

A FIXATION ON MORAL RIGHTS

The Implications of Kelley v. Chicago Park District for Copyright and VARA Protection

Dawn Leung^{*}

TABLE OF CONTENTS

- I. KELLEY V. CHICAGO PARK DISTRICT
 - A. Background
 - B. Kelley in the District Court
 - C. Kelley in the Seventh Circuit
- II. COPYRIGHT'S BASIC REQUIREMENTS
 - A. Originality
 - B. Authorship
 - C. Fixation
- III. MORAL RIGHTS AND THE VISUAL ARTISTS RIGHTS ACT (VARA)
 - A. History of Moral Rights and VARA
 - B. Works Under VARA
 - C. Rights Under VARA
 - D. VARA Exceptions
 - 1. The Passage of Time or the Inherent Nature of the Materials
 - 2. The Public Presentation Exemption and "Site-Specific" Works
 - 3. The Building Exemption
- IV. SUMMARY AND CONCLUSION

The contemporary art world is a volatile and ever changing landscape. More and more artists are experimenting with nontraditional materials to express

^{*} Dawn Leung is a graduate of the University of Maryland Francis King Carey School of Law. She has a Bachelor of Music degree from the Conservatory of Music at Wheaton College in Illinois, and, when she is not exploring the law, she is teaching piano in her private studio. She would like to thank Professor William Reynolds for all his support in producing this paper and for his passion for arts law.

themselves and leave their marks on the world. The implications for what is and is not copyrightable are important to artists as they seek and use these new outlets. Artists also want to know that our nation's courts will protect their legacies and reputations in their works. The case of *Kelley v. Chicago Park District*, examining the copyright and Visual Artists Rights Act (VARA) protectability of Chapman Kelley's "living landscape art" work known as "Wildflower Works," is emblematic of the issues today's artists face in the legal world. In *Kelley*, Judge Sykes of the Seventh Circuit Court of Appeals found that "Wildflower Works" did not qualify for basic copyright protection because, though it may have been "original" in the copyright sense, it was essentially a garden and thus lacked the kind of "authorship" or stable "fixation" required to support copyright.¹ Because "Wildflower Works" did not qualify for basic copyright protection, the Circuit Court found it was not eligible for further protection under VARA.²

After a description of the events of *Kelley v. Chicago Park District* in Part I of this Article, Part II examines the Northern District Court of Illinois and Seventh Circuit Court's views of the basic requirements of copyright (originality, authorship and fixation). This Article argues that Judge Sykes' opinion creates confusion as to the definitions and practical consequences of copyright "authorship" and "fixation." Additionally, the opinion provides no clear standards for future artists and lawyers to ascertain when an artwork and the materials used therein are sufficiently "authored" or "fixed" to be eligible for copyright. Part III looks briefly at the history and reasoning behind VARA and then examines how VARA rights and

1. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

2. *Id.* at 306.

3 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

exceptions might have been applied to “Wildflower Works” if the work had been eligible for VARA protection. This Article particularly examines the consequences potentially arising if “Wildflower Works” were to be considered a “site-specific” work, and it looks at some of the open questions Judge Sykes left unresolved as a result of his dicta about the operation of VARA rights and exceptions.

I. KELLY V. CHICAGO PARK DISTRICT

A. Background

Chapman Kelley (b. 1932) is a Texas-based painter and landscape artist known for his use of elliptical shapes to frame his landscape artworks. In the 1970s and 1980s, he was working on a series of large outdoor wildflower displays when one of his collectors suggested he create a wildflower display in Chicago. Kelley decided he wanted to do it in Chicago’s Grant Park, a park in the heart of the downtown area near Lake Michigan. On June 19, 1984, the Chicago Park District Board of Commissioners granted Kelley a permit to install a “permanent Wild Flower Floral Display.” Under the permit, Kelley would install and maintain the exhibit at his own expense, and the Park District reserved the right to terminate the installation by giving Kelley a 90-day notice to remove the work.³

Kelley called this work “Chicago Wildflower Works I.” The work spanned 1.5 acres of parkland and consisted of two large elliptical flowerbeds set within gravel and steel borders. Kelley selected between 48 and 60 species of self-sustaining, native wildflowers, based on a variety of aesthetic, environmental, and cultural reasons. He designed the initial placement of the wildflowers so they would blossom sequentially, changing colors

3. *Id.* at 292-93.

throughout the growing season and increasing in brightness toward the center of each ellipse. Kelley, Chicago, and the Park District promoted “Wildflower Works” as a new form of “living art” or “living landscape art.” The work was very popular with the public.

Over the next few years, Kelley and volunteers from the nonprofit Chicago Wildflower Works, Inc. tended the vast living landscape by pruning and replanting the existing plants and planting new seeds when some plant species did not thrive. Four years after “Wildflower Works” was installed, the Park District decided to discontinue the work, and they gave Kelley a 90-day notice of termination. Kelley sued, claiming the Park District violated his First Amendment rights by terminating his permit. The parties settled, and the Park District agreed to give Kelley a “temporary permit” for another year. The permit stipulated that Kelley “will have responsibility and control over matters relating to the aesthetic design and content of Wildflower Works I” and Wildflower Works, Inc. “shall maintain [the work] at no cost to the Chicago Park District.”⁴ The permit said, “The planting material is the property of Mr. Chapman Kelley,” yet it also stated the agreement did not “create any proprietary interest for Chicago Wildflower Works, Inc., or Mr. Chapman Kelley in continuing to operate and maintain the Wildflower Garden Display after September 1, 1989.”⁵ There was no provision regarding a termination notice. The Park District extended this permit each succeeding year until 1994, after which Kelley and his volunteers continued to cultivate “Wildflower Works” without a permit.⁶

In March 2004, at a luncheon to discuss the 20th anniversary of “Wildflower Works,” Kelley and

4. *Id.* at 293-94.

5. *Id.*

6. *Id.*

5 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

Wildflower Works, Inc., asked Park District Commissioner Margaret Burroughs if “Wildflower Works” needed a new permit. Commissioner Burroughs responded, “You’re still there, aren’t you? That’s all you need to do.” However, by this point, the city of Chicago was redeveloping the Grant Park area. The Park District officials proposed reconfiguring “Wildflower Works” by decreasing its size from approximately 66,000 square feet to less than 30,000 square feet and reforming its elliptical flower beds into rectangles. The Park District’s director of development asked Kelley for his views on its plans but made it clear that the Park District planned to go forward with the reconfiguration with or without Kelley’s approval. Kelley objected to the proposed changes, but, a week later, the Park District proceeded with its plan. The elliptical borders were made into straight lines and surviving wildflowers were replanted in the smaller-scale garden.⁷

B. Kelley in the District Court

Kelley sued the Chicago Park District for violating his moral rights under the Visual Artists’ Rights Act (VARA), claiming the Park District’s reconfiguration of “Wildflower Works” intentionally “distort[ed], mutilate[ed], or other[wise] modifi[ed]” his work and this distortion was prejudicial to Kelley’s honor or reputation.⁸ He also alleged breach of contract, arguing that Commissioner Burroughs’ remark (“You’re still there, aren’t you?”) created an implied contract, which the Park District breached when it modified “Wildflower Works” without providing reasonable notice.⁹

7. *Id.* at 294-95 (Kelley sought \$25 million for the VARA violation).

8. *Id.* (citing RIGHTS OF CERTAIN AUTHORS TO ATTRIBUTION AND INTEGRITY 17. U.S.C. § 106A(a)(3)(A) (West 1990)).

9. *Id.*

The District Court rejected Kelley's VARA claim for two reasons. First, although "Wildflower Works" could be classified as both a painting and a sculpture, and therefore a work of visual art under VARA, it lacked sufficient originality to be eligible for copyright. Second, site-specific art like "Wildflower Works" is categorically excluded from VARA protection.¹⁰

On the contract claim, the District Court looked at the Chicago Park District Act, which said Park District Commissioners "have full power to manage and control . . . property of the district."¹¹ The District Court interpreted this to mean Commissioner Burroughs had the authority to make a binding oral implied contract with Kelley concerning "Wildflower Works." Thus, the District Court held for Kelley on the contract claim, because the Park District breached the implied contract by failing to give Kelley reasonable notice before altering "Wildflower Works." However, the judge found Kelley's evidence of damages uncertain, and the District Court entered a nominal award of \$1 in damages.¹² Both sides appealed.

C. Kelley in the Seventh Circuit

At the Seventh Circuit Court of Appeals, Judge Sykes affirmed the District Court's VARA ruling against Kelley but on different grounds. He said, for a work to get any moral rights protection under VARA, the work must first fulfill the basic requirements of copyright, and a garden like "Wildflower Works" did not. Contrary to the District Court, Judge Sykes said "Wildflower Works" was sufficiently original. However, he said the work did not

10. Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *3-7 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011).

11. 70 ILL. COMP. STAT. ANN. 1505/7.01 (West, Westlaw through P.A. 98-972, with the exception of P.A. 98-944 of the 2014 Reg. Sess.).

12. Kelley, 2008 WL 4449886, at *7-9.

A FIXATION ON MORAL RIGHTS: The Implications of *Kelley v. Chicago Park District* for Copyright and VARA Protection

fulfill copyright's requirements of authorship and fixation. As to authorship, Judge Sykes said a garden is "planted and cultivated, not authored" and "owes most of its form and appearance to natural forces."¹³ As to fixation, he said a garden is "alive and inherently changeable" and "not stable or permanent enough to be called 'fixed.'"¹⁴

Even though the Circuit Court found "Wildflower Works" ineligible for VARA protection, Judge Sykes went on to voice his disagreement with the District Court's view of how moral rights operate under VARA. Using a narrow definition of "visual art," Judge Sykes believed "Wildflower Works" would not be a "painting" or a "sculpture" under VARA because it was essentially a garden.¹⁵ He also believed VARA does not categorically exclude site-specific works. However, he did not issue any ruling on the VARA issues, other than to say that VARA did not apply to "Wildflower Works."¹⁶

Finally, the Circuit Court ruled for the Chicago Park District on the contract claim, holding that Commissioner Burroughs's comment did not create a contract with Kelley, because she lacked the authority to make a binding contract. Judge Sykes pointed out that the Chicago Park District Act speaks of the Park District "commissioners" in the plural sense, and public bodies do not usually give individual officers authority to unilaterally bind the corporate group.¹⁷ Additionally, the Illinois Park District Code, which applies to all Illinois park districts, says, "No member of the board of *any* park district . . . shall have power to create any debt, obligation, claim or liability, for

13. *Kelley*, 635 F.3d at 302-06.

14. *Id.*

15. *Id.* at 300-02.

16. *Id.* at 306-07.

17. *Id.* at 307-08.

or on account of said park district . . . *except with the express authority of said board* conferred at a meeting thereof and duly recorded in a record of its proceedings.”¹⁸ Therefore, Commissioner Burroughs had no individual or unilateral authority to bind the Chicago Park District in a valid oral or implied contract with Kelley.¹⁹

Judge Sykes’ opinion has prompted a good deal of comment and controversy in both the legal and art worlds. Scholars and artists have been critical of and confused by the Seventh Circuit’s view of copyright’s basic requirements of originality, authorship, and, particularly, fixation.²⁰ As more artists are creating art with nontraditional materials, both the general copyright and VARA moral rights portions of Judge Sykes’ opinion can have far-reaching consequences. More artists are also creating site-specific art so their work will be more visible and accessible to the public outside of a formal gallery. Thus, the definition of site-specific art and its ability to be protected by copyright laws is increasingly becoming an issue.

18. 70 ILL. COMP. STAT. ANN. 1205/4-6 (West, Westlaw through P.A. 98-972, with the exception of P.A. 98-944, of the 2014 Reg. Sess.) (emphasis added by the Court), *Kelley*, 635 F.3d at 308.

19. *Kelley*, 635 F.3d at 307-08.

20. *See, e.g.*, Michelle Chatelain, *Copyright Protection of a Garden: Kelley v. Chicago Park District Holds That Gardens Are Not Artwork Subject to Intellectual Property Protection*, 14 TUL. J. TECH. & INTELL. PROP. 385, 392-94 (2011) (criticizing the Circuit Court’s opinion in *Kelley* because its broad standards could be difficult to apply to artworks in the future); 17 U.S.C.A. § 102 (West 2014) (copyright applies to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated”).

9 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

II. COPYRIGHT’S BASIC REQUIREMENTS

Under the Copyright Act of 1976, copyright protection applies to “*original* works of *authorship* fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.”²¹

A. Originality

To be “original” under copyright means that “the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity.”²² Unlike for patented works, the originality requirement of copyright does not require the work to be novel or entirely unlike previous creations. A work may closely resemble a prior work as long as the similarity is fortuitous. The Supreme Court said in *Feist Publications, Inc. v. Rural Telephone Service Co.*, “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”²³ Even so, the work cannot be one “in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent” or “so mechanical or routine as to require no creativity whatsoever.”²⁴ The

21. § 102 (emphasis added).

22. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (plaintiff’s arrangement of factual phone directory information lacked sufficient originality to be copyrightable); *see also* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 9 (Comm. Print 1961) (the work “must be original in the sense that the author produced it by his own intellectual effort, as distinguished from merely copying a preexisting work”).

23. *Feist*, 499 U.S. at 345 (“The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be.” (internal quotations omitted)).

24. *Feist*, 499 U.S. at 359, 362.

author must contribute a “distinguishable variation,”²⁵ not a “merely trivial variation” anyone could make with little or no creative effort.²⁶

Facts, shapes, and other such generic, commonplace items are not copyrightable, because they do not find their origin in the author.²⁷ Copyright protection also does not extend to any system, method, process, or discovery.²⁸ Congress intended to avoid creating a monopoly over such ideas, so the public may be free to use them. However, as the Circuit Court noted in *Kelley*, you can find originality in the particular arrangement of otherwise common, preexisting, or uncopyrightable elements.²⁹ The Copyright Act protects compilations where “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an

25. *See* *Wihtol v. Wells*, 231 F.2d 550, 551-53 (7th Cir. 1956) (when an author adds something recognizable as a “distinguishable variation” to public domain material, it is enough for it to be “his own”).

26. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951); *see also* *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (“[T]here must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium.”); *and* *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415, 418 (Dist. Ct. Mass. 1936) (a copyrightable music composition “must have sufficient originality to make it a new work rather than a copy of the old, with minor changes which any skilled musician might make”).

