The Should-it-Stay or Should-it-Go Spotlight: Protection of Site-Specific Art under VARA

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THE SHOULD-IT-STAY OR SHOULD-IT-GO SPOTLIGHT:
PROTECTION OF SITE-SPECIFIC ART UNDER VARA

I. INTRODUCTION

As long as art has existed as a form of expression for individuals and societies, it has been the subject of controversy and heated debates. From the subject matter to the artists’ personality, from questions over ownership to choice of placement for display, art conjures up various feelings for various audiences. This is especially true when the work of art is located smack dab in the middle of our daily lives and the viewer has no choice but to gaze upon the work. Site-specific art falls victim to this truism due to its creation for and placement in a location specifically chosen for the work. People often feel that site-specific art interferes with their own thoughts of what should surround them. The Calling is no different. This orange, I-beam sculpture by Mark di Suvero occupied the should-it-stay or should-it-go spotlight shortly after the Milwaukee Art Museum (“Museum”) received a seventy-five

2. The Calling is a large monumental abstract sculpture installed at the east end of Wisconsin Avenue in Milwaukee, WI in 1982. See Whitney Gould, In the Way?: Di Suvero Abstract Sculpture Creating a Stir Again, MILWAUKEE J. SENT., Oct. 11, 2001, at 1B.
3. Mark di Suvero was born in China but moved to San Francisco, California at the beginning of World War II. He graduated from the University of California, Berkeley in 1956 where he studied sculpture and philosophy. He then moved to New York City and started using scrap “from demolished buildings to create what he called “cubist, open spatial sculptures.” In 1960, di Suvero was paralyzed after he was pinned under an elevator for an hour. He is confined to a wheel chair but learned to use an electric arc welder, cranes, cherry pickers, and torches to create his stainless steel sculptures. See Arts on the Point at http://www.artsonthepoint.org/disuvero_mark/disuvero.html (last visited Feb. 8, 2003).
million dollar facelift.  

In May 2001, the Museum unveiled a stunning Santiago Calatrava-designed addition called the Quadracci Pavilion, consisting of “a ninety-foot high glass-walled reception hall enclosed by the Burke Brise Soleil,” a movable sunscreen sculpture. The Pavilion is constructed of white concrete, glass, white Carrera marble and maple wood floors. One journalist captured the essence of the creation by stating that “to watch this kinetic sculpture unfold, to see its white steel fins rise from a steeply pitched, glass-walled reception hall and then turn into a pair of softly curving arcs that suggest a bird taking flight, is to witness a thing of pure, exhilarating joy.” The addition also includes a suspended pedestrian bridge, supported by a leaning mast and steel cables, which reaches out “like an arm extended to

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5. Santiago Calatrava is a Spanish architect and civil engineer. He received a Ph.D. in 1979 from the Federal Institute of Technology in Zurich. Calatrava then began accepting engineering commissions and entering competitions. He is known internationally for designing and building bridges, as well as other large-scale public projects including railway stations, an opera house, and an airport. The Milwaukee Art Museum addition is Calatrava’s first building in the United States. See Milwaukee Art Museum website at http://www.mam.org/site/biography.asp (last visited Feb. 13, 2003).


8. See Blair Kamin, Winged Victory, Spanish Architect’s Sleek Sunshade adds an Exclamation Point to Milwaukee’s Lakefront Art Museum, CHI. TRIB., Oct. 21, 2001. The journalist, an architecture critic, also stated that “the addition so successfully combines the sleek and the sensual, the futuristic and the primitive, machined forms and those that are free-flowing and organic, that one can still rave abut its dazzling synthesis of space, light and structure.” Id.
the city,” connecting the museum to Wisconsin Avenue. Calatrava wanted to add something to the lakefront instead of to the building and describes the addition as “a kind of pavilion, transparent and light, which contrasts with the massive, compact” museum building.

