BEFORE THAT ARTIST CAME ALONG, IT WAS JUST A BRIDGE: THE VISUAL ARTISTS RIGHTS ACT AND THE REMOVAL OF SITE-SPECIFIC ARTWORK

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INTRODUCTION

John Snyder's sculpture *Silent City* commands anything but silence. In fact, from the very day the artist installed the four aluminum tower-like structures on four separate concrete posts of the Route 96 Bridge in Ithaca, the public—including the city's mayor—voiced its disapproval loud and clear.[1] Snyder's sculptures were called everything from "a junior high metal shop project to a maximum-security prison for squirrels to Bart Simpson."[2]

On June 7, 2000, exactly seven months after Snyder installed his work on the bridge, the Ithaca Common Council responded to the public's distaste by voting unanimously to remove the artist's structures and relocate them to a "more suitable location . . . within the city."[3] The city contemplated relocating Snyder's structures to a grassy field behind a local theatre, but the artist protested a move of any kind. Snyder asserted that the artwork was site-specific and that removal would destroy it.[4]

Snyder designed the four aluminum structures specifically for the Route 96 Bridge after winning a competition that the city held as part of a project to redesign an intersection near the bridge.[5] The then-mayor of Ithaca appointed a jury that selected Snyder's proposal from among fifty-five entries.[6] When the jury announced that Snyder had won the competition, his drawings and plans were published in a local newspaper and exhibited in a storefront in downtown Ithaca. Despite the fact that Snyder's winning drawings and plans were well-publicized and readily avail-

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1 *See* Telephone Interview with John Snyder, Artist, *Silent City*, in Ithaca, N.Y. (Sept. 1, 2000) [hereinafter Telephone Interview] (noting that the mayor of Ithaca bluntly criticized the sculptures as being "ugly"); *see also* Lauren Bishop, *Sculptures To Be Removed*, ITHACA J., June 9, 2000, at 1A.

2 Bishop, *supra* note 1.

3 *Id.*

4 *See* Telephone Interview, *supra* note 1.

5 *See* Lauren Bishop, *Octopus Detanglers Angry Over Sculptures*, ITHACA J., June 17, 2000, at 2A.

6 *See* Telephone Interview, *supra* note 1. The jury included a member of the Ithaca city planning department, an alderperson, two Cornell University architecture professors, and a local artist. *See id.*

able for the local public to see, no one voiced opposition to Snyder's work until it was actually constructed and installed on the Route 96 Bridge.[7]

The problem that Snyder confronted when Ithaca city officials decided to remove his aluminum towers from the bridge is paradigmatic of the sort of problem that artists often confront when they are commissioned by government entities to create artworks for specific public sites. When a commissioning entity (and owner of the art) later decides it wants to remove the works, a battle ensues over whose rights trump whose—the artist's right to prevent the destruction or distortion of her work or the owner's right to dispose of its property as it pleases.

Before 1990, artists like Snyder had no recourse when government art owners decided to remove site-specific artworks from their sites.[8] An American artist's protestations regarding any modification of a commissioned work were legally irrelevant, because American law dictated that the owner's right to do what she pleased with her property eclipsed whatever interest the artist might have in preserving her creation as is. That interest would have been elsewhere protected by a legal doctrine known as moral rights, which safeguards an artist's reputation by prohibiting the owner of her art from distorting, mutilating, and, often, destroying the work.[9] However, while many other countries had long recognized the doctrine of moral rights, the United States did not embrace that doctrine until recently.[10] In 1990, Congress did legislate moral rights for artists of certain visual works of art when it passed the Visual Artists Rights Act (VARA).[11] Under VARA, artists working in America suddenly had rights to prevent future owners of their artwork from physically distorting, mutilating, modifying and, in some cases, destroying their work.[12]

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7 *See id.*

8 For example, in the 1980s artist Richard Serra faced a similar situation when the General Services Administration of the Federal Government (GSA) decided to remove Serra's work *Tilted Arc* from a public plaza in Manhattan. The GSA commissioned Serra to design the work for that very site four years earlier, and Serra was unable to prevent its removal. *See* Serra v. United States Gen. Servs. Admin., 664 F. Supp. 798 (S.D.N.Y. 1987) *dismissed in part*, 667 F. Supp. 1042 (S.D.N.Y. 1987), *aff'd*, 847 F.2d 1045 (2d Cir. 1988). *See* discussion *infra* Part I.