27. *Feist*, 499 U.S. at 346-48.

28. 17 U.S.C.A. § 102(b) (West 2014) (copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is . . . illustrated or embodied”).

29. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011); *see also*, 17 U.S.C.A. § 101 (West) (definition of “compilation”); *Feist*, 499 U.S. at 357-58.

11 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

original work of authorship.”³⁰ For example, in a photograph of Oscar Wilde in *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court saw the photographer’s aesthetic choices in the subject’s pose, the selection and arrangement of the costume, draperies and other accessories, and the disposition of the lighting, which resulted in the “desired expression.” The Court found a “useful, new, [and] harmonious” picture and an “original work of art,” which the plaintiff created “entirely from his own original mental conception.”³¹ Works containing a large amount of unprotected expression will have a “thin” copyright, which will not be as strong or as legally foolproof as an entirely original work.³² For example, a compilation of facts will be “original” and copyrightable only in the particular arrangement of those facts, not in the facts themselves. In such a case, only the artist’s original

30. 17 U.S.C.A. § 101 (definition of “compilation”); see *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947) (originality can be found “in taking commonplace materials and acts and making them into a new combination and novel arrangement which is protectable by copyright”). See, e.g., *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir.), *cert. denied*, 273 U.S. 738 (1926) (finding originality in a commercial paper discount chart); *Guthrie v. Curlett*, 36 F.2d 694 (2d Cir. 1929) (finding originality in a compilation of freight tariffs); *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941) (finding originality in a French vocabulary list).

31. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

32. See *Feist*, 499 U.S. at 348 (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. . . . [C]opyright protection may extend only to those components of a work that are original to the author.”); see also *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (artist’s work only possessed thin copyright that protected only against virtually identical copying, and elements commonplace in a glass-in-glass sculpture and typical of jellyfish physiology lacked sufficient originality to be copyrightable).

contributions will be copyrightable, and the work may only be protectable against virtually identical infringing copies.³³

In *Kelley*, the Chicago Park District alleged that Kelley described his “Wildflower Works” as a “vegetative management system” and thus the work was not an “original work of authorship.” Kelley argued, “Wildflower Works is copyrightable under the Copyright Act because the arrangement, coordination or selection displayed [was] copyrightable,” but the District Court saw this statement as a tautology.³⁴ However, because Kelley’s argument was based on the statutory definition of a copyrightable compilation, it could be that Kelley’s legal team simply chose the wrong wording for their argument or the District Court misunderstood it. As mentioned before, Kelley selected approximately 60 species of native wildflowers, based on various aesthetic, environmental, and cultural reasons. He specifically designed the placement of the wildflowers so they would blossom sequentially, changing colors throughout the growing season and increasing in brightness toward the center of each ellipse.³⁵ Thus, under Kelley’s argument, he demonstrated “more than a trivial amount of intellectual labor and artistic expression”³⁶ in his

33. See *Feist*, 499 U.S. at 349-51 (“A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves,” and “a subsequent compiler remains free to use [such] facts . . . to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”).

34. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. E.Div. Sept. 29, 2008).

35. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 293 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

36. Opening Brief of Appellant Chapman Kelley at 14-15, *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir.) (No. 08-3701 & No. 08-3712) (quoting *Runstadler Studios, Inc. v. MCM Limited Partnership*, 768 F.

13 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

particular selection, coordination, and arrangement of the flowers.³⁷

The District Court said it could not identify what Kelley considered original about his work and why Kelley had left the District Court “to assume that he is the first person to ever conceive of and express an arrangement of growing wildflowers in ellipse-shaped enclosed area in the manner in which he created his exhibit.”³⁸ The District Court went on to say that Kelley did not adequately differentiate his work from other similar elliptical wildflower beds, such as Thomas Jefferson’s gardens at Monticello. Thus, the District Court ruled that “Wildflower Works” lacked the requisite originality for copyright protection.³⁹

The Circuit Court criticized the District Court’s view of originality. By saying that Kelley believed himself to be the first to think of an elliptical garden, the District Court mistakenly believed the statutory definition of “originality” meant “novelty.” Judge Sykes stated, “[T]he law is clear that a work can be original even if it is not novel.”⁴⁰ The existence of other elliptical flowerbeds does not preclude “Wildflower Works” from being original under copyright. Judge Sykes continued, “No one argues

Supp., 1292, 1295-96); *see also id.* at 4-5 (Kelley argued that “Wildflower Works” was the culmination of his artistic vision, as he had created other three dimensional works of his elliptical wildflower paintings demonstrating his creativity; two similar works by Kelley were done in Texas.).

37. *Kelley*, 635 F.3d at 293; *see* 17 U.S.C.A. § 101 (West 2010) (definition of “compilation”).

38. *Kelley*, 2008 WL 4449886, at *6.

39. *Id.*

40. *Kelley*, 635 F.3d at 302-03 (“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.”) (citing *Feist*, 499 U.S. at 345).

that Wildflower Works was copied; it plainly possesses more than a little creative spark.”⁴¹ Thus, in the eyes of the Circuit Court, “Wildflower Works” did not fail the test of copyright originality. In response to the Park District’s allegation that “Wildflower Works” was an uncopyrightable “system,” the Circuit Court said Kelley was seeking statutory protection for a garden, not a “method” or “system.” Furthermore, the Circuit Court noted that, while common geometric shapes cannot be copyrighted, an artist’s particular expressive arrangement of otherwise uncopyrightable material (such as geometric shapes) can satisfy the Copyright Act’s originality requirement.⁴²

Although the Circuit Court believed “Wildflower Works” had the necessary “creative spark” to be original, Kelley’s copyright in the work would arguably be quite thin. The average person viewing Kelley’s work may question whether its originality was as “plain” or obvious as the Circuit Court claimed.⁴³ Another court, using a correct definition of “originality” (i.e., not based on novelty), could still find the work was not original enough to qualify for copyright protection, particularly if the question were left to a jury.

B. Authorship

The Copyright Act requires a work to be an original work of authorship in order to be copyrightable.⁴⁴ “Authorship” is an explicit requirement in the intellectual property clause of the Constitution, which limits copyright protection to “Authors” and their “Writings.”⁴⁵ To be a

41. *Id.*

42. *Id.*

43. *Id.*

44. 17 U.S.C.A. § 102(a) (West 2014).

45. U.S. CONST. art. I, §8, cl. 8 (Congress shall have power “To promote the Progress of Science and useful Arts, by securing for

15 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

“work of authorship,” the work must have “originated” in the author.⁴⁶

According to NIMMER ON COPYRIGHT, “[a]n ‘original work of authorship,’ as that phrase is used in the Copyright Act, should not be confused with the material objects in which the work must be embodied in order to satisfy the fixation requirement.”⁴⁷ For example, “a ‘literary work’ is a work of authorship, but a ‘book’ is not. A ‘book’ is merely a material object that may embody, and hence constitute, a copy of a given literary work. By like reasoning, the ‘author’ is the originator of the intangible material (*e.g.*, the novel), rather than the individual who fixes it into particular copies (*e.g.*, the stenographer).”⁴⁸ The material is merely the tool the artist uses to convey his or her work of authorship to others.

The Circuit Court in *Kelley* held that, even if “Wildflower Works” would be “original” under the Copyright Act, it did not qualify for copyright protection, because “a living garden lacks the kind of authorship and stable fixation normally required to support copyright.”⁴⁹ Judge Sykes reasoned that “authorship is an entirely human endeavor,” and a garden like “Wildflower Works” is “planted and cultivated, not authored Most of what we see and experience in a garden—the colors, shapes, textures, and scents of the plants—originates in nature, not

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011) (noting the constitutional requirements of authorship and fixation).

46. *See* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (an author in the constitutional sense is “he to whom anything owes its origin; originator; maker”).

47. 1-2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.03.

48. *Id.*

49. *Kelley*, 635 F.3d at 303.

in the mind of the gardener.”⁵⁰ He said “natural forces” determine the growth, form, and appearance of plant materials, and even though a gardener determines the initial arrangement of the flowers, plants the garden, and “obviously assists” the garden, this is not the kind of authorship copyright requires.⁵¹

The Circuit Court’s determination as to how or when a work is “authored” by a human versus being subject to the “forces of nature” seems somewhat problematic and arbitrary. Kelley’s specific selection of flowers and his plan for “Wildflower Works” suggest that, like many gardeners and landscape artists who are familiar with the life cycle of flowers and plants, Kelley knew and had a plan for how the flowers, colors, and textures in “Wildflower Works” would progress with the changing seasons.⁵² Kelley designed the placement of the wildflowers so they would blossom sequentially, changing colors throughout the growing season and increasing in brightness toward the center of each ellipse.⁵³ Arguably, this progression was part of the expression of his “work of authorship.” Additionally, all physical materials are subject to natural forces, and many artists work with materials originating in nature. Paints and oils are often made of natural or organic materials, and sculptures are often made of stone or metals. The Circuit Court mentions the plant materials’ “colors, shapes,

50. *Id.* at 304-06.

51. *Id.*

52. See Michelle Chatelain, *Copyright Protection of a Garden: Kelley v. Chicago Park District Holds that Gardens Are Not Artwork Subject to Intellectual Property Protection*, 14 TUL. J. TECH. & INTELL. PROP. 385, 392-93 (2011) (criticizing the Circuit Court in *Kelley* for its potentially arbitrary decision of where materials are too “natural” for a work to be “authored” and for not recognizing the possibility Kelley was knowledgeable enough about the way the flowers progress over time so as to make that progression part of his vision for the work).

53. *Kelley*, 635 F.3d at 293.

17 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

textures, and scents” as things that originate in nature;⁵⁴ however, with an analysis that broad, most materials would not have any color, shape, or texture without nature’s influence. It would be unrealistic to say that artists who work with natural material no longer count as artists or authors. The Circuit Court’s view of authorship could make it difficult for artists and courts to know when the material is removed enough from its “origins in nature” to be “authored” or usable in a copyrightable work.

Kelley’s personal vision for “Wildflower Works” and his specific creative choices shaped the appearance of his work. Thus, the “work of authorship” originated in him. Within the copyright statutes, there is no mention of any requirements for the “keeping up” of the work to make sure natural forces do not change it too much, and such maintenance does not take away the work’s “origins” in the author. Even so, over the course of twenty years, Kelley arranged for continuous control, care, and maintenance of “Wildflower Works.”⁵⁵ Kelley and his volunteers worked vigorously to maintain his artistic vision for the work. Kelley’s “work of authorship” not only “originated” in him, but it was also continually under his supervision while it was under his name. If “originality” partly requires a work to be independently created by an “author,”⁵⁶ then it is a contradiction for the Circuit Court to say Kelley’s work is “original” under the Copyright Act yet does not qualify for “authorship.”

The Circuit Court connected the definition of authorship closer to the definition of fixation than to the

54. *Id.* at 304-05.

55. *Id.* at 293-94.

56. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-48 (1991).

definition of originality.⁵⁷ However, the “work of authorship” under the Copyright Act is the artist’s particular vision of his idea, not the materials he uses to embody a vision. As Nimmer said, “An ‘original work of authorship’ . . . should not be confused with the material objects in which the work must be embodied in order to satisfy the fixation requirement.”⁵⁸ Kelley’s “work of authorship” was his intangible vision for “Wildflower Works,” and the flowers were merely the material objects in which the work was embodied and conveyed to the world. Kelley attempted to argue that his concept or “work of authorship” lay in his vision of the colors and textures of the flowers he had chosen and in the progression of those colors and textures over the changing seasons,⁵⁹ not in the physical flowers themselves. Additionally, others assisted Kelley in his physical maintenance of his vision of “Wildflower Works,”⁶⁰ but his helpers would not likely count as “co-authors” because they merely executed Kelley’s personal vision of the work.

C. Fixation

Another basic requirement for copyright protection is that the work must be “fixed.”⁶¹ A work is “fixed” when its embodiment “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory

57. *Kelley*, 635 F.3d at 303-05.

58. 1-2 NIMMER, *supra* note 47.

59. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011).

60. *Kelley*, 635 F.3d at 293-94.

61. 17 U.S.C.A. § 102 (West 2014) (copyright applies to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated”).

19 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

duration.”⁶² The “fixation” (sometimes called “the copy”) is the tangible medium of expression—the “fixed” embodiment of the work of authorship.⁶³ For example, as mentioned in William Patry’s copyright treatise, Mozart could supposedly compose an entire musical work in his head without writing it down, but the music was not copyrightable while it was in his head. The music became copyrightable only when it was in a tangible form. A musical work of authorship, such as one by Mozart, can have several copyrightable tangible fixations. It can be embodied in sheet music, on a compact disc recording, or as part of an audio-visual motion picture.⁶⁴

A work may be fixed in “any tangible medium of expression, now known or later developed, from which [the work] can be perceived . . . or otherwise communicated, either directly or with the aid of a machine or device.”⁶⁵ House of Representatives Report 94-1476 states, “[I]t makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other

62. 17 U.S.C.A. § 101 (definition of “fixed”).

63. 1-2 NIMMER, *supra* note 47.

64. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2014); *see also* Laura A. Heymann, *How to Write A Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 849 (2009) (observing that works that are not fixed, such as an unrecorded speech or improvised musical or dance performance, might still qualify for state common law protection); H.R. REP. NO. 94-1476, at 131 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5959, 5665 (“[U]nfixed works are not included in the specified ‘subject matter of copyright.’ They . . . would continue to be subject to protection under State statutes or common law until fixed in tangible form.”).

65. § 102(a).

stable form.”⁶⁶ Congress wanted to avoid “artificial and largely unjustifiable distinctions . . . under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.”⁶⁷

The Copyright Act also says a work is “created” when it is “fixed in a copy . . . for the first time.”⁶⁸ “Where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.”⁶⁹ The Register of Copyright’s 1965 Report said, “[A]s long as there has actually been a fixation in some sort

66. H.R. REP. NO. 94-1476, *supra* note 64, at 52 (1976).

67. *Id.* (Congress intended to legislatively overrule *White-Smith Pub. Co. v. Apollo Co.*, 209 U.S.1 (1908), where the court held that perforated rolls that allow mechanical player pianos to play music did not infringe on the copyrighted musical compositions, because the rolls were not published “copies” within the meaning of the Copyright Act); *see also* *Midway Mfg. v. Dirkschneider*, 543 F. Supp. 466, 480 (D. Neb. 1981) (“The Act contains no restrictions on the type of material objects suitable for fixation.”) (court held that the plaintiff’s audiovisual works in a video game are fixed in the printed circuit boards from which the audiovisual works may be perceived with the aid of a machine for more than a transitory period of time).

