips' arguments presented on appeal that it glosses over the purpose of VARA to provide artists with moral rights in their work. While it is true that U.S. courts in the past had been reticent to recognize these rights, the enactment of VARA shows a shift toward the general recognition of moral rights.⁸³

Subsequently, separating out “site-specific” art from integrated art and from pop-art frustrates the purpose of granting the rights in the first place.⁸⁴ In fact, the court's refusal to apply VARA to site-specific art simply mimics the reasoning of pre-VARA cases where courts were squarely concerned with the effect of moral rights on common law property regimes. The First Circuit was explicit in its reasoning that site-specific art would not fall under the protection of VARA because of the potentially messy effects in the area of property law.⁸⁵ Thus, the First Circuit's reasoning regarding VARA's applicability to site-specific art creates a standard that fractures “visual art” in more categories than those enumerated in 17 U.S.C. § 101, and suggests that while some artists will continue to enjoy moral rights, other artists who deal in both crafted material and integrated space will not.

This brings up the same concern that was present before the enactment of VARA—that the art market will suffer because artists will have no incentive to continue the creative process if they are unable to retain any moral rights in their work. Moreover, since site-specific art is typically found in public places and is intended for public enjoyment and use, as the Eastport Park and Foley Square examples suggest, then the refusal to recognize site-specific art as protected by VARA could harm the public by creating disincentives for artists to create site-specific art for public enjoyment.⁸⁶

The First Circuit's concern regarding VARA's effects on property rights is obvious but necessary. While these property right concerns are legitimate, both to protect the property rights of private art owners as well as governmental agencies that commission site-specific art, these concerns could be alleviated, as one author suggests, simply by the

82. *See id.*

83. *See* Garson, *supra* note 15, at 214-15.

84. *See id.*

85. *See Phillips*, 459 F.3d at 142.

86. *See* Garson, *supra* note 15, at 243.

allowance of waivers for these commissioned artworks.⁸⁷ Waivers would generally be allowed as between private parties, where the artist could officially waive his moral rights in a site-specific artwork integrated into private property.⁸⁸ However, a potential problem could emerge within the context of government-commissioned artwork intended for display in public areas.⁸⁹ While these works of art improve the public aesthetic, the government has a legitimate interest in preventing the perpetual binding of public property, as artists creating site-specific art could dictate its location and use if site-specific art was recognized under VARA.⁹⁰ However, if Congress amended VARA to include a waiver provision for site-specific art, as one author has suggested, then VARA would not be subjected to a disjointed categorization of site-specific art as separate from other works of visual art. Subsequently, the competing interests of free alienability and use of property and the promotion of the commercial art market would also escape frustration.⁹¹

V. CONCLUSION

The First Circuit's refusal to apply VARA to site-specific art, while promoting pre-VARA concerns about free alienation and use of property, creates a segregated definition of "visual art" to exclude site-specific art, while not explicitly addressing the issue in the statutory language. However, these property concerns could largely be alleviated through the use of waivers by private parties and the enactment of a waiver amendment to allow governmental agencies to attain total control over site-specific art.⁹² Moreover, the decision in *Phillips* could have the effect of frustrating the art market for those who deal primarily in site-specific art and sculpture, as they would be denied the rights generally granted to their contemporaries dealing in integrated art and plop-art.

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87. *See id.* at 240.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

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