*The Calling* was installed in 1982 at the east end of Wisconsin Avenue. The large, steel, “boldly geometric” sculpture has been described in a number of ways, including a “bold orange sunburst,” and an “orange star.” However, *The Calling* now sits in front of the Calatrava addition. It is not a surprise that these two contrasting works formed the basis for heated discussion regarding the future of the site-specific sculpture. The surrounding community let their voices be heard. As natural to any controversy, people presented strong arguments both for and against any move of the sculpture. One resident argued for “the City of Milwaukee to remove that pile of scrap iron [*The Calling*] blocking the view of the beautiful new Milwaukee Art Museum.” On the other hand, one journalist argued that the two works enhance each other while “the great wings atop the Quadracci Pavilion frame and set off di Suvero’s big-scale work, to their mutual benefit.” There were still others who argued that even though *The Calling* is a respectable piece of sculpture, it no longer

10. *Id.*
11. *Id.*
12. *See* Gould, *supra* note 2, at 01B.
14. *Id.*
fits with the new addition as a backdrop and should be moved.  
However, from an artistic standpoint, the decision of whether to
move the sculpture so as not to interfere with the million-dollar
renovation should not be based on anyone’s opinion but the
artist’s. At the height of the controversy in October of 2001, the
museum’s executive director stated that the opinions at the
museum were not relevant and that the museum needed to respect
the artist’s wishes. Even Calatrava himself stated it is “the right of
the artist to decide whether the sculpture should stay or go.” Even
though a number of publications regarding the heated
situation reported that di Suvero was to visit Milwaukee to discuss
the future of the sculpture, nothing has been reported to confirm
any visit or any final decision.

This article uses the above sculpture-architecture controversy as
a backdrop for an analysis of legal protection for site-specific
artwork. The article discusses possible ways to protect the artist
and the sculpture, while focusing on moral rights and the Visual
Artist Rights Act (“VARA”). Part II of this article provides
relevant background information regarding past and current
protection of moral rights in the United States. This section also
discusses the interplay between moral rights and site-specific
artwork. Part III provides an analysis of the current situation and
addresses the question of whether The Calling, as a site-specific

18. See Busalacchi, supra note 4, at 12A. Anthony S. Busalacchi concluded
that “the di Suvero must be moved, because it has lost its backdrop of lake and
sky with the changing blues, grays and whites that I felt were part of the work” and
argued to give “it a new home that returns a similar backdrop.” The
statement that the sky and the lake are part of the work strengthens the argument
that site-specific art receives its essence from its surroundings. Additionally,
this statement raises an important question of whether permitting the addition to
be built and, therefore, interfere with and take away from the meaning of the
sculpture, violates di Suvero’s moral rights in the first place.

19. See Auer, supra note 4.

20. See Auer, supra note 4; see Cheryl Swack, Safeguarding Artistic
Creation and the Cultural Heritage: A Comparison of Droit Moral Between
supra note 2; see James Auer, Reader’s Verdict Clear: ‘Move di Suvero Now’,
sculpture, may gain protection under VARA. This article will also briefly discuss alternative theories of protection. Unfortunately, this paper concludes that the law, as it is now, provides little or no protection for The Calling.

II. BACKGROUND

A. Moral Rights

Moral rights come from the French term *droit moral* and refer to the inherent and natural rights an author has in a created work. The idea is that an artist’s personality and feelings become part of the work through the creative process and may never be separated from the work. Part of the author is left in the creation and vice versa; the work is the artist’s “spiritual child.” These rights include the right of attribution and the right of integrity. The right of attribution includes the right to have one’s name on one’s creation or to have one’s name removed if the work is mutilated and fails to continue as the author’s original creation. The right of integrity focuses on the right to not have one’s creation mutilated or destroyed. The continent of Europe readily recognizes these rights above and beyond any economical rights an author may have. However, in the United States, moral rights

24. Id.
25. For further discussion regarding international protection of moral rights, see Vera Zlatarski, “Moral” Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States, 23 COLUM.-VLA J.L. & ARTS 201, 201 (1999) (stating French copyright law provides for both an economic right and a non-economic right, which “is seen as ‘an emanation of manifestation of her personality’”); see Swack, supra note 22 (dealing specifically with moral rights and public art).
take a back seat to pecuniary rights.