9 *See* Edward Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1741-42 (1984).

10 *See, e.g.*, 2 RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 943 (2d ed. 1988); *see also* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1 (1980) *reprinted in* ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS 470-72 (Franklin Feldman et al. eds., 1986).

11 Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in part as 17 U.S.C. § 106A(a)(2) (1990)).

12 *See id.*

Still, while Snyder may have the right to prevent the City of Ithaca from physically modifying or destroying the towers themselves, it is not clear that the city's conceptual destruction of the works—as would be accomplished by their careful removal and relocation from the bridge—would constitute a violation of Snyder's moral rights under VARA. Since each of the four structures is bolted to an individual concrete post on the bridge, the city can easily remove the structures without physically damaging them. Nonetheless, Snyder argues that this removal would effectively destroy his work. The artist contends that *Silent City* is not simply the structures alone, but is the bridge *and* the structures together.[13] Thus, the only way that Snyder could successfully claim that the removal of *Silent City* would violate his moral rights is if he could convince a court that such removal would constitute destruction despite the absence of consequent physical damage to the piece.

Since Congress' enactment of VARA, no court has squarely confronted the question of whether removing a government-commissioned site-specific work from its context constitutes a violation of the artist's rights under the statute. While that recognition is necessary, as made clear by the opinions of a number of artists, critics, and legal scholars, such an acknowledgement would push the United States' narrow grant of moral rights protection to its absolute limits. Congress was hesitant to draft moral rights legislation because these rights imply a non-contracted-for exception to economic property rights.[14] That is, interpreting VARA to allow a government-commissioned artist to prevent the removal of her site-specific artwork would potentially bind public property indefinitely. This would seem to be Congress' worst nightmare. Unfettered moral rights protection for such artists would effectively privatize public land—and a lot of it. Since the Kennedy administration established the United States General Services Administration Art-in-Architecture program in 1963, the federal government has commissioned over 200 works for public spaces.[15]

VARA protection is therefore a mixed blessing. If artists can prevent art owners from removing public-commissioned site-specific work from their contexts, both the art owners and the artists face serious dilemmas. For example, since VARA provides that an artist may enforce

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13 Telephone Interview, *supra* note 1.

14 *See, e.g.*, Louise Nemschoff, *A Rose By Any Other Name: The U.S. and Moral Rights*, *in* MORAL RIGHTS 166 (Cees van Rij & Hubert Best eds., 1995).

15 *See* 2000 GSA Design Awards, *at* http://www.gsa.gov/pbs/pc/nw_files/00/preface/preface.hthttp://hydra.gsa.gov/pbs/pc/nw_files/00/preface/preface.htmm (n.d.). Under the Art-In-Architecture program, the GSA donates one-half of one percent of its total projected construction costs for each federal building to financing artwork for particular public spaces. *See* http://www.gsa.gov (Public Buildings > Art in GSA Buildings > Art in Architecture Program) (n.d.).

her moral rights in an artwork for the duration of her life,[16] the commissioning party (i.e., the owner) may have to tolerate a structure on public land for 50 or more years even if the artwork may prevent the owner from using the land to its best potential. In fear of committing public land to this sort of inflexibility, federal, state, and local governments may choose not to commission artwork for public spaces, thereby diminishing opportunities for artists to express ideas, and depriving communities of cultural and aesthetic images in prime gathering areas. Congress anticipated similar problems regarding artwork installed in buildings; and, to ensure that real estate remained alienable, it included a real estate waiver provision under VARA.[17] The provision allows patrons to contract with artists who install works in buildings to ensure that the artists do not enforce their moral rights if the work could not be removed without being destroyed.[18] However, Congress did not enact a similar provision with regard to site-specific art.

This Note contends that courts should find that conceptual destruction of the sort that would ensue if Snyder's structures were removed, constitutes a violation of VARA. Further, to address the alienability dilemma discussed above, the Note proposes that Congress should amend VARA to include a limited waiver of moral rights when an artist agrees with a government entity to install a work in a public space. This Note contends that such a waiver would be valuable because: (1) it would eliminate the potential for artists to bind public-owned land for the durations of the artists' lives, regardless of the public's interest in removing the artist's work; and (2) it would prevent discouraged patrons from declining to commission such works which, in turn, could lead to substantial decline in commercial opportunities for artists.