68. 17 U.S.C.A. § 101 (West 2010) (definition of “created”); *see also* Heymann, *supra* note 64, at 843 (“No matter to what extent a work may have been conceived, communicated, or performed before fixation, it does not acquire any legal status until it is concretized in some form, if only temporarily”).

69. 17 U.S.C.A. § 101 (West 2010) (definition of “created”); *see also* 2 PATRY, *supra* note 64 (the definition of “created” is provided “to ensure that a work fixed over time is protected at each step of the process, rather than having to wait until it is entirely finished”); *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 50-52 (1st Cir. 2010) (VARA applies to works of visual art “created” within the meaning of copyright even if the work is not completed) (“Reading VARA in accordance with . . . section 101, it too must be read to protect unfinished but ‘fixed’ works of art that, if completed, would qualify for protection under the statute.”).

21 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

of material object, it would not matter if the fixation were impermanent.”⁷⁰ As Nimmer said, “Once a work is fixed for a period of more than transitory duration, it does not lose copyright protection because thereafter all authorized copies are destroyed.”⁷¹

On the other hand, the House Report said the definition of “fixed” should exclude “purely evanescent or transient” embodiments, “such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the ‘memory’ of a computer.”⁷² For example, Nimmer notes that a live television broadcast’s projected sounds and images are ephemeral, and hence not “fixed,” but a live broadcast of sounds and images recorded in a fixed form simultaneously with its transmission is copyright protected.⁷³

Most of the cases dealing with the definition or concept of “fixation” have dealt with the meaning of the term “transitory duration.”⁷⁴ For example, *Cartoon*

70. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT §9:63 (citing STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 9, Supplemental Rep. at 17 (Comm. Print 1961) (the Register offers the example of a magnetic tape that would come within the definition of “fixed” even if it were later erased)).

71. 1-2 NIMMER, *supra* note 47 (citing *Pac. & S.Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984)); *see also* *Peter Pan Fabrics v. Rosstex Fabrics, Inc.*, 733 F. Supp. 174 (S.D.N.Y. 1990) (copyright owner of a design that was used on a fabric still had the right to assert copyright violation even though the original painting that the copyrighted design was based on had been destroyed).

72. H.R. REP. NO. 94-1476, *supra* note 64, at 53.

73. 1-2 NIMMER, *supra* note 47.

74. § 101 (defining “fixed” as “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

Network v. Cablevision dealt with DVR technology and held that fragments of a work copied into a buffer for no more than a “fleeting” 1.2 seconds before being automatically overwritten are not “fixed” for more than a transitory duration and thus are not infringing copies. The court in *Cartoon Network* said fixation has two primary requirements: 1) the work must be embodied in a medium (the “embodiment requirement”), and 2) it must remain embodied “for a period of more than transitory duration” (the “duration requirement”).⁷⁵ In *MAI Systems v. Peak Computer, Inc.*, a Peak Computer repairman had to load and run MAI System’s copyrighted computer operating system software in order to repair a customer’s computer.⁷⁶ The allegedly illegal copy of the software remained embodied in the computer’s RAM (random access memory) until it was erased by further RAM usage or until the user turned the computer off. When Peak loaded the software into the RAM, they were able to view the system error log and diagnose the computer problem, and the software was “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁷ Thus, the

75. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127, 129 (2d Cir. 2008).

76. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 513 (9th Cir. 1993).

77. *Id.* at 518-19 (citing 17 U.S.C.A. § 101 (definition of “fixed”)); see also *Cartoon Network*, 536 F.3d at 128 (court read *MAI Systems* to mean that loading a program into a computer’s RAM satisfies the embodiment requirement, and it also can but does not always result in copying that program); *Advanced Computer Services of Mich. v. MAI Sys. Corp.*, 845 F. Supp. 356, 362-63 (E.D. Va. 1994) (a computer software program’s RAM “representation” is sufficiently “fixed” to be copyright protected when the program is loaded and kept in the RAM for minutes or longer, even though it disappears when the computer is turned off; the court noted that useful representations of the program information can be displayed or printed out almost as soon as it is finished loading).

23 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

court held that the RAM copy, though temporary, was sufficiently “fixed” under the Copyright Act.⁷⁸ However, the court in *MAI Systems* did not provide a bright line rule of “where along the time continuum the line should be drawn between RAM representations of a program that are of a sufficient duration to be ‘fixed’ and those that are not.”⁷⁹

In *Kelley*, Judge Sykes found that, because Kelley’s garden was neither “fixed” nor “authored” under the definitions of the Copyright Act, it could not qualify for copyright protection.⁸⁰ He conceded the planting material was tangible and could be perceived for more than a transitory duration. However, he said planting material is not “stable or permanent enough to be called ‘fixed,’” because seeds and plants are in an inherent state of “perpetual change” over the course of their life cycle. The Circuit Court stated, “[T]he real barrier to copyright here is not *temporal* but *essential*. The essence of a garden is its vitality, not its fixedness.”⁸¹ The Court compared this to when a landscape designer puts his plan for a garden in the

78. *MAI Sys.*, 991 F.2d at 518-19.

79. *Advanced Computer Services of Mich.*, 845 F. Supp. at 363 (“It is unnecessary here to decide precisely where along the time continuum the line should be drawn between RAM representations of a program that are of a sufficient duration to be ‘fixed’ and those that are not.”); see also *Stern Elec., Inc. v. Kaufmann*, 669 F.2d 852, 855-57 (2d Cir. 1982) (infringing company argued that video game sights and sounds did not satisfy the statutory fixation requirement, because their sequence on the screen varied depending on each player’s actions; court held that the game’s audio-visual display was copyrightable because the way the program was imprinted on the computer’s memory devices satisfied the statutory requirement of a fixed copy, but the court did not specifically address the duration issue).

80. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303-05 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

81. *Id.* (a garden “may endure from season to season, but its nature is one of dynamic change”).

written forms of text, diagrams, or drawings on paper or on a digital-storage device. The written plans constitute tangible “fixations” that are sufficiently “permanent and stable cop[ies] of the designer’s intellectual expression.”⁸² In the Court’s view, such plans are vulnerable to infringing copying in a way that gives the designer a right to claim copyright, but a garden was not a fixed copy of the gardener’s intellectual property.⁸³

Although the Circuit Court seemed to distinguish the concepts of being of more than “transitory duration” and being “permanent and stable,”⁸⁴ there was no meaningful discussion as to how or why the two concepts should be viewed differently under the statute. Additionally, the Copyright Act stipulates that a “fixed” work “is *sufficiently* permanent or stable *to permit it to be* perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁸⁵ The order of thought as literally expressed in the statute seems to suggest that a work cannot be perceived “for more than a transitory duration” *unless* it is sufficiently “permanent or stable.” Another way of saying this is that the work must be “permanent or stable” *enough to be perceived* for “more than a transitory duration.” This literal reading may be more consistent with cases such as *Cartoon Network* that focused on the “transitory duration” concept to decide whether a work was fixed.⁸⁶ The Court in *Kelley* seems to

82. *Id.*

83. *Id.*

84. *Id.* at 303-5 (“Wildflower Works” was tangible enough to be perceived for a “more than transitory duration” but not sufficiently permanent or stable enough to be fixed under the statute).

85. 17 U.S.C.A. § 101 (West 2010) (definition of “fixed”) (emphasis added).

86. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) (fixation has two primary requirements: 1) the work must be embodied in a medium (the “embodiment requirement”),

25 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

potentially contradict this more literal reading of the statute by treating the two ideas the other way around, if not completely separately.

The Circuit Court, in challenging the “fixed” status of “Wildflower Works,” asked, “[A]t what point has fixation occurred? When the garden is newly planted? When its first blossoms appear? When it is in full bloom?”⁸⁷ The case essentially asks, “Does the Copyright Act allow for change over time?” Would the fact that the flowers and plant materials change with the seasons affect its fixation or copyrightability? The Court said this inherent changeability prevents the work from being “fixed” and thus copyrightable.⁸⁸ However, as said before, a work is “created” under the Copyright Act when it is fixed in a copy “for the first time.”⁸⁹ This definition makes no mention of what is required to happen or not happen after it has been “fixed” or created “for the first time.” This definition does say that “where a work is prepared *over a period of time*, the portion of it that has been fixed *at any particular time* constitutes the work *as of that time*, and where the work has been prepared in different versions, each version constitutes a separate work.”⁹⁰ Similarly, Patry says the definition of “created” is provided “to ensure that a work fixed over time is protected at each step of the process, rather than having to wait until it is entirely

and 2) it must remain embodied “for a period of more than transitory duration” (the “duration requirement”).

87. *Kelley*, 635 F.3d at 305.

88. *Id.* at 304-05.

89. 17 U.S.C.A. § 101 (West 2010) (definition of “created”); see Heymann, *supra* note 64, at 843 (“No matter to what extent a work may have been conceived, communicated, or performed before fixation, it does not acquire any legal status until it is concretized in some form, if only temporarily.”).

90. § 101 (definition of “created”) (emphasis added).

finished.”⁹¹ The Register of Copyright said, “[A]s long as there has actually been a fixation in some sort of material object, it would not matter if the fixation were impermanent.”⁹² These views and interpretations of the copyright definition of “created” suggest the Copyright Act may have room for some change over time while still allowing the work to be copyrighted at some point, if not overall. Kelley maintained, worked on, and tended to his vision of his work constantly over the course of 20 years,⁹³ so it is arguable that his work was “prepared over a period of time” and was thus at least fixed in some form at several “particular times” at several stages of the work’s “progress.” It is also possible to argue he “created” several “versions” of his work over the course of those years. Additionally, as discussed before, the “work of authorship” here is not necessarily the flowers themselves, but rather is Kelley’s vision and expression of how the forms and colors progress over time. Thus, the changes were part of his “work of authorship,” and the flowers’ changing over the seasons was the physical manifestation of his “work of authorship.”

By holding that a living garden is not copyrightable, the Circuit Court in *Kelley* implied that some other creative works that are inherently changeable by “forces of nature” or by actions (supposedly) beyond the control of the artist may not be sufficiently “fixed” to be copyrightable. Judge

91. 2 PATRY, *supra* note 64.

92. 3 PATRY, *supra* note 70 (citing STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 9, Supplemental Rep. at 17 (Comm. Print 1961) (the Register offers the example of a magnetic tape that would come within the definition of “fixed” even if it were later erased); *see also* 1-2 NIMMER, *supra* note 47 (citing *Pac. & S.Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984)) (a work “does not lose copyright protection because thereafter all authorized copies are destroyed”).

93. *Kelley*, 635 F.3d at 293-94.

27 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

Sykes said he was not suggesting that artists who incorporate natural or living elements in their work can *never* claim copyright or that copyright attaches only to fully permanent works.⁹⁴ However, again the Court did not discuss where to draw the line. What about outdoor art made of metal or other degradable material that is affected by rust or age? Paints and oils start to fade as soon as you apply them to a canvas, even if you cannot see it with the naked eye. As one commentator observed, “[A]ny medium in which a work is fixed is subject to degradation: paper fades, canvas tears, film melts, and computer memory boggles, with no accompanying degradation of the rights in the work formerly contained in those physical forms.”⁹⁵ The House Report said, “It makes no difference what the form, manner, or medium of fixation may be,” and Congress wanted to avoid situations where copyright depended on the form and medium in which a work is fixed.⁹⁶ Congress’ intent to avoid such distinctions in material fixation is contrary to Judge Sykes’ adamant distinction of “garden” or plant materials versus other more “traditional” or supposedly static art materials.

By making these judgments of what materials constitute an artwork, the Court was almost asking, “What is art?” Judge Sykes also discusses the copyrightability of conceptual art; he says that “the artistic community might classify Kelley’s garden as a work of postmodern

94. *Id.* at 305.

95. Heymann, *supra* note 64, at 853-54 (observing that a work acquires legal status when it is concretized in some form, if only temporarily, and “the post-creation destruction of the original fixation does not affect the status of the copyright in the work at all”).

96. H.R. REP. NO. 94-1476, *supra* note 64, at 52; *see also* Midway Mfg. v. Dirkschneider, 543 F. Supp. 466, 480 (D. Neb. 1981) (citing 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.03(B)(1), 2.09(D)(1) and H.R. REP. NO. 94-1476 (1976)) (“The Act contains no restrictions on the type of material objects suitable for fixation.”).

conceptual art,” but “[c]ertain works of conceptual art stand outside copyright protection,” because a work cannot be a “writing” within the constitutional meaning unless it is fixed.⁹⁷ While it is true that some works of art may be too conceptual to copyright, here again Judge Sykes’ expression and use of these principles is potentially in danger of equating the intellectual “work of authorship” with the tangible object. Even if the idea behind an artist’s “work of authorship” is conceptual, its use of nontraditional materials does not necessarily take away from its “originality” or “fixation.” Regardless of the particular materials used, if the work is not sufficiently “original” (i.e., originating in the author and possessing a minimal degree of creativity) as described in *Feist*, it will not be copyrighted.⁹⁸ Nor will it be copyrighted if it is too conceptual to be perceived for “more than a transitory duration” in any material medium.⁹⁹

The Circuit Court also asked, “How . . . is a court to determine whether infringing copying has occurred?”¹⁰⁰ One of the reasons for the “fixation” requirement is to provide a tangible form from which to assess the work’s originality and which will serve as evidentiary legal proof

97. *Kelley*, 635 F.3d at 303-04 (citing 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.03); *see also* 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:7 (2013) (“A judgment that a given work regarded as creative by the art world is not original in the legal sense is not a judgment that the work is not creative in the colloquial sense.”).

98. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (to be “original” under copyright means that “the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity”).

99. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) (fixation has two primary requirements: 1) the work must be embodied in a medium (the “embodiment requirement”), and 2) it must remain embodied “for a period of more than transitory duration” (the “duration requirement”).

100. *Kelley*, 635 F.3d at 305.