1. Protection of Moral Rights Prior to VARA

Before the United States enacted VARA and there was no statutory grant of protection based on moral rights, courts either refused to protect these rights or were reluctant to protect these rights. However, some courts indirectly provided protection for moral rights under alternative theories. In *Gilliam v. American Broadcasting Co.*, Monty Python, a British comedy group, claimed that ABC violated its right of integrity by mutilating its program through extensive editing. The court relied on § 43(a) of the Lanham Act to find misrepresentation and unfair competition because the program was no longer fairly considered the plaintiff's work after editing. The court stated that "to deform [the artist's] work is to present [the artist] to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done." Therefore, the court did not expressly provide

26. See Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) (stating that "the conception of "moral rights" of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers."). This case focused on the right of attribution. A photographer brought suit against a publisher claiming that the publication of plaintiff's photographs without his signature violated his right to receive credit and that the same constituted a misrepresentation as representing the works to be that of another. *Id.* at 524. The court held for the publisher because moral rights did not exist in the United States and stated that the court was not available to establish any new law in this area. *Id.* at 526.

Additionally, the court in *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (1949), failed to recognize moral rights where the plaintiff artist brought suit in response to the destruction of a mural he painted that was attached to the wall of defendant's church. The church received numerous complaints regarding the mural, which was eventually painted over during redecoration without notice to the plaintiff. The court denied the existence of the artist's right of integrity and stated that any right must be reserved in writing between the parties.

27. 538 F.2d 14 (2d Cir. 1976).

protection for the plaintiff’s work due to violation of moral rights but indirectly protected the plaintiff’s moral rights under trademark law. Technically, “the court did not vindicate the artists’ right to control the future of their creations but rather the public’s right to be properly informed of the nature and origin of the work.”

2. Protection of Moral Rights Under VARA

VARA is the United States’ attempt to incorporate moral rights into statutory law. The United States joined the Berne Convention in 1988 to achieve greater international protection for intellectual property. Article 6bis of the Berne Convention protects the rights of integrity and attribution by providing: “(1) [I]ndependently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”

The Berne Convention requires that protection must last as long as the artist’s economic rights.

To achieve compliance with the Berne Convention, Congress enacted the Visual Artists Rights Act of 1990, which is codified in the Copyright Act. Rights provided by VARA only extend to works of visual art. A work of visual art is defined in section 101 of the Copyright Act and includes “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed by the author . . .”

53 HARV. L. REV. 554, 569 (1940)).
29. See GERSTENBLITH, supra note 21, ch. 4 at 13.
31. See GERSTENBLITH, supra note 21, ch. 4 at 19.
32. VARA can be found in 17 U.S.C. §§ 106A.
33. The entire definition states:
A “work of visual art” is – (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple
The rights granted by VARA include the right of attribution and integrity. Section 106A(a) states:

that the author of a work of visual art (1) shall have the right – (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) shall have the right – (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right. 34

However, protection under VARA only lasts for the life of the author. 35 VARA is not retroactive and only applies to works of visual art created on or after the effective date of the statute, June 1, 1991, and “to works created prior to the statute’s effective date but title to which has not, as of such effective date, been

cases, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. The section also includes a negative definition of what a work of visual art does not include.

34. 17 U.S.C. § 106A(a). The statute continues to set forth the scope and exercise of rights, exceptions to protection, duration of rights, and transfer and waiver of rights. See 17 U.S.C. §§ 106A(b), (c), (d), and (e).