Part I of this Note discusses the origins of the doctrine of moral rights in French law, and examines the role of moral rights in American law prior to VARA. Part II analyzes the incentives leading to the United States' adoption and codification of moral rights under VARA. Part III looks at the various hurdles an artist must overcome to prevent destruction of her artwork under VARA. Part IV looks at the status of site-specific art as protected by the statute, and argues that courts must find that conceptually destroying such art by removing it from its context, even without physically harming the crafted work, constitutes a violation of VARA. This part further urges Congress to amend the statute to provide a limited waiver clause, similar to the one that already exists under VARA, to help preclude artists from enforcing their moral rights when a

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16 17 U.S.C. § 106A(d)(1)(a) (1990).

17 *See id.* § 113(d).

18 *Id.*

federal, state, or local government removes the artist's site-specific work from its context.

I. HISTORY OF THE MORAL RIGHTS DOCTRINE IN EUROPE AND THE UNITED STATES

A. ORIGINS OF MORAL RIGHTS: FRANCE AND THE *DROIT MORAL*

The concept of moral rights stems from the French *droit d'auteur* ("authorship rights"), which protect an artist's rights regarding her creations.[19] French scholars regard the authorship rights as rights founded upon the spirit of individualism and the principles of the French Revolution, the source of modern French jurisprudence.[20] Such rights are not economic, but natural and personal.[21] Accordingly, a work belongs to its creator in a way that transcends the sale of the work to a new owner.[22]

French law divides the authorship rights into two subsets of rights: *droits patrimonaux* ("patrimonial rights"), which protect an artist's pecuniary rights, and *droit moral* ("moral rights"), which protect an artist's rights in her creation even once the work has become a public commodity.[23] The patrimonial rights are analogous to American copyright law.[24] They can be transferred and sold, and expire after a specified amount of time.[25] On the other hand, moral rights are personal, un-assignable, inalienable and perpetual.[26] Moral rights derive from the notion that when an artist creates a work of art, she imbues herself—her mind, personality and spirit—into her creation.[27] In return for that gift of creativity, the artist retains a moral right for society to respect her creation.[28] The French regard moral rights as natural rights, "independent from and superior to any pecuniary interest in a work of art."[29] In fact, the French contend that an artist secures and asserts her pecuniary interest in a work by virtue of moral rights.[30]

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19 *See* DaSilva, *supra* note 10, at 437-39.

20 *Id.* at 442-43.

21 *Id.* at 437-38.

22 *See, e.g.*, LERNER & BRESLER, *supra* note 10, at 947.

23 *See* DaSilva, *supra* note 10, at 437.

24 *Id.*

25 *Id.* at 437-38.

26 *See* LERNER & BRESLER, *supra* note 10, at 947.

27 *See, e.g.*, Eric M. Brooks, Comment, *"Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 CALIF. L. REV. 1431, 1434 (1989).

28 *See* LERNER & BRESLER, *supra* note 10, at 943; DaSilva, *supra* note 10, at 446.

29 DaSilva, *supra* note 10, at 438.

30 *See id.* at 439.

1. *Codification*

Prior to the French Revolution, French law was splintered along regional lines and lacking in national uniformity.[31] As a result, the sentiment that both public and private law should be uniform and recognize the natural rights of all people, rather than just a privileged few, was a central feature of the Revolutionary Settlement.[32] Following the overthrow of the traditional birthright monarchical system and the ensuing reconstruction of France's social structure, Emperor Napoleon Bonaparte furthered a campaign to devise a codified national legal system.[33] The revolutionary Constitution of 1791 dictated that France was to have a civil code, though efforts to execute such a body of law proved unsuccessful until 1804.[34] Adhering to the political tone of France's Declaration of the Rights of Man of 1789,[35] the drafters of the Civil Code worked towards the goal of codifying the "universal, unchanging law that is the source of all positive law; [that is] the natural reason that governs all peoples of the world."[36] The Civil, or Napoleonic, Code thus laid the foundation for a legal system reliant upon such theories of natural law.[37]

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31 *See* RENE DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 7 (Michael Kindred trans., 1972).

32 *See* DAVID POLLARD, SOURCEBOOK ON FRENCH LAW ix (1996).

33 *See id.*

34 DAVID, *supra* note 31, at 12.

35 The Declaration of the Rights of Man of 1789 was the first of a series of written constitutions in France. *See* POLLARD, *supra* note 32. Seeking to embody the fundamental rights of man, the document states in part in its opening sentence:

> The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of all public calamities, and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all members of the Social Body, shall remind them continually of their rights and duties . . .