29 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

for the Copyright Register or in an infringement suit.¹⁰¹ In this case, “Wildflower Works” was apparently “fixed” enough for the Court to decide it was original.¹⁰² As far as potential infringement evidence, the Court ignores the possibility that another “artist” who is knowledgeable of how flowers, plants, and gardens work (or who knew about Kelley’s plans for “Wildflower Works”) could study “Wildflower Works” as it was in Grant Park and copy it fairly closely elsewhere. The fact that the flowers change with the seasons would make very little difference to an experienced landscaper. Also, the garden itself is not the only possible “embodiment” of Kelley’s work. Kelley may take photographs or video or create paintings of “Wildflower Works,” and another party may infringe on those “embodiments” of his work. Thus, “Wildflower Works” could still fulfill the purported legal purposes of the “fixation” requirement.

Fixation is an increasingly important and relevant issue in today’s world because of the Internet, digital media, and computers. In the art world, because contemporary art is often very experimental, nontraditional, and conceptually or digitally based, the question of what is or is not “fixed” can become key to getting those kinds of works protected under copyright or VARA. However, Judge Sykes in the Seventh Circuit Court of Appeals in *Kelley* does not clarify the issue in a very satisfactory way. His explanation of “fixation,” as related to copyright’s “authorship” and “originality” requirements, creates some unsettling potential problems for both past and future artists and their artworks, particularly because he gave no

101. Heymann, *supra* note 64, at 852-57 (discussing the justifications for the fixation requirement).

102. *Kelley*, 635 F.3d at 302-03.

standards of how or when a “work of authorship” or its materials may be sufficiently “fixed.”

III. MORAL RIGHTS AND THE VISUAL RIGHTS ACT (VARA)

The Circuit Court in *Kelley* said that because “Wildflower Works” did not qualify for basic copyright (i.e., it was not sufficiently “fixed” or “authored”), it did not qualify for further protection under the Visual Artists Rights Act (VARA).¹⁰³ This decision was based on the Copyright Act’s definition of visual art, which says, “A work of visual art does not include . . . any work not subject to copyright protection.”¹⁰⁴ Thus, the Circuit Court did not rule on any VARA issues. Nevertheless, Judge Sykes felt the need to express some of his points of disagreement with the District Court on the implications of VARA rights and exemptions.¹⁰⁵ Since *Kelley*, scholars and artists have commented on how the Circuit Court’s opinion raised serious questions about VARA’s meaning and application for future moral rights claims.

A. History of Moral Rights and VARA

Moral rights find their origin in French law around the time of the French Revolution. French law divides authorship rights into two subsets. *Droits patrimoniaux* (patrimonial rights) (singular: *droit patrimonial*) protect an artist’s economic or pecuniary rights, and *droits moraux* (moral rights) (singular: *droit moral*) protect an artist’s personal or “personality” rights in his or her work apart

103. *Id.* at 306.

104. 17 U.S.C.A. § 101 (West 2010) (definition of “visual art”); see also H.R. REP. NO. 101-514, at 14 (1990) (VARA grants protection only to works subject to copyright protection to “avoid[] any tension between the public’s ability to exploit the work” under VARA).

105. *Kelley*, 635 F.3d at 295-302, 306-07.

31 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

from the economic interests.¹⁰⁶ The idea behind *droits moraux*, or moral rights, is that an artist puts a part of himself, his reputation, and his personality into his creation, and that aspect of a work deserves the public's respect.¹⁰⁷ In contrast with U.S. copyright law, which tends to think of moral rights coming after commercial or economic rights, French *droits moraux* see the economic rights stemming from an artist's moral rights in their work. *Droits moraux* have four components: rights of integrity of the work, rights of attribution, rights of divulgation (i.e., deciding when a work is complete), and the right to withdraw or take back a work from its owner. *Droits moraux* protect the artist's interest in "works of the mind," including paintings, sculptures, films, choreography, and literary works. *Droits moraux* are perpetual and descend to the author's heirs after his or her death.¹⁰⁸

In 1886, the Berne Convention for the Protection of Literary and Artistic Works created an international multilateral treaty to set minimum standards for the protection of artistic works of the member states. The Berne Treaty protects "every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression" for the life of the author and 50 years

106. Francesca Garson, *Before That Artist Came Along, It Was Just A Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203, 207 (2001) (overview of moral rights history).

107. See Anna Belle Wilder Norton, *Site-Specific Art Gets A Bum Wrap: Illustrating the Limitations of the Visual Artists Rights Act of 1990 Through A Study of Christo and Jeanne-Claude's Unique Art*, 39 CUMB. L. REV. 749, 762-63 (2009).

108. See generally Amy L. Landers, *The Current State of Moral Rights Protection for Visual Artists in the United States*, 15 HASTINGS COMM. & ENT. L.J. 165 (1992) (overview of moral rights).

after his or her death.¹⁰⁹ Moral rights were incorporated into the Berne Convention in 1928 under Article 6*bis* of the Treaty. Berne Convention moral rights protect the right of attribution,¹¹⁰ the right of integrity (i.e., to avoid distortion, mutilation, or alteration of the work),¹¹¹ and the right to object to any action that would be “prejudicial to the author’s honor or reputation.”¹¹²

In the United States, efforts to enact moral rights legislation date back to 1979, but lawmakers were fairly resistant to moral rights legislation. The U.S. tends to focus on copyright’s economic or utilitarian purposes, and it attempts to balance the author’s interest in profiting from his or her creations and the public benefit in access to those works. U.S. copyright strives to encourage artists to create through economic advantages while enriching society at the least cost to consumers. European copyright, on the other hand, tends to focus on philosophical ideas about the intrinsic nature and cultural value of art. American legislators were resistant to the idea of moral rights because they believed the heavy focus on the artist’s individual interests did not facilitate commerce or public benefits.

109. *Id.* at 171 (citing Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, as revised at Paris on July 24, 1971, *reprinted in* Sam Ricketson, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 933 (1987)); *see also* 3-8D MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.01(explaining that the Berne Convention requires a signatory nation to recognize moral rights for the same duration past an author’s death that the nation recognizes economic rights).

110. *See* 3-8D NIMMER, *supra* note 109 (attribution under the Bern Convention includes the right “to assert that the author is the work’s creator; to publish anonymously or pseudonymously, with the option of later changing his mind and abandoning anonymity; and to prevent use of his name with reference to a work that he did not create”).

111. *Id.* (the right to “object to any distortion, mutilation or other modification” does not extend to the right to object to outright destruction of the subject work recognized in some jurisdictions).

112. *Id.*

33 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

Moral rights also seemed to conflict with the American ideas of free alienability and absolute ownership of property, because they allowed the artist to retain some control over the owner's property.¹¹³ Opponents feared moral rights would have a negative commercial effect on the art market. As one commentator put it, they believed "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."¹¹⁴ Some argued that the moral rights ideas of attribution and integrity were already previously built into the existing law of copyright, trademark, common law contract, defamation, libel, right of publicity, and right of privacy.¹¹⁵

Meanwhile, moral rights supporters argued that moral rights can balance the interests of both the public and the artists. Moral rights laws foster the "preservation of valuable human expression" and thus benefit the larger populations they govern. More specifically, the moral right of attribution would preserve the public record of authorship, and the moral right of integrity would protect the artists' dignity and reputation by prohibiting intentional or grossly neglectful harm to their work. Some in the U.S. Congress felt that joining the Berne Convention would enhance and create consensus in intellectual property protection between the U.S. and its global trading and cultural partners, and they hoped it would ensure U.S.

113. See Virginia M. Cascio, *Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works under VARA*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 167, 170-72, 188 (2009).

114. Kristin Robbins, *Artists Beware: The Effect of the First Circuit's Refusal to Apply VARA to Site-Specific Art*, 9 TUL. J. TECH. & INTELL. PROP. 395, 398 (2007).

115. See Cascio, *supra* note 113, at 171-72.

leadership in international trade and help avoid copyright piracy.¹¹⁶

The U.S. joined the Bern Convention in 1988, and, as part of the U.S. efforts to comply with the Berne Convention requirements, Congress formally adopted moral rights through the Visual Artists Rights Act (“VARA”) of 1990.¹¹⁷ To mitigate resistance to the Berne Convention’s moral rights requirements, Congress adopted a “minimalist” approach to Berne compliance. Congress said the Berne Convention was not “self-executing” and the U.S.’ obligations under the Berne Convention “may be performed only pursuant to appropriate domestic law.”¹¹⁸

Like Berne Convention moral rights, VARA rights are personal to the artist, and the artist retains his or her VARA rights regardless of whether or not he is the copyright holder.¹¹⁹ Unlike Berne Convention moral rights, VARA rights for works created after VARA’s effective date last only for the lifetime of the artist. For works created before VARA’s effective date (where title has not been transferred from the author), VARA rights expire at the same time as other rights under the Copyright Act, Section 106. VARA rights are not transferable, but the artist may consent to waive his VARA rights through a signed contract.¹²⁰ Also unlike the Bern Convention, VARA limits protection to 200 copies or fewer and

116. Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 216-18 (2010).

117. At the time the U.S. joined the Berne Convention, the Treaty had 76 signatories. Berne Convention for the Protection of Literary and Artistic Works, *2, Sept. 9, 1886, as revised at Paris on July 24, 1971, S. Treaty Doc. No. 99-27 (1986).

118. Garson, *supra* note 106, at 222 (citing Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988)).

119. *Id.* at 225.

120. 17 U.S.C.A. § 106A (West 1990).

35 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

requires copies of the work to be numbered and marked by the artist.¹²¹ VARA rights do not extend to works for hire,¹²² and there is no explicit right to complete a work.¹²³ As with other Copyright Act violations, VARA remedies for an artist include injunctive relief, actual and statutory damages, and attorney's fees.¹²⁴

B. Works Under VARA

Unlike the Berne Convention, which grants protection to all art forms, VARA protection only grants moral rights protection to "works of visual art." "Visual art" is narrowly defined to include only "a painting, drawing, print, sculpture," or exhibitional photograph.¹²⁵ The House Report noted that "critical factual and legal differences in the way visual arts . . . are created and disseminated have important practical consequences."¹²⁶ Such visual art is considered special "because of its unique

121. 17. U.S.C.A. § 101 (West 2010) (definition of "visual art").

122. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 77 (2d Cir. 1995) (sculpture was held to be a work for hire and thus not protectable under VARA).

123. *Broughel v. Battery Conservancy*, 2009 WL 928280, at *10-11 (S.D.N.Y. Mar. 30, 2009) (it is not a violation of VARA if an artist is prevented from finishing a project).

124. Michelle Bougdanos, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 557 (2002) (citing 17 U.S.C.A. §§ 502, 505, 506 (2002)) (also noting there are no criminal penalties).

125. § 101 (definition of "visual art").

126. H.R. REP. NO. 101-514, at 9, 11 (1990) (audiovisual works are generally made-for-hire, but visual art works generally are not; also, audiovisual works come in multiple copies, so when one copy is deformed or mutilated, other copies of the original still exist; by contrast, visual art is often made in single copies or a limited series, and modifications are not easily remedied).

and irreplaceable qualities.”¹²⁷ The terms “painting,” “drawing,” “print,” and “sculpture” are not specifically defined for VARA purposes. However, the Copyright Act stipulates that “visual art” does not include any advertising material, reproductions or depictions of works, or “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.”¹²⁸

The definition of visual art under VARA is narrower than the broader copyright categories of “pictorial, graphic, or sculptural” works under Section 101 of the Copyright Act, and it is “not synonymous with any other definition in the Copyright Act.”¹²⁹ The Legislature intended to narrowly delineate the works of art VARA would protect. Congress also said 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 [of visual art].”¹³⁰ The House Report acknowledges, “Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition [of a work of

127. Bougdanos, *supra* note 124, at 553 (citing Stephen W. Snively, *Artists’ Rights Meet Property Rights: An Invisible Restraint*, 9-DEC PROB. & PROP. 18, 20 (1995)).

128. § 101 (definition of “visual art”).

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

130. H.R. REP. NO. 101-514, at 11 (1990) (“[W]e have gone to extreme lengths to very narrowly define the works of art that will be covered. . . . This legislation covers only a very select group of artists.”).

37 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

visual art] should not depend on the medium or materials used.”¹³¹

Even with VARA’s narrow definition of “visual art” and the call to use “common sense,” courts have struggled with the definition’s practical applicability to specific artworks, especially as more contemporary artists are experimenting with new and nontraditional (sometimes consciously unusual or provocative) art forms and materials.¹³² As one scholar commented, “Courts are in fact confronting the query raised in this work as to ‘what is art?’ and attempting to rationalize a result under a statutory construction.”¹³³ Author Christine Haight Farley observed that art is subjective while law is objective, and “law is about precedent whereas art is about the evolution of ideas.”¹³⁴ Justice Holmes cautioned in an early copyright

131. *Id.* at 11, 13-14 (“[A] new and independent work created from snippets of [otherwise proscribed] materials like newspapers, audiovisual works, applied art and maps under 17 U.S.C.A. § 101A such as a collage is . . . not excluded.”).

132. *See* Peter Schjeldahl, *Gated*, THE NEW YORKER, Feb. 28, 2005, at 30 (“This loss of a commonsense definition is a big art-critical problem.”).

133. 1 ART, ARTIFACT, ARCHITECTURE AND MUSEUM LAW § 9:9 (2012); *see also* Norton, *supra* note 107, at 783 (“[R]esolving ‘What is art?’ in terms of VARA necessitates a determination of ‘What is art?’ in a larger sense, because VARA is the only means that artists have in the United States to achieve the moral rights of integrity and attribution related to their work. The continued existence of these rights is dependent on the answer to this universal question.”).

134. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005); *see id.* at 811-13 (also observing that judges strive to be neutral and objective in their rulings, but judging art implicates one’s particular subjective tastes); *see also* Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *4 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011). (“There is a tension between the law and the evolution of ideas in modern or avant garde art; the former requires legislatures to taxonomize artistic creations,

case, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹³⁵ In other words, judges should not presume to be experts knowledgeable in what counts as art in the artistic community. Even so, courts have often interpreted VARA’s definition of visual art to be narrowly limited to classical “traditional” art forms, which sometimes only confuses things more in a world where much of contemporary art is anything but traditional.