35. See 17 U.S.C. § 106A(d). This duration is arguably in violation of the requirements set forth by the Berne Convention that moral rights must last as long as the duration of economic rights. In the United States, the duration of economic rights received from copyright protection lasts for the life of the author plus seventy years. Therefore, the durations of these rights are in conflict between the two granting bodies.
transferred from the author." The following summarizes the small number of cases that have been brought under VARA.

i. Carter v. Helmsley-Spear, Inc.37

In Carter, three artists brought an action to prevent alteration of artwork installed by them in the lobby of a commercial building. The artists entered into an agreement with the building lessee to "design, create and install sculpture and other permanent installations" in the building and the lobby. The artwork was a walk-through sculpture consisting of sculptural elements representing environmental concerns and recycling. However, the building's lease was terminated and the building was surrendered to the building owner and management company. At that time, the artists were told that they could no longer install artwork on the property and that the artwork already in place would likely be removed.

After a long discussion regarding VARA and the moral rights protected by the statute, the court held that the sculpture was a work made for hire and therefore not protected under VARA. In making this decision, the court looked at a number of factors to determine whether the artists were employees, causing the sculpture to be a work made for hire, or whether the artists were independent contractors. Even though the artists retained complete artistic freedom with respect to the sculpture's creation, the work was made for hire because the management company had a right to and did assign other duties to the artists, employee benefits and tax treatment of the artists indicated employee status, and the artists were provided with many supplies in creating the sculpture.

37. 71 F.3d 77 (2d Cir. 1995).
38. Id. at 80.
39. Id.
40. Id. at 81.
41. Id. at 87-88.
42. Id. at 86-87. The court in Community for Creative Non-Violence v. Reid,
The only case brought under VARA and analyzed by the Seventh Circuit Court of Appeals is *Martin v. City of Indianapolis*. In this case, the artist brought suit under VARA for the city's destruction of the artist's sculpture. The large outdoor stainless steel sculpture was located on property that was later acquired by the city as part of an urban renewal project and demolished without notice to the artist.  

The court stated that in order to protect a work of visual art from destruction, the work must be a recognized stature, a term that is not defined in the act. The court used the two-prong stature test set forth in *Carter*, which requires "(1) that the visual art in question has "stature," i.e. is viewed as meritorious, and (2) that this stature is "recognized" by art experts, other members of the artistic community, or by some cross-section of society."  

Although the artist did not present expert testimony, the court allowed the test to be satisfied by newspaper and magazine articles and various letters because they were used to show that the sculpture had not gone unnoticed instead of being offered for the truth of what they asserted. Additionally, under the agreement between the city and the artist, the city had a duty to give notice prior to destruction, which they failed to do. Therefore, the court...
held that the surprise destruction of the artist’s sculpture was a violation of VARA and awarded the artist statutory damages.

iii. Pollara v. Seymour

In this case, the artist, Pollara, brought suit under VARA based on the defendant’s destruction of a mural she created. Pollara was hired by a public interest group to create a painting to be displayed as part of a lobbying effort to protest against legal aid funding cuts. The mural was created on heavy photographic paper and affixed to a metal frame for display. Pollara installed the painting but it was removed prior to public viewing and, in the process, the mural was ripped into three sections. Later, the rips were repaired and taped to the wall for display at the event.

The court stated that to maintain a claim under VARA, the artist must show that “(1) the destroyed work was a “work of visual art” and a “work of recognized stature”; and (2) the destruction of [the] work was either intentional or grossly negligent.” When determining whether a work was of recognized stature, the court used the same two-prong test set forth in Carter. However, the court did not decide if the work was actually of recognized stature because the mural was never publicly displayed and therefore could not gain recognized stature. The court relied on the fact that the mural was “intended to be displayed on a one-time, short-term basis.” Additionally, Pollara did not intend to preserve the work for future display or retain any lasting value. Therefore, the court

artist may waive VARA rights in a written instrument signed by the author, specifying to what the waiver applies,” there was no written waiver instrument in this case. Martin, 192 F.3d at 614.
49. Id. at 334. The public interest group who hired Pollara was the New York State Defenders Association (“NYSDA”) and the protest was to be done by the Gideon Coalition. Id.
50. Id. at 335.
51. Id. at 336.
52. Id. at 335.
53. Pollara, 206 F.Supp.2d at 337. The court stated “the fact that the mural was not intended to have any lasting value is evidenced by her admission that
held that the mural was not of recognized stature due to its short viewing life and thus was not protected under VARA.