DECLARATION OF THE RIGHTS OF MAN (1789) *reprinted in* POLLARD, *supra* note 32, at 33-35. For translation, see www.barvennon.com/~liberty/Declaration_of_rights_of_man.html (n.d).

36 DAVID, *supra* note 27, at 14 n.13 (quoting Article I of the draft of the Civil Code).

37 Interestingly, the French Civil Code of 1804 emphasized the unconditional nature of the individual's private rights of property. That concept, initially grounded in the Declaration of the Rights of Man (1789), discussed *supra* note 35, marked the new era of the triumph of individualism over absolutism. *See* VINDING KRUSE, THE RIGHT OF PROPERTY 7 (1939). Specifically, the French Civil Code of 1804 stated: "The right of property is the right to enjoy and dispose of objects in the most absolute manner provided the owner does not exercise his use in a manner prohibited by law or ordinance." *See id.* (citing the French Civil Code, art. 544 (1804)). Therefore, it is not surprising that the doctrine of moral rights did not emerge in the post-revolutionary climate. *See supra* note 34 and accompanying text. Yet, at the same time, one would suppose that, since the Civil Code also emphasized natural law, the moral rights doctrine—which is grounded in natural law—would have emerged as an exception to property rights. But France did not take that next step until nearly a century later. *See infra* note 39.

Among the laws that the French enacted during the radical post-revolutionary period was the *loi du 19-24 juillet 1793* (law of July 19-24, 1793), a pioneering copyright law that articulated the patrimonial rights.[38] Moral rights were not codified in that statute, but instead emerged from judicially created doctrines dating back to the late nineteenth century.[39]

In the middle of the twentieth century, the French soldered together the natural and pecuniary rights of an author in her creative work when it codified moral rights and patrimonial rights in the *loi du 11 mars 1957* (Law of March 11, 1957).[40] While that law has since been repealed and replaced by the *Code De La Propriete Intellectuelle,*[41] ("Intellectual Property Code"), the latter law does not alter the moral rights doctrine as codified in the 1957 Law.[42] In its opening sentence, the 1957 Law captured the essence of the natural right concept of authorship rights: "The author of a work of the spirit enjoys in that work, by sole virtue of its creation, a right of incorporeal property, exclusive and opposable against all."[43] Under that statute, moral rights were "perpetual, inalienable, and imperscriptible."[44]

The *droit a la paternite* ("right of attribution") and the *droit au respect de l'oeuvre* ("right of integrity") are moral rights that were codified in the same clause of article 6 of the 1957 Law.[45] Those rights are the most important of moral rights.[46] They are the two rights consistently

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38 COLLECTION COMPLETE DES LOIS 29-32 (J.B. Duvergier ed., Paris, Guyot et Scribe, Libraires-Editeurs 2d ed. 1834). The Law of July 19-24, 1793 offered a prototype for copyright legislation around the world. Specifically, the French parliament enacted the law to balance the author's pecuniary interest in her work and of the public's interest in accessing creative works. Accordingly, the law gave authors the exclusive right to reproduction for a limited period of time. *See* MAKEEN FOUAD MAKEEN, COPYRIGHT IN A GLOBAL INFORMATION SOCIETY: THE SCOPE OF COPYRIGHT PROTECTION UNDER INTERNATIONAL, U.S., U.K., AND FRENCH LAW 9 (2000).

39 *See* LERNER & BRESLER, *supra* note 10, at 947 (stating that moral rights were first recognized in 1874).

40 Loi du 11 mars 1957 sur la propriete litteraire artistique, 1957, J. O., *translated in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1976) [hereinafter 1957 Law].

41 Title II, Ch. Ier, Art. L. 121-1aL, 121-9 (Fr.) [hereinafter I.P. Code].

42 ANDRÉ LUCAS & ROBERT PLAISANT, *France, in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 1(1) (Paul Edward Geller & Melville B. Nimmer eds., 2000).

43 *Id.* at art. 1, ¶ 1.

44 *Id.* at art. 6.