Courts have examined VARA applicability for puppets, costumes, and theatre sets;¹³⁶ industrial materials and fabrications;¹³⁷ stainless steel sculptures;¹³⁸ murals;¹³⁹

whereas the latter is occupied with expanding the definition of what we accept to be art.”).

135. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); *see also* *Situation Mgmt. Sys., Inc. v. ASP. Consulting LLC*, 560 F.3d 53 (1st Cir. 2009) (“[A] work’s entitlement to copyright protection does not depend in any way upon the court’s subjective assessment of its creative worth.”).

136. *Gegenhuber v. Hystopolis Prods., Inc.*, 1992 WL 168836, at *4 (N.D. Ill 1992) (excluded from visual art).

137. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 50 (1st Cir. 2010) (unfinished art made of architectural elements was held to be protectable under VARA).

138. *Martin v. City of Indianapolis*, 982 F. Supp. 625 (S.D. Ind. 1997), *aff’d*, 192 F.3d 608, 609 (7th Cir. 1999) (defendants destroyed a sculpture that was of “recognized stature” and worthy of VARA protection).

139. *Hunter v. Squirrel Hill Assocs., L.P.*, 413 F. Supp. 2d 517, 519 (E.D. Pa. 2005) (based on VARA’s legislative history, court said Congress viewed murals as a subset of paintings); *contra* *Pollara v. Seymour*, 344 F.3d 265, 266, 271 (2d Cir. 2003) (mural at issue was excluded because it constituted “advertising or promotional material,” because it was used solely to publicize a public interest group; even so, the court noted it should normally “steer clear of an interpretation of VARA that would require courts to assess either the worth of a

39 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

and sculpture installations in a building lobby.¹⁴⁰ In *Flack v. Friends of Queen Catherine, Inc.*, a clay statue sculpted as a model for a bronze statue was held to be a work of visual art under VARA because, in the art world, models are often viewed as works of art in their own right.¹⁴¹ In *Lilley v. Stout*, a district court examined a set of photographic prints and negatives, which the plaintiff intended to eventually incorporate into a larger work. The court held that the plaintiff's prints and negatives were ineligible for VARA protection because the court did not believe they were "for exhibition purposes only" as the statute requires. Rather, the court said they were merely "studies" that might be used for a number of unrelated purposes.¹⁴²

In *Kelley*, the District Court noted that the terms "painting, drawing, print, or sculpture" are not defined in the Copyright Act, and, when statutory terms are not defined or given clear legislative intent, they are usually given their plain and ordinary meaning. However, the District Court also said it was loath to take such words too

purported work of visual art, or the worth of the purpose for which the work was created").

140. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 77 (2d Cir. 1995) (sculpture installations were not visual art under VARA because they were works for hire).

141. *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp.2d 526, 533-34 (S.D.N.Y. 2001) (plaintiff's clay statue was not the kind of "model" that VARA excludes from the definition of "visual art"; common sense and standards of the artistic community applied to statutory construction indicated that "if [the term] 'model' were construed to [exclude] the preliminary work of sculptors, then sculptors would enjoy less protection than photographers and painters, and this would be an absurd result"; VARA "does not exclude an otherwise qualifying work simply because it is a part of a larger project").

142. *Lilley v. Stout*, 384 F. Supp.2d 83, 87-89 (2005) (photography generally qualifies for VARA but specific work at issue was excluded on other grounds).

literally. “There is a tension between the law and the evolution of ideas in modern or avant garde art,” and VARA should not be read “so narrowly as to protect only the most revered work of the Old Masters.”¹⁴³ Thus, “the ‘plain and ordinary’ meanings of words describing modern art are still slippery.”¹⁴⁴

Consistent with Congress’ encouragement to “use common sense and generally accepted standards of the artistic community,”¹⁴⁵ the District Court looked at the dictionary definitions of “sculpture” and “painting” and quoted art experts about what has recently constituted a “sculpture” in the art world. Fine-art advisor and art professor Jane Jacob said, “[S]ince World War II . . . sculpture [has been] defined as any non-two[-]dimensional art form . . . including environmental art and some conceptual art.”¹⁴⁶ Ms. Jacob also said paintings are “representations where a picture is executed by applying colored matter to various surfaces as decoration, among other things.”¹⁴⁷ For “Wildflower Works,” the District Court ultimately took a very broad view of the definition of “visual art” and concluded that “the manipulation of the flowers, metal, and gravel into an elliptical shape fits within the broadest of the definitions of sculpture.”¹⁴⁸ The District Court also ruled that “[a]n exhibit that corrals the variegation of wildflowers in bloom into pleasing oval swatches” could constitute a painting.¹⁴⁹ Thus, the District Court held that “Wildflower Works” “could be considered

143. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *4 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011).

144. *Id.*”

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

146. *Kelley*, 2008 WL 4449886, at *5.

147. *Id.* at *5.

148. *Id.*

149. *Id.*

41 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

either a painting or a sculpture under VARA.”¹⁵⁰ This arguably stretched the “visual art” definition quite far, even in light of the dictionary and art expert’s definitions.

The Circuit Court criticized the District Court’s broad approach to the definition of visual art. Judge Sykes said, “VARA’s definition of ‘work of visual art’ operates to narrow and focus the statute’s coverage.”¹⁵¹ While copyright’s general protection uses the flexible, broadly applicable adjectives “pictorial” and “sculptural,” VARA uses the specific, limiting nouns of “painting” and “sculpture.” Judge Sykes stated these terms should not be taken metaphorically or by analogy. “‘Wildflower Works’ cannot just be ‘pictorial’ or ‘sculptural’ in some aspect or effect, it must actually *be* a ‘painting’ or a ‘sculpture.’”¹⁵² Kelley or the Park District cannot make something a “painting” or “sculpture” or “living art” simply by calling it so. “If a living garden like ‘Wildflower Works’ really counts as both a painting and a sculpture, then these terms do no limiting work at all.”¹⁵³ Judge Sykes acknowledged there is a danger in taking “painting” or “sculpture” too literally, but he warned that “there’s a big difference between avoiding a literalistic approach and embracing one that is infinitely malleable.”¹⁵⁴ Judge Sykes believed the District Court leaned too much toward the latter extreme, and he said “Wildflower Works” did not constitute a

150. *Id.* (emphasis in original).

151. Kelley v. Chi. Park Dist., 635 F.3d 290, 300-01 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

152. *Id.*

153. *Id.*

154. *Id.*; see also 5 PATRY, *supra* note 97 (“VARA is not concerned with protecting all forms of artistic imagination: one cannot gain VARA protection simply by claiming your work is artistic.”).

“painting” or a “sculpture” under VARA’s definition of “visual art.”¹⁵⁵

While the District Court’s view may have arguably been overbroad, some commentators have said the Circuit Court’s more literal, “traditional” interpretation is too strict and limiting and not in line with other courts’ decisions that more broadly define the scope of VARA protected works.¹⁵⁶ For example, the courts in both *Carter v. Helmsley-Spear* and *Pollara v. Seymour* noted Congress’ stipulation that “whether a particular work falls within the definition should not depend on the medium or materials used.”¹⁵⁷ In *Pollara*, the court also noted, “Protection of a work under VARA will often depend . . . upon the work’s objective and evident purpose.”¹⁵⁸ Furthermore, it is interesting to note that both the VARA and general copyright lists of subject matter include sculpture or sculptural works,¹⁵⁹ and one might ask how different “sculptures” and “sculptural works” really are.

155. *Kelley*, 635 F.3d at 300-01.

156. *See Chatelain, supra* note 52, at 393 (criticizing Judge Sykes for viewing “visual art” works too literally).

157. H.R. REP. NO. 101-514, at 11 (1990); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84-85 (2d Cir. 1995) (to say VARA excludes “applied art” that incorporates otherwise utilitarian objects would render VARA protection meaningless); *Pollara v. Seymour*, 344 F.3d 265, 266, 269-70 (2d Cir. 2003).

158. *Pollara*, 344 F.3d at 269-70 (“VARA does not protect advertising, promotional, or utilitarian works, and does not protect works for hire, regardless of their artistic merit, their medium, or their value to the artist or the market.”) (banner at issue was found to be for advertising and promotion purposes as part of a lobbying effort, and thus it did not fall under VARA); *see also Lilley v. Stout*, 384 F. Supp.2d 83, 86-88 (2005) (photograph prints and negatives were rejected from VARA protection because the court believed they were not for exhibition purposes).

159. 17 U.S.C.A. § 101 (West 2010) (definition of “visual art”); 17 U.S.C.A. § 102(a)(5) (West 2014) (general copyright subject matter).

43 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

Kelley created “Wildflower Works” for exhibition purposes, consistent with the artistic purposes VARA is intended to promote. At the same time, one might question the District Court’s argument that “Wildflower Works” would count as both a “painting” and a “sculpture.” The District Court seemed to argue that “Wildflower Works” was a painting primarily because of its use of color in “pleasing oval swatches.”¹⁶⁰ But it is not an essentially two-dimensional object, as most paintings are, and the color was not applied to a surface but rather was inherent in the materials themselves. However, if Jane Jacob’s expert definition of a sculpture as “any non-two[-]dimensional art form . . . including environmental art and some conceptual art”¹⁶¹ counts as a “standard[] of the artistic community,”¹⁶² then “Wildflower Works” could have been a sculpture that happened to use a lot of color.

C. Rights Under VARA

Under VARA, there are two primary categories of moral rights. First, “rights of attribution” include the artist’s right 1) to claim authorship of their work; 2) to prevent the use of his or her name in connection with a work he or she did not create; and 3) to prevent the use of his or her name in the event of a distortion, mutilation, or other modification of the work that is prejudicial to the author’s honor or reputation.¹⁶³

160. Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *5 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011).

161. *Id.*

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

163. 17 U.S.C. § 106A(a) (West 1990); H.R. REP. NO. 101-514, at 14 (1990) (these rights include “the right to publish anonymously or under a pseudonym).

Second, VARA gives the artist “rights of integrity,” where the artist may “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”¹⁶⁴ The House Report suggests that “the best approach to construing the term ‘honor or reputation’ in [the statute] is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected.”¹⁶⁵ The statutory use of the terms “prevent” and “would be” suggest that proof of actual harm to an artist’s honor or reputation is not required; courts may enjoin threatened distortions, mutilations or modifications if they would be prejudicial to the artist’s reputation.¹⁶⁶ Unlike the Berne Convention, VARA does not prohibit “other derogatory action in relation to” the work,¹⁶⁷ possibly because Congress did not want VARA integrity rights to cover activities that did not permanently physically alter a work. Patry suggests that “where the copy remains in its original form, but is juxtaposed with other material in a

164. § 106A(a).

165. H.R. REP. NO. 101-514, at 15-16 (1990) (the standard used is not analogous to reputation in a defamation case, where the general character of the person is at issue); see *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 323 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995) (using dictionary definitions of “prejudice,” “honor,” and “reputation” to determine whether alterations to a work “would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community,” the court found that such injury or damage would occur because the work would present to viewers “an artistic vision materially different from that intended by plaintiffs”); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 275 (2003) (harm to an artist’s reputation “is likely to affect the prices of his artworks and thus, if he is still active or has retained copyright or ownership of some of his works, his income”).

166. 5 PATRY, *supra* note 97, § 16:21.

167. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886 (revised 1971), (amended 1979), (S. Treaty Doc. No. 99-27) (1986).

45 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

manner the artist finds objectionable, there is no violation of VARA.”¹⁶⁸

VARA rights of attribution and integrity are meant to provide the artist with a reputational incentive and to promise the artist a legacy in his or her work. As one scholar observed, these rights are “concerned with the dignity and personality interests of the author, and the ability of the author to command her reputational due.”¹⁶⁹ This is based on the principle that “an artist’s professional and personal identity is embodied in each work created by that artist.”¹⁷⁰

Integrity rights in particular are said to protect the authenticity and coherence of the artist’s aesthetic vision or ‘voice’ as embodied in his work. They give the artist the ability to control the actions of subsequent owners and restrain them from making prejudicial alterations to his work. The rights of the artist are potentially favored over the competing interest of those who own the title to the objects. This recognizes the significance of the artist’s contribution to the wider community through his or her works of art. Integrity rights “are, in a sense, emblematic of a civil society that affirms the intrinsic worth of such artistic contributions to the cultural landscape.”¹⁷¹ Also, in terms of economic implications, “each of an artist’s works is an advertisement for all of the others,” similar to a franchise.¹⁷² Any prejudicial alteration or treatment of a

168. 5 PATRY, *supra* note 97, §16:20.

169. Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 996 (2002).

170. H.R. REP. NO. 101-514, at 15 (1990).

171. Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 302-04 (2003).

172. *Id.* at 304-06.

work that negatively impacts the artist's reputation will adversely affect the value of his or her other existing and future work.¹⁷³

Also, if the work is of "recognized stature," the artist has the right to prevent its destruction and any intentional or grossly negligent acts that violate that right.¹⁷⁴ The term "recognized stature" implies the work has cultural significance or has already received acclaim and respect from the art world or the public, regardless of quality or aesthetic value.¹⁷⁵ The House Report states, "In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or

173. *See id.* at 298, 302-06 ("Because of their potential to curtail a subsequent owner's freedom to do as he pleases with a work over which he has an unqualified legal title, integrity rights are potentially the most intrusive rights conferred on the artist and reflect the strongest expression of the philosophical impulses that underpin moral rights jurisprudence.").

174. 17 U.S.C. § 106A(a) (West 1990); *see* *Martin v. City of Indianapolis*, 192 F.3d 608, 609, 612 (7th Cir. 1999) (visual art needs "recognized stature" before an artist can prevent its destruction); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995) ("recognized stature" need not rise to the level of a Picasso, Chagall, or Giacometti).

175. Peter H. Karlen, *What's Wrong with VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT L.J. 905, 916-17 (1993) (observing that works usually receive "recognized stature" only after a long period of time, which has been problematic; many works are destroyed before they receive such stature, and several VARA cases have arisen after the works have been in existence for only a few years); *contra* LANDES & POSNER, *supra* note 165, at 275 ("[T]he statutory term 'work of recognized stature' has been interpreted to require only minimum public acknowledgment of a work's quality or significance.").