3. Moral Rights and Site-Specific Art

If a work of art is site-specific, additional problems may arise when seeking protection under VARA. "Site-specific art is art whose placement in a three-dimensional context is integral to the expression and meaning of the art work itself." 54 The work is "conceived and created in relation to the particular conditions of a specific site." 55 "The Calling is a site-specific work, designed, crafted and placed for maximum effect in a particular spot.... [I]t exploits the shoreline to the east, the skyline to the west." 56

i. Serra v. United States General Services Administration 57

In this situation, Serra, the artist, contracted with the General Services Administration of the Federal Government to create a work of art for the Federal Plaza at Foley Square in Manhattan. 58 Tilted Arc, the formalist and minimalist sculpture, was installed in 1981. 59 The slightly curved sculpture, created from a slab of steel, was 120 feet long and twelve feet high and bisected the plaza. 60 The sculpture was immediately disliked and subject to hostility from those who worked and lived in the area. 61 After the GSA held public hearings, it was determined that the sculpture was to be

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54. See GERSTENBLITH, supra note 21, ch. 4 at 12.
56. See Auer, supra note 4.
59. See Brooks, supra note 55, at 1431.
60. Id.
61. See MERRYMAN & ELSEN, supra note 1, at 360.
removed and relocated. Serra filed suit to prevent the destruction of the work basing his claim on the first amendment freedom of expression. However, this argument was rejected by the district court and affirmed by the Second Circuit Court of Appeals.

Serra raised new legal arguments based on the United State’s adherence to the Berne Convention. However, he abandoned this argument when his attorneys advised him that neither the Berne Convention nor the implementing act would protect the sculpture. The only success Serra encountered was “in preventing the re-installation of the sculpture in another location because a panel of art experts unanimously concluded that the sculpture was site-specific and therefore could not be displayed elsewhere without destroying its artistic integrity and intent.”

III. Analysis

This section analyzes the arguments available to di Suvero if a suit should arise from this sculpture/architecture controversy. Next, this section analyzes the facts to conclude that the sculpture is not protected under VARA. This section then discusses other possible forms of protection for the sculpture and concludes that the common law does not provide protection for the artist and the sculpture.

Arguments

If the Museum decided to move the sculpture to obtain a full and uninterrupted view of the new Calatrava addition, di Suvero may want to protect the sculpture. There may be a number of possible theories of protection. The artist would most likely argue violation of the right of integrity to either prohibit the move or to sue for damages after any move. The United State’s greatest, although arguably weak, protection of visual art is provided by VARA.

62. See Brooks, supra note 55, at 1432; Serra, 664 F. Supp. at 801.
63. See Brooks, supra note 55, at 1433.
64. See GERSTENBLITH, supra note 21, ch. 4 at 12.
Therefore, the artist would seek protection under VARA for this right of integrity. Additionally, the artist may argue under alternative theories of protection including contract, copyright, and trademark.

A. The Calling not protected under VARA

If di Suvero seeks protection under VARA, he will not be able to prevent the Museum from moving the sculpture. This disappointing, but not totally unexpected conclusion, is the result of one small but detrimental provision in the statute that severely limits the protection provided to visual art in this country. VARA only protects works of visual art that are created on or after the effective date of the statute, which is June 1, 1991. The Calling was installed in 1982. Therefore, the sculpture cannot even receive protection under VARA, the country's foremost protection of moral rights, just because of the date of its creation.