45 *Id.* at art. 6, ¶ 1. The relevant clause in article 6 states: "The author enjoys the right to have his name, his status as author, and his work respected." *Id.*

46 Under the French *droit moral*, two rights in addition to the right of attribution and the right of integrity are traditionally reserved for the artist when she creates a work: the *droit de divulgation* (right of disclosure/publication), and the *droit de retrait ou de repentir* (right to withdraw work from publication or right to make modification after publication). *See* LERNER & BRESLER, *supra* note 10, at 945-46.

recognized by numerous countries around the world,[47] embodied in international copyright law,[48] and codified under VARA.[49] The French right of attribution is comprised of three rights:

> First, an author has a right to be recognized by name as the author of his work. Second, the author has a right to prevent his work from being attributed to someone else. And, third, the author has a right to prevent his name from being used on works which he did not in fact create.[50]

The French right of integrity is considered to be the most essential part of the moral rights doctrine.[51] It grants the artist the power to protect her work from intentional mutilation, distortion, or destruction.[52]

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47 *See generally* Hubert Best, *Survey*, *in* MORAL RIGHTS 241-82 (Cees van Rij & Hubert Best eds., 1995).

48 *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886 (amended July 24, 1971), Article 6*bis*, *reprinted in* WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (1978) [hereinafter Berne Convention].

49 *See* 17 U.S.C. § 106A. Section 106A provides in relevant part:

a) Rights of attribution and integrity— . . . [t]he 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) subject to the limitations set forth in section 113(d), 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.

50 *See* DaSilva, *supra* note 10, at 460.

51 *Id.* at 464 ("[The right of integrity] is considered by virtually all scholars to be the most essential part of droit moral.").

52 However, there has been considerable debate over whether the French moral rights doctrine allows artists to prevent the *complete* destruction of their works. *See, e.g.*, Lacasse et Welcome v. Abbe Quenard, CA Paris, Apr. 27, 1934, D.P. II, 385 *discussed in* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1034 (finding no violation of artist's moral rights when artwork was completely destroyed). *See also* Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 100 (1997) ("'[T]he right to prevent destruction' . . . [is] a right that remains quite controversial in Europe. . . [T]he right of integrity as construed in most civil law countries [is a right which] arguably provides no protection against complete destruction of the work."); LERNER & BRESLER, *supra* note 10, at 947 (noting that French *droit au respect de l'oeuvre* does not explicitly protect against complete destruction of artwork). *But see* Damich, *supra* note 9, at 1742 ("The [French] right of integrity also includes a prohibition against . . . complete destruction;" citing *Le Salon d'Ete de Jean Dubuffet*, SOCIETE DE LA PROPRIETE

Today, the moral rights doctrine is codified in the Intellectual Property Code.[53] Enacted in 1992, that code, like the 1957 Law, codifies economic rights along with moral rights in a single statute. The Intellectual Property Code clearly considers moral rights an exception to property rights:

> The author of a work of the mind shall enjoy in that work, by mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons. This right shall include attributes of an intellectual and moral nature as also attributes of an economic nature . . . The incorporeal property right . . . shall be independent of any property right in the physical object.[54]

2. *Case law*

French courts have tested the breadth of the right of integrity in a number of cases. Generally, the case law suggests that the threat of physical destruction of the actual artwork is not required. The change of context—or decontextualization—resulting in the conceptual destruction is enough for the artist to assert her moral rights.

Perhaps most notable is the classic case of *Fersing v. Buffet*,[55] in which the Paris Court of Appeals determined that dismantling a work of art into its component pieces, and then selling the pieces as individual works, constituted a violation of the artist's right of integrity.[56] The court reasoned that the work at issue was an artistic unit, and removing one of its components from its context distorted the entire work of art.[57]

In *Fersing*, the artist Bernard Buffet had painted a composition on all sides of a refrigerator that was to be auctioned in Paris. Although the composition consisted of six panels, three on the front, one on the top, and one on either side of the refrigerator, Buffet considered the panels to

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ARTISTIQUE ET DES DESSINS ET MODELES, June-Oct. 1983, at 1, nos. 7-8, (discussing the Judgment of Mar. 16, 1983, Cass. 1e 1983 D., where the French Supreme Court recognized artist's moral right to prevent complete destruction of his artwork)); Andre Francon & Jane C. Ginsburg, *Author's Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. & ARTS 381, 382 (1985) ("The concept of destruction or mutilation extends to more than physical damage to works of the plastic arts. It denotes any nonconsensual alteration to a work of authorship. . .").

53 *See* I.P. Code, *supra* note 41.