47 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

marketing of works of visual art.”¹⁷⁶ The district court in *Carter* said that, in order for a work to have recognized stature, 1) it must be viewed as “meritorious,” and 2) the stature must be recognized by “art experts, other members of the artistic community, or by some cross-section of society,” which likely would involve expert testimony.¹⁷⁷ For example, in *Pollara*, a public interest group asked the plaintiff artist to create a long mural on paper and installed it at the Empire State Building. State officials removed the mural before the public could view it the next day and severely damaged the work in the process. The court held that the work never achieved any “recognized stature” in the artistic community because it was only a display piece for a one-time event. Thus, it was not protectable from destruction under VARA.¹⁷⁸ Also, in *Scott v. Dixon*, Linda Scott’s Swan sculpture was held not to be a protectable work of “recognized stature” under VARA because the plaintiff lacked sufficient expert testimony to the contrary.¹⁷⁹

“Destruction” is not defined, but Nimmer suggests “destruction” means “to physically alter the work in a manner that renders it incapable of being reconstructed.”¹⁸⁰ Congress enacted this provision in reaction to the outrageous behavior of “two Australian entrepreneurs who cut Picasso’s ‘Trois Femmes’ into hundreds of pieces and sold them as ‘original Picasso pieces.’”¹⁸¹ Other examples

176. H.R. 2690, 101ST CONG. 6 (1989).

177. *Carter*, 861 F. Supp. at 325.

178. *Pollara v. Seymour*, 344 F.3d 265, 266, 265-66 (2d Cir. 2003).

179. *See Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004) (noting that expert testimony could establish the “recognized stature” of a work but finding no “recognized stature” where the work was not visible to the public and no expert testimony was given).

180. 3-8D NIMMER, *supra* note 109, § 8D.06.

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

of allegedly destroyed artworks include the subject matter of *Hunter v. Squirrel Hill Associates, L.P.*, where the plaintiff alleged that the defendant destroyed his mural on a building exterior through gross negligence in failing to make timely repairs to the building's drainage system. The defendant did not remove drain covers or properly seal certain seams when he was repairing the roof, so water overflowed from the roof and seeped into the stucco surface of the mural wall.¹⁸² In *Scott v. Dixon*, the sculpture at issue was incapable of being repaired because it had been stored out in the open and subjected to the elements.¹⁸³

In *Kelley*, if "Wildflower Works" had qualified for VARA protection (i.e., if the Circuit Court had found "Wildflower Works" was sufficiently "fixed" and "authored" and constituted a work of "visual art" under VARA), the Chicago Park District's actions would have put Kelley's VARA rights of integrity at issue. The Park District intentionally reduced the size of "Wildflower Works" by half and changed the work's shape from elliptical to rectangular.¹⁸⁴ Kelley sought damages to his "reputation and integrity" for the allegedly willful and destructive acts of the Park District when they distorted and modified his work without reasonable notice and without his consent.¹⁸⁵ Kelley would have had to prove the modifications to his work would adversely affect his "artistic or professional honor or reputation . . . as

182. *Hunter v. Squirrel Hill Assocs., L.P.*, 413 F. Supp. 2d 517, 520 (E.D. Pa. 2005) (court denied defendant's motion to dismiss and said gross negligence was a question of fact for a jury).

183. *Scott*, 309 F. Supp. 2d at 399-401 (plaintiff still lost, because her work was not one of recognized stature).

184. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 294-95 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

185. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *1 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011).

49 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

embodied in the work.”¹⁸⁶ Because Kelley was known for elliptical shapes in his paintings and “living landscapes,” the modifications to his work were arguably detrimental to his honor or reputation. People viewing the altered garden would think the modifications were part of his original vision. He could have used evidence that his planned series of landscape art would be cut short or that other cities and landowners would be less likely to let him work on their property because of the modifications.

Kelley possibly also would have argued that “Wildflower Works” had “recognized stature,” making his work eligible for protection from intentional destruction. To support an argument of “recognized stature,” he would have had to show evidence of the widespread publicity he and his work received. The work was quite popular; people, news media, and members of the artistic community from the Chicago area and across the country publicized, discussed, and visited the work. Additionally, he would have had to show his work was destroyed to the point where it could not be repaired, reconstructed, or replaced.¹⁸⁷ That argument may be a little more difficult here than it would be with a “traditional” sculpture, because flowers and plant materials can be (and often have to be) replanted. In any case, even if Kelley had the chance to attempt these arguments, he would still have to make sure his work did not fall under any of VARA’s exemptions from protection.

186. H.R. REP. NO. 101-514, at 15-16 (1990).

187. 3-8D NIMMER, *supra* note 109 § 8D.06 (“destruction” means “to physically alter the work in a manner that renders it incapable of being reconstructed”).

D. VARA Exceptions

There are a few exceptions to VARA protection, most of which deal with the VARA right of integrity. First, modifications as a natural result of either the passage of time or the “inherent nature of the materials” are not actionable under VARA. Second, modifications resulting from acts of “conservation,” such as changing the lighting and placement of the work, are not actionable as long as they are not the result of gross negligence. Finally, VARA rights do not apply where a work of visual art is incorporated into a building in such a way that removing the work will cause its destruction, distortion, mutilation, or other modification if: 1) the artist consented to install the work before VARA’s effective date or 2) the artist waived his integrity rights in a signed contract after VARA’s effective date.¹⁸⁸

1. The Passage of Time or the Inherent Nature of the Materials

Modifications to a work of visual art as a “result of the passage of time or the inherent nature of the materials” are not violations of the VARA right of integrity.¹⁸⁹ However, as one scholar observed, “[T]here is a fine line between reasonably cared-for works that deteriorate over a long period of time and improperly cared-for works that would not have deteriorated had they received proper care.”¹⁹⁰ Additionally, some materials inherently deteriorate quite fast, and exposing such materials to certain elements or conditions may or may not be intentional or grossly negligent destruction. For example, in

188. 17 U.S.C. § 106A(c) (West 1990).

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

190. Karlen, *supra* note 175, at 918-19.

51 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

Flack the court held that the deterioration of an outdoor clay sculpture was not the result of the defendant's "gross negligence" but rather the natural result of being exposed to the elements. The court also noted the sculpture was damaged but not destroyed, and it was capable of being repaired. Thus, the court in *Flack* denied the plaintiff artist's VARA claim for the clay sculpture under this exception.¹⁹¹ On the other hand, Patry says, "[I]f a protected work of visual art made of fragile materials was exposed, over a period of time, to harsh weather or to harmful interior temperatures and was destroyed as a result, a cause of action for destruction would be available."¹⁹²

If the Circuit Court in *Kelley* had found "Wildflower Works" to be eligible for VARA protection, the "passage of time" exemption would not have applied because the Chicago Park District's modifications to the work were deliberate and constituted much more than the natural result of "the passage of time" or the "inherent nature of the materials." However, the existence of this exemption in VARA might be more proof that the Copyright Act allows a work to change over time as a result of the inherent nature of the materials, such as when flowers and other "garden" materials grow and change with the seasons.

191. *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp.2d 526, 534-35 (S.D.N.Y. 2001) ; *but see* *Hunter v. Squirrel Hill Assocs., L.P.*, 413 F. Supp. 2d 517, 520 (E.D. Pa. 2005) (museum failed to make "timely necessary repairs" to the building's roof drainage system, so water leaks caused damage to a mural that the court said amounted to gross negligence in violation of the artist's VARA rights).

192. 5 PATRY, *supra* note 97 § 16:29.

2. The Public Presentation Exemption and “Site-Specific” Works

A second exception to VARA rights of integrity is what is called the “public presentation” exemption. Under this exception, “[t]he modification of a work of visual art which is the result of conservation [of the work] is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.”¹⁹³ This exemption is sometimes called the “museum exemption,” because Congress intended for the exemption to allow a museum curator to have “normal” discretion as to the lighting, framing, and location of the artwork without facing liability for modification or destruction under VARA.¹⁹⁴ As the court in *Board of Managers of Soho International Arts Condominium v. City of New York* observed, the purpose of VARA is “not . . . to preserve a work of visual art *where* it is, but rather to preserve the work *as* it is.”¹⁹⁵ Also, modifications due to mere negligence or accident are not actionable. Conduct is actionable when it goes beyond ordinary presentation to intentional or grossly negligent physical modifications of the work in a way that harms the artist’s honor or reputation.¹⁹⁶

193. § 106A(c).

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

195. Bd. of Managers of Soho Int’l Arts Condo. v. N.Y.C., No. 01Civ.1226DAB, 2003 WL 21403333, at *10 (S.D.N.Y. June 17, 2003).

196. See *Hunter*, 413 F. Supp. 2d at 519-20 (the standard of “gross negligence” is satisfied when the defendant’s behavior is “flagrant, grossly departing from the ordinary standard of care”); H.R. REP. NO. 101-514, at 12 (1990) (“[T]he presentation exclusion would operate to protect a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time,” but “conduct that goes beyond presentation of a work to physical modification of it is actionable.”).

53 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

In *Phillips v. Pembroke Real Estate*, the First Circuit used the public presentation exemption to create a blanket rule that VARA did not protect site-specific art. Site-specific art incorporates the surrounding location and environment into the artwork and makes the location an essential element of the artist's vision in the meaning and expression of the work. David Phillips had designed a 27-piece sculpture for Boston's Eastport Park. He incorporated the location into the work's design and placement. When Pembroke Real Estate wanted to redesign the park and alter or relocate Phillips' sculpture, he sued for injunctive relief under VARA on the grounds that removal or relocation would destroy his vision of the work. The district court had held that VARA's public presentation exception permits the removal of site-specific art. However, because the First Circuit Court defined site-specific art as art where the location contributes to the work's meaning, the court believed the removal of site-specific art causes its destruction. The court could not see how the statute could both protect the site-specific artwork under its general provisions and at the same time allow its destruction under the public presentation exemption.¹⁹⁷ Some say the *Phillips* court's view of site-specific art is consistent with the legislative history.¹⁹⁸ The House Report said, "[T]he 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" harm to the artists' honor or reputation.¹⁹⁹ Phillips

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

198. 5 PATRY, *supra* note 97, § 16:31.

199. H.R. REP. NO. 101-514, at 17 (1990); *see also* Cascio, *supra* note 113, at 190 (arguing that even if removing Phillip's work would have equaled the work's complete destruction, the court should have seen that the work would have to be of recognized stature before such destruction could have been prevented under VARA).

tried to argue for a “dual regime,” saying the public presentation exemption only applied to movable “plop-art” that could more easily be subjected to minor changes in lighting and placement and that did not incorporate the surroundings, location, or environment into the work (e.g., a painting that can be moved to another wall). He said the presentation exemption does not apply to art that cannot ordinarily be moved.²⁰⁰ Under this argument, if the location is part of the work, then removing or changing the placement of the work would be more than a mere act of “conservation” and might even harm the artists’ reputation. However, the court believed this interpretation went against the statute’s plain meaning. The court also considered the balance between a plaintiff artist’s moral rights and a defendant’s real property interest. The court said that when site-specific art is protected under VARA, “such objects could not be altered by the property owner absent consent of the artist,” and this would allow artists to bind and limit a property owner’s use and enjoyment of their property. Thus, the First Circuit held that VARA does not protect site-specific art at all.²⁰¹

Site-specific art has been a major “trend” of the past few decades. Site-specific artists often aim to “remove [art] from the ‘sterile context’ of fine art museums” and “orchestrate relationships between their work, the surrounding environment, and viewers.”²⁰² The art is meant “to become part of its locale, and to restructure the viewer’s conceptual and perceptual experience of that locale through the artist’s intervention.”²⁰³ The question of what is “site-

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

201. *Id.* at 142-43.

202. Rachel E. Nordby, *Off the Pedestal and into the Fire: How Phillips Chips Away at the Rights of Site-Specific Artists*, 35 FLA. ST. U. L. REV. 167, 170-71 (2007).

203. Lauren Ruth Spotts, *Phillips has left VARA Little Protection for Site-Specific Artists*, 16 J. INTELL. PROP. L. 297, 300-05 (2009).

55 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

specific” is crucial in the contemporary art world, especially if such works are considered to be excluded from VARA protection. How much does a work need to incorporate its surroundings to be considered site-specific? What if it is possible to move the work’s surrounding environment? If someone moved the Statue of Liberty to a different city, it would still be the Statue of Liberty, but New Yorkers might feel they were missing something in their city’s famous skyline. Sometimes, whether a work is site-specific could depend on the artist’s own vision of his “work of authorship.” For example, in the *Phillips* case, the court arguably called the work “site-specific” because the artist said he considered the location to be part of his work.²⁰⁴ One well-known example of artwork that has been called site-specific art is Richard Serra’s “Tilted Arc,” which was created in Manhattan’s Foley Square in 1981 under a contract with the federal government’s General Services Administration (GSA). Around the time VARA was being drafted in Congress, the GSA wanted to remove and relocate the work. Serra sued based on his First Amendment freedom of expression. He argued that Tilted Arc’s Foley Square location was part of the work and removing the work from the location would destroy it. The district court dismissed the case because GSA had qualified immunity as a government organization.²⁰⁵

Many have expressed concern that moral rights of integrity put the rights of site-specific artists in competition with the rights of real property owners.²⁰⁶ The real property owner has an interest in being able to control what is on his

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

205. *Serra v. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1057 (S.D.N.Y. 1987), *aff’d* 847 F.2d 1045 (2d Cir. 1988) (“Tilted Arc” was moved to a storage space).

206. *See Phillips*, 459 F.3d at 142 (discussing the case’s real property implications).

property, and an artist's integrity rights could infringe on the owner's constitutional rights by restricting the "free alienability" and "absolute ownership" sometimes considered the center of U.S. property law. However, some have argued that the harm will not be great because integrity rights can be waived under 17 U.S.C. § 106A(e), and artists who are concerned about the integrity of their work can refuse such waivers. On the other hand, landowners, such as a Park District board, often are in the better or more powerful bargaining position, and, as a result, artists are often rushed or persuaded into waiving these rights in their efforts to secure permission or funding for their work.²⁰⁷

The District Court in *Kelley* relied heavily on the *Phillips* court holding that site-specific works are not protected under VARA. Based on *Phillips*, the District Court defined "site-specific art" as artwork in which "one of the component physical objects is the location of the art."²⁰⁸ Kelley's expert Jane Jacob said, "Site-specific art usually takes into consideration the natural environment in which a work of art is installed."²⁰⁹ According to the District Court, both Kelley and Ms. Jacob said "Wildflower Works" was site-specific. The Court explained, "[T]he theoretical concepts that motivated Kelley's design and placement of Wildflower Works required that it be placed in Grant Park; Kelley wanted a location that would create a contrast between the linearity of the urban grid [and Chicago skyline], the rondure of the elliptical gardens, and

207. Nordby, *supra* note 202, at 191 (discussing the competing interests of the artist and the real property owner and the pros and cons of VARA's waiver provision as related to site-specific art).