However, even putting aside this unfortunate limitation and after an analysis of the rest of the statute, the sculpture probably would not be protected by VARA even if it was created on or after June 1, 1991. This conclusion is the result of one narrow provision and the reality of site-specific art. The first main issue when analyzing these facts under VARA is whether the moving of a site-specific artwork deforms, mutilates, modifies or destroys the artwork. This is an issue because whether the artwork will be deformed, mutilated, modified, or destroyed is essential to invoking the protections offered by the statute. Those protections preserve an author's right of attribution, right of integrity, and with works that are of a recognized stature, the right to prevent destruction, which is part of the right of integrity.

The right of integrity allows the artist to prevent any deforming or mutilating changes to his work. VARA protects the right of integrity by stating that the artist has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or

65. Carter, 71 F.3d at 81.
reputation."\textsuperscript{66} As a result, the question becomes whether moving a site-specific sculpture deforms or mutilates the work, or qualifies as a modification allowed under the statute. No court has analyzed VARA in this way; the few cases where courts analyze VARA deal with the destruction of a work and of the statutory requirement of proving 'recognized stature.' Additionally, the statute is silent on the issue for it does not provide definitions for these terms.\textsuperscript{67} Even when looking at dictionary definitions of these terms, the issue is not solved for the real issue is how do these terms legally relate to the nature of site-specific artwork.

Distort is defined as "to twist out of the true meaning . . . to twist out of a natural, normal, or original shape or condition."\textsuperscript{68} Mutilate is defined as "to cut up or alter radically so as to make imperfect."\textsuperscript{69} The definition of modify must also be analyzed for the statute states an artist may protect the artwork from any "other modification of that work which would be prejudicial to his or her honor or reputation."\textsuperscript{70} Modify is defined as "to make minor changes in the form or structure of; alter without transforming . . . to make a basic or important change."\textsuperscript{71} Although, the terms are now defined, the question remains as to how they are applied to site-specific artwork.

1. Moving of Site-Specific Artwork Probably not Seen as Destruction

For a site-specific artwork to be protected under these terms, it must be argued from an artistic and creative standpoint that moving a site-specific work distorts, mutilates, or modifies the work due to its reliance on its surroundings to define and be the essence of the meaning of the work. This argument was used in response to the Richard Serra controversy, which ended in a

\begin{itemize}
  \item \textsuperscript{66} 17 U.S.C. § 106A(a)(2).
  \item \textsuperscript{67} See 17 U.S.C. § 101.
  \item \textsuperscript{68} WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 659 (1981).
  \item \textsuperscript{69} Id. at 1493.
  \item \textsuperscript{70} 17 U.S.C. § 106A(a)(2).
  \item \textsuperscript{71} WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1452.
\end{itemize}
removal of his sculpture from the plaza where it was installed, when “a panel of experts unanimously concluded that the sculpture was site-specific and therefore could not be displayed elsewhere without destroying its artistic integrity and intent.”\textsuperscript{72} Even though this states that moving a site-specific artwork destroys its artistic integrity, it is doubtful any court would equate this with the term destroy as used in VARA. This is evident from the use of the term destroy by the courts in the few available cases.

The court in \textit{Carter} held that the artists could not prevent the removal of the sculpture, which would result in its destruction or alteration, because the sculpture was a work made for hire and hence not protected under VARA.\textsuperscript{73} It may be argued that the sculpture in \textit{Carter} constituted site-specific sculpture because it was created for a particular space, the lobby of the building, and was incorporated into the building as a single, interrelated work. The building lobby and the incorporated surroundings were an integral part to the expression and meaning of the work itself. However, because the court decided the sculpture was a work made for hire and not protected, the court did not delineate exactly what would happen to the sculpture when it was moved, i.e. be destroyed or altered.