54 I.P. Code, Titre I, Ch. Ier, Art. L. 11-1 a. L. 111-3.

55 CA Paris, May 30, 1962, D. Jur. 1962, 570; Cass. chs. exprops., 6 juillet [July 6], 1965, Gaz. Pal. 1965, 2, pan. jurispr. 126, *construed in* Merryman, *supra* note 52, at 1023.

56 *Id. See* Merryman, *supra* note 52, at 1027; DaSilva, *supra* note 10, at 465.

57 *See* Merryman, *supra* note 52, at 1027.

exist together as one painting.[58] Six months after the refrigerator was auctioned, a catalog for another auction listed a "Still Life With Fruits" by Bernard Buffet, described as a painting on metal.[59] It became clear that the owner of the refrigerator dismantled it and proposed to sell each panel as an individual artwork.[60] Buffet protested the sale, contending that the refrigerator was a single indivisible artwork.[61] The Paris Court of Appeals held that the sale of each panel as a separate work was prohibited as a violation of Buffet's right of integrity.[62] This decision was affirmed.[63]

The disposition in *Fersing* demonstrates that the French consider the decontextualization of an artwork to constitute a violation of an artist's expression of her personality. That is, this decontextualization adversely affects the artist's reputation and honor, thereby impairing her legally protected integrity interest.[64]

In another case addressing the decontextualization of a work, a French court ruled that Twentieth Century Fox violated a group of Russian composers' moral rights when it used their compositions in a film containing themes that were offensive to them.[65] Specifically, the court found that the production company infringed upon the artists' rights of integrity when it injected the music into an unintended context.[66]

French courts have also found that altering the context of a work by adding or subtracting artistic elements constitutes a violation of the artist's integrity right. In *Léger v. Reunion des Theatres Lyriques Nationaux*,[67] the court found that a theatre violated the artist Leger's moral rights when it omitted, without the artist's consent, certain stage settings from the context of a group of settings that the artist designed for an opera.[68] Similarly, in a case involving reproductions of Henri Rousseau paintings, a French court found that the "different colors and altered images" employed in the reproductions violated the artist's right of integrity.[69] More recently, in the case of *The Asphalt Jungle*, a French court

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58 *Id.* at 1023.

59 *Id.*

60 *Id.* at 1023 n.1.

61 *Id.*

62 *Id.* at 1023, 1027.

63 *See* DaSilva, *supra* note 10, at 465.

64 *See* Merryman, *supra* note 52, at 1027.

65 Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox American Twentieth Century, CA Paris, Jan. 13, 1953, Gaz. Pal. 1954, 2, pan. jurispr., *construed in* DaSilva, *supra* note 10, at 435-36.

66 *See id.*

67 Tribunal civil de la Seine, 1955, 6 R.I.D.A. 146, *construed in* Merryman, *supra* note 52, at 1029-30.

68 *See* Merryman, *supra* note 52, at 1029-30.

69 Bernard-Rousseau v. Soc. des Galeries Lafayette, T.G.I. Paris, Mar. 13, 1973, 48 J.C.P. 224, *construed in* Merryman, *supra* note 52, at 1030-31.

found that colorizing a movie when the filmmakers intended for it to be shown in black and white, violated the artists' moral right of integrity.[70] French courts also have found violations of the integrity right when decorative elements surrounding a photograph were eliminated,[71] when a drawing was mutilated by the addition of colors and the omission of certain parts,[72] and when constructions were added to a group of architectural structures.[73]

Further, French case law suggests that removing a work from its original location, distorting it, and then relocating the damaged work for display in a new context, unintended by the artist, constitutes a violation of the artist's integrity right. For example, when a city council removed an artist's site-specific sculpture from its context, broke it up and used its pieces to fill holes in the road, the court found that the destruction violated the artist's integrity right.[74]

B. MORAL RIGHTS IN THE UNITED STATES

1. *A History of Reticence*

Although efforts to enact federal moral rights legislation date back to 1979,[75] the United States has traditionally resisted the idea of granting artists such rights despite the fact that nearly seventy countries around the world formally recognized moral rights.[76] Such reticence stemmed from concern that natural, or "personality," rights conflicted with American common law, which traditionally took a commercial approach to the process of creating art.[77]

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70 Versailles, ch. réuns., 19 Dec. 1994, R.I.D.A. 1995, no. 164, 389, *noted in* LUCAS & PLAISANT, *supra* note 42, § 7[1][c][ii], FRA-101.