208. *Phillips*, 459 F.3d at 129; *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011).

209. *Kelley*, 2008 WL 4449886, at *6.

57 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

the entropy of the wildflower beds.”²¹⁰ Also, “Wildflower Works incorporated pre-existing elements of the environment into its display,” including the roof of the East Monroe Street Parking Garage and the garage air vents, which “worked as figurative elements in the ‘painting.’”²¹¹ Kelley himself testified he would not have done “Wildflower Works” in its Grant Park location if he could not have included the air vents. Thus, the District Court held that “Wildflower Works” was site-specific and not protected under VARA.²¹²

The Circuit Court did not challenge the District Court’s holding that “Wildflower Works” constituted site-specific art, but it did challenge its belief that site-specific art was categorically excluded from VARA. The Circuit Court noted that the term “site-specific art” does not appear in the statute and nothing in the statutory definition of “visual art” or in the public presentation exemption explicitly or implicitly excludes all “site-specific art” from VARA protection. Rather, “the [public presentation] exception simply narrows the scope of the statute’s protection for all qualifying works of visual art” and “provides a safe harbor for ordinary changes in the public presentation of VARA-qualifying artworks.”²¹³

According to the Seventh Circuit Court of Appeals, the *Phillips* First Circuit’s main mistake in its view of site-specific work was that it believed that if site-specific works were protected, then they could not be removed. The Seventh Circuit Court argued, “Site-specific art is not *necessarily* destroyed if moved; modified, yes, but not

210. *Id.* at *6-7.

211. *Id.*

212. *Id.*

213. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 306-07 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

always utterly destroyed.”²¹⁴ Similarly, Patry argues that removal per se does not violate VARA, but mutilations that occur after removal might violate VARA.²¹⁵ The Circuit Court noted, “[T]he artist has no cause of action unless through gross negligence the work is modified, distorted, or destroyed in the process of changing its public presentation.” Additionally, a site-specific work’s integrity can be “defaced and damaged in ways that do not relate to its public display,” and an artist’s name can still be misappropriated. Thus, some site-specific art is still potentially protectable by VARA.²¹⁶ On this point, the Circuit Court’s view of VARA protection would have been potentially favorable toward artists. However, this argument for the protection of site-specific works was simply dicta, because the Court had already held that “Wildflower Works” did not qualify for VARA protection in the first place. The Court remarked, “Because we are resolving the VARA claim on other grounds, we need not decide whether VARA is inapplicable to site-specific art.”²¹⁷

If the Circuit Court had found that “Wildflower Works” qualified for VARA protection, it is still possible the public presentation exemption would not have applied. The Park District did not simply remove or relocate “Wildflower Works” from its Grant Park location, as Pembroke did with Phillips’ work. Rather, the Park District drastically modified the work from Kelley’s original vision. As mentioned before, the Park District intentionally reduced the size of “Wildflower Works” by half and

214. *Id.* at 307.

215. 5 PATRY, *supra* note 97 § 16:31.

216. *Kelley*, 635 F.3d at 307 (VARA’s inclusion of a building exception, which covers a specific kind of site-specific art, suggests that site-specific art is not categorically excluded from VARA).

217. *Id.* (“These observations are of course general and not dispositive.”).

59 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

changed the work's shape from elliptical to rectangular.²¹⁸ The Park District's modifications were not merely the result of ordinary actions of conservation as described in the statute or the House Report; they did more than simply change the work's lighting or placement as a museum curator would normally do. If the Park District's actions were not the result of ordinary "conservation" of the work, then the public presentation exemption probably would not apply.²¹⁹ The Park District's intentional physical modification of the work would still potentially be actionable. The District Court did not go into the implications of the public presentation exemption in this detail, because they viewed the work and the exemption under the *Phillips* court's categorical exclusion of site-specific works.²²⁰ The primary reason the Circuit Court mentioned the exemption was to express its disagreement with the exclusion, not to issue any ruling on the issue.²²¹

Kelley's "Wildflower Works" was arguably site-specific, especially considering that both Kelley and his expert said it was.²²² Additionally, since the flowers used in "Wildflower Works" were planted in the ground, removing them could arguably destroy or modify the work, particularly if you only removed a portion of them, as the

218. *Kelley*, 635 F.3d at 294-95.

219. Additionally, if the public presentation exemption does not apply, the issue of whether the Park District's actions were "grossly negligent" would not be an issue under this particular provision. In any case, the Park District's actions were intentional, not "grossly negligent." 17 U.S.C.A. § 106A(c) (West 1990).

220. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *6-7 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011).

221. *Kelley*, 635 F.3d at 306-07.

222. *Kelley*, 2008 WL 4449886, at *6-7 (Kelley said he considered the Chicago skyline and East Monroe Street Parking Garage air vents to be part of his work).

Park District did. On the other hand, one could also argue that plants can be planted anywhere there is room and decent soil, and replanting or replacing the plant material is sometimes necessary regardless of whether you are moving the work. Thus, it is not impossible to require a work of landscape art to be replanted elsewhere. However, Kelley would have to get permission from another city or property owner who had enough land for him to recreate his work. The complications that could arise if Kelley needed to go through this trouble could harm his honor or reputation or his artistic integrity. Also, this would ignore Kelley's express vision of the work. Under the view that "Wildflower Works" was site-specific, if the Seventh Circuit were to officially agree with the First Circuit's exclusion of site-specific works, then Kelley would have no recourse. However, if the Seventh Circuit were to officially hold that VARA protection still applies to some site-specific works, then Kelley would potentially still have rights of integrity, because the public presentation exemption would probably not apply.

3. The Building Exemption

The third and final exemption concerns situations where "a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work" that damages the artist's honor or reputation.²²³ The exemption provides that VARA integrity rights do not apply to such a work if 1) the artist consented to the artwork's installation in the building before VARA's effective date or 2) the artist consented to waive his VARA integrity rights after VARA's effective date through a written, signed contract between him and the property

223. 17 U.S.C.A. § 113(d) (West 1990).

61 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

owner.²²⁴ In these specific situations, the artist is not protected from destruction, distortion, mutilation, or other modification of his work even if it is prejudicial to his honor and reputation.²²⁵ By creating this exemption, Congress foresaw some of the legal problems and competing interests that could arise between artists and real property owners when artwork is physically incorporated into buildings. Some believed this waiver provision was necessary to ensure that property owners continued to work with artists to install artworks in their buildings.²²⁶

Additionally, if the artwork can be removed from the building without destruction, distortion, mutilation, or other modification of the work, the author's VARA rights still apply unless "(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or (B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal."²²⁷ This provision expects the owner of the

224. *Id.*; see also, 5 PATRY, *supra* note 97, § 16:33 (the waiver agreement "in effect extends to all subsequent owners of that building"; also suggesting that since the written instrument requirement applies only to consents on or after VARA's effective date, an oral consent to waiver probably is sufficient before that date).

225. § 113(d) (VARA rights do not apply if "the author consented to the installation of the work in the building either before the effective date . . . of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal").

226. Garson, *supra* note 106, at 243.

227. § 113(d)(2)

building to make a good faith and diligent effort to notify the artist *before* removing the work from the building.²²⁸

For example, in *Carter*, the district court issued a preliminary injunction against the removal of a sculptural installation in the lobby of defendant's building because such removal would cause the work's destruction and plaintiffs did not give any written consent to waive their integrity rights.²²⁹ The district court later granted a permanent injunction, further noting that the work was created and installed after VARA's effective date.²³⁰ However, the Second Circuit reversed the district court's holding on the grounds that the sculpture was a work for hire and thus ineligible for VARA protection in the first place.²³¹

In *Phillips*, the artist Phillips mentioned the building exemption in his "dual regime" argument of "plop art" versus site-specific art. Specifically, he noted that VARA included a building exemption but did not have a site-specific art exemption, and he tried to argue that this showed Congress intended VARA to apply to site-specific art. The First Circuit did not accept this view of VARA.²³² However, the Seventh Circuit in *Kelley* saw the existence of the building exemption as proof that VARA can protect some kinds of site-specific art. Judge Sykes argued that art that is incorporated into buildings is a type of site-specific art and VARA only excludes art in buildings under specific circumstances. Even so, because the Circuit Court was not

228. § 113(d)(2).

229. *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228, 228, 235-37 (S.D.N.Y. 1994); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 322-23 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

230. *Carter*, 861 F. Supp. at 322-23, 337-38''.

231. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 77-78 (2d Cir. 1995).

232. *Phillips*, 459 F.3d at 141-42.

63 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

deciding any VARA issues, Judge Sykes noted, “These observations [were] of course general and not dispositive.”²³³

If “Wildflower Works” had qualified for VARA protection, there could still be an open question of whether the building exemption would apply. Someone could argue that “Wildflower Works” was part of a building because it was on the roof of a parking garage and Kelley said the air vents were part of the work.²³⁴ The term “building” was not defined for VARA purposes, but, generally, a “building” is considered an enclosed space that is meant for shelter or human habitation.²³⁵ Also, “Wildflower Works” was a pre-VARA work. Under this view, “Wildflower Works” could be a work connected to a building, and the exemption would apply if removing it would cause its destruction or modification. However, neither the District nor the Circuit Court considered this possibility. Also, when people saw “Wildflower Works,” they probably did not think of it as part of the parking garage. The work could exist and be enjoyed in Grant Park even if the parking garage were not used. “Wildflower Works” was primarily an outdoor work in a municipal park; it was not in any enclosed space. Under that view, the building exemption would not apply to “Wildflower Works.”

233. Kelley v. Chi. Park Dist., 635 F.3d 290, 307 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011) (the Court did not feel the need to discuss “the Park District’s additional arguments that Kelley waived his VARA rights or that Wildflower Works is a work installed on a building before 1991 and therefore not subject to VARA protection”).

234. Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *6-7 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011).

235. See H.R. REP. NO. 101-735, *reprinted in* 1990 U.S.C.A.N. 6935, 6951 (1990) (definition of “building” in the House Report on the Architectural Works Protection Act of 1990).

IV. SUMMARY AND CONCLUSION

Copyright and Visual Artists Rights Act (VARA) protection are meant to incentivize creativity, but the fact that art like “Wildflower Works” might not be protectable does not incentivize artists to explore more experimental or site-specific art forms. Cities and communities are trying to encourage the creation of public art for public enjoyment and benefit outside traditional galleries, but much of this art is site-specific. As artists seek to preserve their work and their legacy, they hope to find support in our nation’s laws and courts. However, cases like *Kelley* put both copyright and VARA protection for contemporary art works into question for both communities and artists.

Under the Copyright Act of 1976, copyright protection applies to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.”²³⁶ To be “original” under copyright means that “the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity.”²³⁷ The work must owe its origin to the author’s own intellectual effort.²³⁸ If the idea or expression is trivial, commonplace, or lacking in any creativity, then it is not “original” enough to be copyrightable.²³⁹ However, you can find originality in

236. 17 U.S.C.A. § 102 (West 2014).

237. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (plaintiff’s arrangement of factual phone directory information lacked sufficient originality to be copyrightable).

238. REGISTER OF COPYRIGHTS, 87TH CONG. REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 9 (House Comm. Print 1961) (the work “must be original in the sense that the author produced it by his own intellectual effort, as distinguished from merely copying a preexisting work”).

239. *Feist*, 499 U.S. at 346-48 (facts, shapes, and other commonplace items do not find their origin in the author).

65 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

the particular arrangement of otherwise common, preexisting, or uncopyrightable elements.²⁴⁰ The Copyright Act protects compilations where “a work [is] formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”²⁴¹

When Kelley created “Wildflower Works,” he designed two large elliptical flower beds and selected between 48 and 60 species of self-sustaining, native wildflowers, based on a variety of aesthetic, environmental, and cultural reasons. He designed the placement of the wildflowers so they would blossom sequentially, changing colors throughout the growing season and increasing in brightness toward the center of each ellipse.²⁴² Kelley argued that he demonstrated “more than a trivial amount of intellectual labor and artistic expression”²⁴³ in his particular selection, coordination, and arrangement of the flowers he used in “Wildflower Works.”²⁴⁴ Judge Sykes said “Wildflower Works” “plainly possess[ed] more than a little creative spark” and thus did not fail the test of copyright originality.²⁴⁵ Even so, it is possible that Kelley’s originality in the work was relatively thin or that another court would find that “Wildflower Works” was not original enough to qualify for copyright protection.

240. Kelley v. Chi. Park Dist., 635 F.3d 290, 303 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).; *see also* 17 U.S.C.A. § 101 (West 2010) (definition of “compilation”); *Feist*, 499 U.S. at 357-58.

241. § 101 (definition of “compilation”).

242. *Kelley*, 635 F.3d at 293.

243. Opening Brief of Appellant Chapman Kelley, *supra* note 36, at 14-15 (quoting Runstadler Studios, Inc. v. MCM Limited Partnership, 768 F. Supp., 1292, 1295-96).

244. *Kelley*, 635 F.3d at 293; § 101 (definition of “compilation”).

245. *Kelley*, 635 F.3d at 302-03.

The Copyright Act also requires a work to be a “work of authorship” that originated in the author.²⁴⁶ Nimmer said, “An ‘original work of authorship,’ as that phrase is used in the Copyright Act, should not be confused with the material objects in which the work must be embodied in order to satisfy the fixation requirement.”²⁴⁷ The “work of authorship” is the author’s intangible vision of the work (e.g., a literary work), while the material object embodying the work is the “fixed” copy (e.g., a book).²⁴⁸ The materials are merely the tools the artist uses to convey his or her intangible work of authorship to the world.