However, those facts can be compared with the ones at issue here. Even though the sculpture in \textit{Carter} arguably was site-specific, parts of the sculpture were attached to and incorporated into the building. Therefore, any removal of the work would cause part of the sculpture to be removed from the building, in itself destroying part of the sculpture. The sculpture is not in the same form it would be after it is removed because part of the sculpture, the building, will be missing. Here, \textit{The Calling} is not attached to a building but stands by itself, allowing it to be moved without disrupting the actual sculpture. As a result, it can be argued that no damage will occur to \textit{The Calling} than what happened to the sculpture in \textit{Carter} and hence, is not a destruction of the work.

In \textit{Martin}, the sculpture was destroyed because it was

\textsuperscript{72} See \textsc{Gerstenblith}, supra note 21, ch. 4 at 12.
\textsuperscript{73} \textit{Carter}, 71 F.3d at 88.
demolished. The sculpture ceased to exist in its original state, the metal being mangled by a machine. That is not what will happen here. If *The Calling* is moved, the work of art, the pieces of metal itself, will not be harmed. The work will remain as a whole piece and it will just be placed somewhere else. Therefore, a court will not see the move as a destruction of the sculpture.

In *Pollara*, the work of art was destroyed when the mural was ripped in three different places. Again, this is not what will happen to *The Calling*. The sculpture itself, the steel beams, will not be crushed, bent, cut in half, or any other possible destruction. It will stay exactly the same; the work will just be moved. Therefore, a court will most likely not see the moving of a site-specific sculpture that does not harm the actual physical work itself, as a destruction of the work. Consequently, *The Calling* must be seen as distorted, mutilated or modified to be protected under the statute.

2. *Moving of Site-Specific Artwork Probably not Seen as Distortion or Mutilation*

When looking at the definitions set forth above, the sculpture will probably not be seen as distorted because it is neither being “twisted out of shape” nor will a move “change the usual shape or appearance of” the sculpture. As just analyzed, the moving of a site-specific sculpture does not change the actual physical parts of the sculpture, just its surroundings. Likewise, a court is not likely to see the moving of the sculpture as a mutilation because it will not be damaged or injured. However, it may be argued that moving a site-specific sculpture from its intended surroundings amounts to making the sculpture imperfect, by removing an essential part of the work. However, this may be a stretch from the literal dictionary definitions and a court will likely concentrate on the physical work itself and not the conceptualized surroundings when analyzing site-specific work under the statute.
3. Moving of Site-Specific Artwork Probably Seen as a Modification

The best bet for the sculpture to gain protection under VARA is the argument that moving the sculpture is a modification that would be prejudicial to the artist's honor or reputation. Moving the sculpture, even though the actual physical work is not changed, is at the very least a modification of the sculpture because it is moved from its original and conceptual surroundings. But the next part of the definition may prove crucial because this modification needs to be prejudicial to the artist's honor or reputation. Here, again, one needs to examine whether the moving of a site-specific work from its intended surroundings to a new context is prejudicial to the artist's honor reputation.

Obviously, by its very definition, a site-specific work relies on its surrounding for its meaning and expression. Artists and advocates of the art world would argue that moving a site-specific work modifies a work of art to the point of being prejudicial to the artist's honor or reputation. The work of art is a product of the artist and part of the artist's personality stays with the work. With site-specific artwork, the artist created an object to fit in a particular setting, for a particular reason, and to draw on particular emotions. Therefore, because part of the artist stays with the sculpture that has been placed where it is for a reason, moving the sculpture would be prejudicial to the artist's honor. If this issue were to find itself before a court, the art advocate can only hope that the court understands and appreciates the essence of site-specific art.

None withstanding the above analysis, site-specific art faces a bigger obstacle regarding a provision found in VARA. Section 106A(c)(2) states that "the modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification." It may be argued that the moving of The Calling is a modification of the public

presentation because it is a simple change in placement and therefore not protected under VARA. The response to this argument goes back to the same argument seen above. If the work was created for a specific surrounding and the meaning of the work is based on those surroundings, the artist's chosen public presentation of the work is where it is because that is where the work was created to reside. Therefore, by changing the placement of the artwork, the whole meaning of the work changes and it is no longer the same sculpture with the same expression. Therefore, the move is not for public presentation because the sculpture is where it is for a specific presentation and if it is moved the purpose of the presentation is changed and thus does not fall under this provision.