The Circuit Court in *Kelley* held that, even if “Wildflower Works” would be considered “original” under the Copyright Act, it did not qualify for copyright protection because “a living garden lacks the kind of authorship and stable fixation normally required to support copyright.”²⁴⁹ The Court argued that “authorship is an entirely human endeavor” and a garden like “Wildflower Works” owes too much of its form to the forces of nature to be copyrighted.²⁵⁰ In viewing copyright’s requirements this way, Judge Sykes almost equated the concept of authorship with the concept of fixation.²⁵¹ However, Kelley’s “work of authorship” under the Copyright Act was his personal intangible vision for “Wildflower Works,” and the flowers were the material objects in which the work was embodied and conveyed. Additionally, the Court ignored the possibility that Kelley may be familiar with the life cycle of

246. 17 U.S.C.A. § 102(a) (West 2014); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (1884) (an author in the constitutional sense is “he to whom anything owes its origin; originator; maker”).

247. 1-2 NIMMER, *supra* note 47.

248. *Id.*

249. *Kelley*, 635 F.3d at 303.

250. *Id.* at 303-04.

251. *Kelley*, 635 F.3d at 303-04.

67 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

flowers and plants and that he had a plan for how the flowers, colors, and textures in “Wildflower Works” would progress with the changing seasons.²⁵² Arguably, this progression was part of Kelley’s “work of authorship.”

The Circuit Court’s argument of how or when a work is “authored” by a human versus being subject to the “forces of nature” seems somewhat problematic. All physical materials are subject to some natural forces at some time, and artists often work with materials originating in nature. The Circuit Court’s view of authorship could make it difficult for artists and courts to know when material is removed enough from its “origins in nature” to be “authored” or usable in a copyrightable work. Furthermore, if “originality” partly requires the work be independently created by the “author,”²⁵³ then it is a contradiction for the Circuit Court to say that Kelley’s work was “original” yet did not qualify for “authorship.”

A work is “fixed” when its embodiment “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁵⁴ A work may be fixed in “any tangible medium of expression, now known or later developed, from which [the intangible ‘work of authorship’] can be perceived . . . or otherwise communicated, either directly or with the aid of a machine or device.”²⁵⁵ The House Report states, “[I]t makes no

252. See Chatelain, *supra* note 52, at 392-93 (criticizing the Circuit Court in Kelley v. Chi. Park Dist., 635 F.3d 290 (7th Cir. 2011) for its potentially arbitrary decision of where materials are too “natural” for a work to be “authored” and for not recognizing the possibility Kelley was knowledgeable enough about the way the flowers progress over time so as to make that progression part of his vision for the work).

253. *Feist*, 499 U.S. at 345-47.

254. 17 U.S.C.A. § 101 (West 2010) (definition of “fixed”).

255. 17 U.S.C.A. § 102(a) (West 2014).

difference what the form, manner, or medium of fixation may be.”²⁵⁶ The court in *Cartoon Network v. Cablevision* said fixation has two primary requirements: 1) the work must be embodied in a medium (the “embodiment requirement”), and 2) it must remain embodied “for a period of more than transitory duration” (the “duration requirement”).²⁵⁷

In *Kelley*, Judge Sykes argued that the planting material in “Wildflower Works” was not “stable or permanent enough to be called ‘fixed,’” yet he conceded the planting material was tangible and could be perceived for more than a transitory duration.²⁵⁸ When the Copyright Act says a “fixed” work “is *sufficiently* permanent or stable *to permit it to be* perceived, reproduced, or otherwise communicated for a period of more than transitory duration,”²⁵⁹ the statute’s order of thought seems to suggest that a work cannot be perceived “for more than a transitory duration” *unless* it is sufficiently “permanent or stable.” Judge Sykes seems to contradict this more literal reading of the statute by reversing or completely separating the concepts of being “permanent and stable” and being “more than a transitory duration.” But the Court did not discuss how or why the two concepts should be viewed differently.

The Court said the plant materials’ inherent changeability prevented “Wildflower Works” from being “fixed” and copyrightable.²⁶⁰ However, a work is “created” under the Copyright Act when it is fixed “for the first time,” and “where a work is prepared *over a period of time*, the portion of it that has been fixed *at any particular time*

256. H.R. REP. NO. 94-1476, *supra* note 64..

257. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127, 129 (2d Cir. 2008).

258. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304-05 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

259. § 101 (definition of “fixed”) (emphasis added).

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

69 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

constitutes the work *as of that time*, and where the work has been prepared in different versions, each version constitutes a separate work.”²⁶¹ This suggests the Copyright Act allows for some change over time while still protecting the work at some point, if not overall. Kelley maintained, worked on, and tended to his vision of his work constantly over the course of 20 years,²⁶² so it is arguable that his work was “prepared over a period of time” and fixed in some form at several “particular times” at several stages or versions of the work as it progressed. Additionally, the Copyright Act “contains no restrictions on the type of material objects suitable for fixation.”²⁶³ This is contrary to Judge Sykes’ adamant distinction of plant materials versus other more “traditional” or supposedly static art materials. One scholar observed, “[A]ny medium in which a work is fixed is subject to degradation . . . with no accompanying degradation of the rights in the work formerly contained in those physical forms.”²⁶⁴ Therefore, the fact that flowers and plant materials change over time does not make them unusual, and it may not necessarily disqualify a work that uses them from being “fixed” or copyrighted.

The Circuit Court said that, because “Wildflower Works” did not qualify for basic copyright (i.e., it was not sufficiently “fixed” or “authored”), it did not qualify for further moral rights protection under the Visual Artists’

261. § 101 (definition of “created”) (emphasis added).

262. *Kelley*, 635 F.3d at 293-04.

263. *Midway Mfg. v. Dirkschneider*, 543 F. Supp. 466, 480 (D. Neb. 1981) (plaintiff’s audiovisual works in a video game are fixed in the printed circuit boards from which the audiovisual works may be perceived with the aid of a machine for more than a transitory period of time).

264. Heymann, *supra* note 64, at 853-54 (observing that a work acquires legal status when it is concretized in some form, if only temporarily, and “the post-creation destruction of the original fixation does not affect the status of the copyright in the work at all”).

Rights Act (VARA).²⁶⁵ The Copyright Act says visual art does not include “any work not subject to copyright protection.”²⁶⁶ Although the Circuit Court did not rule on any VARA issues for “Wildflower Works,” Judge Sykes felt the need to express some of his views on the implications of VARA rights and exemptions.²⁶⁷

In VARA, “visual art” is defined to include only paintings, drawings, prints, sculptures, or exhibitional photographs.²⁶⁸ Congress said 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 [of visual art],” and “whether a particular work falls within the definition should not depend on the medium or materials used.”²⁶⁹ Using a narrow interpretation of the VARA “visual art” definition, Judge Sykes held that “Wildflower Works” was not a “painting” or “sculpture” under VARA because it was essentially a garden.²⁷⁰ However, if art expert Jane Jacob’s definition of a sculpture as “any non-two[-]dimensional art form . . . including environmental art and some conceptual art”²⁷¹ is a “standard[] of the artistic community,”²⁷² then “Wildflower Works” could have been a sculpture.

VARA provides two primary categories of moral rights. First, an artist’s “rights of attribution” include the artist’s right 1) to claim authorship of their work; 2) to prevent the use of his or her name in connection with a

265. *Kelley*, 635 F.3d at 306.

266. § 101 (definition of “visual art”).

267. *Kelley*, 635 F.3d at 295-302, 306-07.

268. § 101 (definition of “visual art”).

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

270. *Kelley*, 635 F.3d at 300-02.

271. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *5 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011).

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

71 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

work he or she did not create; and 3) to prevent the use of his or her name in the event of a distortion, mutilation, or other modification of the work that is prejudicial to the author's honor or reputation.²⁷³ Second, an artist's "rights of integrity" allow him to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."²⁷⁴ Also, if the work is of "recognized stature," the artist has the right to prevent its destruction and any intentional or grossly negligent acts that violate that right.²⁷⁵

If "Wildflower Works" had qualified for VARA protection (i.e., if the Court had found "Wildflower Works" was sufficiently "fixed" and "authored" and constituted a work of "visual art" under VARA), the Park District's actions would have put Kelley's VARA rights of integrity at issue. The Park District intentionally reduced the size of "Wildflower Works" by half and changed the work's shape from elliptical to rectangular.²⁷⁶ To receive protection under rights of integrity, Kelley would have had to prove that the Park District's modifications to his work would be "prejudicial to [his artistic or professional] honor or reputation" as "embodied in the work."²⁷⁷ Because Kelley was known for elliptical shapes in his paintings and "living landscapes," the modifications to his work were arguably detrimental to his honor or reputation. Kelley also could have argued that "Wildflower Works" had "recognized stature" in the public or artistic community that made his work eligible for protection from intentional destruction.

273. 17 U.S.C. § 106A(a) (West 1990).

274. *Id.*

275. *Id.*

276. *Kelley*, 635 F.3d at 294-95.

277. H.R. REP. NO. 101-514, at 14-16.

There are a few exceptions to VARA's right of integrity. First, modifications as a natural result of the passage of time or the "inherent nature of the materials" are not actionable. Second, modifications resulting from acts of ordinary "conservation," such as changing the work's lighting and placement, are not actionable. This is sometimes called the "museum exemption," because Congress intended the exemption to allow museum curators to have "normal" discretion in the lighting, framing, and location of the artwork without facing liability for modification or destruction.²⁷⁸ Conduct is actionable when it goes beyond ordinary presentation to intentional or grossly negligent physical modifications of the work that harm the artist's honor or reputation.²⁷⁹ Finally, where a work of visual art is incorporated into a building such that removing the work will cause its destruction, distortion, mutilation, or other modification, VARA rights do not apply if 1) the artist consented to install the work before VARA's effective date or 2) the artist waived his integrity rights in a signed contract after VARA's effective date.²⁸⁰

If "Wildflower Works" had qualified for VARA protection, the "passage of time" exemption would not have applied because the Park District's modifications to the work were deliberate and not the natural result of "the passage of time" or the "inherent nature of the materials." The public presentation exemption probably would not have applied to "Wildflower Works," either. The Park District's modifications to "Wildflower Works" were not merely the result of ordinary actions of conservation as

278. *Id.* at 17.

279. *Id.* ("[T]he presentation exclusion would operate to protect a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time," but "conduct that goes beyond presentation of a work to physical modification of it is actionable.").

280. § 106A(e); 17 U.S.C. § 113(d)(2) (West 1990).

73 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

described in the statute or the House Report; they did more than simply change the lighting or placement of the work. They drastically modified the work from Kelley's original vision. The Park District's intentional physical modification of the work would have potentially been actionable.

There could still be an open question of whether the building exemption would have applied to "Wildflower Works." One could argue that "Wildflower Works" was part of a building because it was on the roof of a parking garage and Kelley said the air vents were part of the work.²⁸¹ If so, the exemption would apply if removing "Wildflower Works" would cause its destruction or modification. However, it is also arguable that "Wildflower Works" was primarily an outdoor work. The work was not in an enclosed space, and it could exist and be enjoyed in Grant Park even if the parking garage was not used. Under that view, the building exemption would not have applied. However, all these arguments may be moot if site-specific works, such as "Wildflower Works," are categorically excluded from VARA protection.

Based on the First Circuit Court's blanket rule from *Phillips v. Pembroke Real Estate* saying site-specific works are not protected under VARA, the District Court in *Kelley* held that "Wildflower Works" was site-specific and thus not protected under VARA.²⁸² The District Court defined site-specific art as artwork that includes the location as a physical component.²⁸³ Kelley's "Wildflower Works" was

281. Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *6-7 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011).

282. *Id.*

283. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 129 (1st Cir. 2006); *Kelley*, 2008 WL 4449886, at *6.

arguably site-specific, especially because Kelley thought of the Chicago skyline and the East Monroe Street Parking Garage air vents as part of his work.²⁸⁴ The Seventh Circuit in *Kelley* did not challenge the District Court's holding that "Wildflower Works" was site-specific, but it did challenge the District Court's categorical exclusion of site-specific art from VARA. Nothing in the definition of "visual art" excludes all "site-specific art" from VARA protection. Judge Sykes also saw the building exemption as proof VARA can protect some kinds of site-specific art, because art incorporated into buildings is a type of site-specific art and VARA only excludes art in buildings under specific circumstances. However, these arguments for the protection of site-specific works and for VARA rights in general were simply dicta. Judge Sykes remarked that because "Wildflower Works" did not qualify for VARA protection in the first place, "[t]hese observations [were] general and not dispositive."²⁸⁵ Thus, the Seventh Circuit did not rule on any VARA issues.

Real property interests may have played a role in the District and Circuit Courts' views of both copyrightability and VARA protection. If Kelley's work had been held to be protectable under copyright and VARA, then other artists could try to obtain such protection for their "living landscapes." This would potentially lead to increased conflicts and restraints on the rights of real property owners in the use and enjoyment of their property.²⁸⁶ Chicago's Grant Park and Millennium Park were prime real estate at the time. There were already several existing cultural attractions nearby, such as the Art

284. *Kelley*, 2008 WL 4449886, at *6-7.

285. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 306-07 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (U.S. 2011).

286. Nordby, *supra* note 202, at 191 (discussing the competing interests of artists and real property owners and the pros and cons of VARA's waiver provision as related to site-specific art).

75 **A FIXATION ON MORAL RIGHTS: The
Implications of Kelley v. Chicago Park District
for Copyright and VARA Protection**

Institute and the Chicago Symphony Orchestra's Symphony Center. The city had also recently installed an ice rink, an outdoor concert stage, a promenade, and new gardens and fountains. The city hoped to make this area a center of activity for the community as well as for tourists. Real property interests were probably at the forefront of the minds of the Chicago Park District Board of Commissioners, if not the courts themselves.

Judge Sykes' opinion in *Kelley v. Chicago Park District* leaves a lot of open questions about copyrightability and VARA protection for contemporary art and artists who use nontraditional materials, especially because he provided no clear standards as to how or when a work is authored or fixed and thus protectable under copyright or VARA. Additionally, because Judge Sykes' views on VARA are essentially dicta with no applicable ruling on things like "site-specific" works, artists who would want to create site-specific works are left wondering whether the First Circuit's view in *Phillips* will rule the day. Judge Sykes' opinion in *Kelley* will likely continue to create controversy and elicit comment until the Seventh Circuit Court of Appeals is presented with a situation where VARA is found to be truly applicable and a judge finally makes a ruling.