In any case, preventing a move of The Calling under VARA proves to be an impossible task due to the effective date of the statute. But even if the sculpture was created on or after June 1, 1991, and hence available for protection, the issue is raised as to whether the moving of a site-specific artwork is a destruction, distortion, mutilation, or modification that is prejudicial to the artist's reputation or honor. Section 106A(c)(2) is also a high hurdle for site-specific art to jump in order to gain protection under VARA. The main argument a lawyer must raise before a court deciding these issues is that the whole essence and meaning of a site-specific artwork is based on its surroundings and that any change in the whole creation, the sculpture as well as the setting, affects both the expression of the work as well as the artist's honor and reputation.

B. Alternative Theories of Protection

Before Congress enacted VARA, courts protected moral rights in varying fashions by disguising the concept in theories like "copyright, unfair competition, invasion of privacy, defamation, and breach of contract." As a result, the artist in this situation may attempt to protect The Calling under one of these theories.

75. Carter, 71 F.3d at 82.
This section will focus on three possible alternative theories including contract, copyright and trademark.

1. Contract Theory

Di Suvero may be able to protect his sculpture under contract law. Because the museum owns the piece and it was installed approximately twenty year ago, it is unlikely that di Suvero or the Museum contracted on how to handle this issue. However, di Suvero may be protected if he contracted to retain this right regarding placement or moving the sculpture. More facts need to be known about the original and ongoing contractual relationship between the artist and the Museum before this may be determined.

2. Copyright Theory

The artist may be able to protect his work under copyright law but this protection depends on who owns the bundle of rights offered by copyright law. However, the Museum owns the actual artwork itself and can probably move it without violating any right based in copyright the artist may still retain. This is due to the fact that the copyrighted work is separate from the copyright itself. Therefore, the owner can probably do what they wish to the actual work under copyright law.

3. Trademark Theory

Theoretically, this may be a better match for protection in the current situation. The court in Gilliam relied on § 43(a) of the Lanham act to find misrepresentation and unfair competition because the television program was no longer fairly considered the artist’s work after the extensive editing. The court stated that "to deform [the artist’s] work is to present [the artist] to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done.” In the situation at hand, di

76. See Gould, supra note 2, at 1B.
Suvero may have to show that any moving of the sculpture would deform the work. This is the same issue that arose in the VARA analysis and is harder to show here than in the Gilliam case. An argument might be that the audience of the sculpture would still know it was created by di Suvero, even if it is moved, because the physical work itself is still the same. In contrast, the program in the Gilliam case was physically changed as a result of over-editing and the removal of a significant amount of footage and material. Therefore, di Suvero will have a hard time gaining protection under trademark law unless the court understands the essence of site-specific art.

V. CONCLUSION

Even though this is a cut and dry issue for di Suvero, due to the effective date of the statute, this is not a cut and dry issue for site-specific work in general. If a work is available to receive protection under VARA, there are a number of hurdles to cross before an artist will reach victory. The nature of site-specific art raises a number of issues while searching for protection under VARA including, whether the moving of a site-specific artwork destroys, distorts, mutilates or modifies the artwork. These terms are not defined in the statute and even with the help of dictionary definitions, it is not clear how these terms legally apply to the nature of site-specific artwork. Any protection a court may grant to site-specific artwork will most likely be based in conceptual and theoretical understandings of the artwork’s reliance on its surroundings for essence and meaning. There are alternative theories of protection that courts have used in the past. However, it is clear that these theories do not protect moral rights to the extent that will protect the moving of a site-specific artwork. Unfortunately, di Suvero may be out of luck.

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