71 TGI Paris 1e ch., 26 June 1985, D. 1986, inf. rap. 184, obs. Colombet, *noted in* LUCAS & PLAISANT, *supra* note 42, § 7[1][c][ii], FRA-99.

72 Paris 4e ch., 31 Oct. 1988, C.D.A. Apr. 1989, 22, *noted in* LUCAS & PLAISANT, *supra* note 42, § 7[1][c][ii], FRA-99.

73 Riom, 26 May 1966, J.C.P. 1967, II, 15183, note Boursigot, *noted in* LUCAS & PLAISANT, *supra* note 42, § 7[1][c][ii], FRA-99.

74 *See* Sudre v. Commune de Baixas, Conseil d'Etat, 1936, D.P. III, 57, *construed in* Merryman, *supra* note 52, at 1034.

75 *See* H.R. REP. NO. 101-514, at 8 (1990) (referring to prior proposed legislation addressing moral rights, as follows: H.R. 288, 96th Cong., 125 CONG. REC. 164 (1979); H.R. 2908, 97th Cong., 127 CONG. REC. H5691 (1981); H.R. 1521, 98th Cong., 129 CONG. REC. 2414 (1983); S.2796, 99th Cong., 132 CONG. REC. S12, 185 (daily ed. Sept. 9, 1986); S. 1619, 100th Cong., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987)). FINAL REPORT OF THE REGISTER OF COPYRIGHTS, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS 6 n.21. (1996) [hereinafter WAIVER REPORT].

76 *Moral Rights In Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary,* 101st Cong. 19, 76 (1989) (statement of Sen. Kennedy) [hereinafter *Moral Rights Hearings*].

77 *See* Nemschoff, *supra* note 14, at 166.

Specifically, recognition of a moral right to control the use of chattel after transfer or sale contradicted common law property notions of free alienability and absolute ownership against the world. While copyright law may have a similar effect of carving out an exception to ownership rights, it does so to bolster pecuniary gain. That is, copyright law balances the author's interest in profiting from her creations with the public's interest in accessing the works.[78] The result is that society as a whole benefits from the access.[79] Moral rights, on the other hand, function to protect personality, as opposed to financial interests, and do not so readily benefit the public. This is particularly so if the public's interests oppose the artist's interests, as when, for example, the location of a sculpture prevents a community from installing a playground or benches, thereby inhibiting outside play and communal gathering.

The United States has refused to recognize an exception to an art owner's property rights when the artist had not contracted to retain post-sale rights.[80] While moral rights generally carve out an exception to the property rights of the owner of the artwork by allowing the artist to prevent the property from being physically violated without the owner having bargained for that right, artists in the United States traditionally have had to contract to prevent the owner from disposing of her property as she wishes.[81]

Additional resistance to moral rights legislation stemmed from concern that it might "depress the healthy American art market" by discouraging patrons from commissioning works by contemporary artists,[82] and by causing the number of copyrighted works to decline.[83] Also, opponents to this legislation maintained that existing law such as common law contract, defamation, libel, right of publicity, right to privacy, and certain federal statutes such as the Federal Copyright[84] and the Trademark Act of 1946 (Lanham Trade-Mark Act)[85] adequately protected the artist's interest in attribution and integrity.[86] Some feared that federal moral rights

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78 *See, e.g., Moral Rights Hearings, supra* note 76, at 2 (statement of Sen. DeConcini).

79 *See, e.g.*, LERNER & BRESSLER, *supra* note 10, at 950.

80 *See* Gerald Dworkin, *Moral Rights in Common Law Countries, in* MORAL RIGHTS 37, 40 (1995); DaSilva, *supra* note 10, at 438 ("It is no longer uncommon in this country, moreover, to find [rights similar to moral] rights secured by artists by contract."); *Moral Rights Hearings, supra* note 76, at 19 (statement of Sen. Hatch) ("I must also mention my concern about the imposition of moral rights concepts by federal statute rather than through the bargaining of the parties to the transaction.").

81 *See* Dworkin, *supra* note 80, at 40.

82 *Moral Rights Hearings, supra* note 76, at 19 (statement of Sen. Hatch) (relaying some popular concerns regarding moral rights legislation).

83 *See id.* at 77 (statement of Sen. Hatch).

84 17 U.S.C. §§ 101-810 (2000).

85 15 U.S.C. §§ 1051-1127 (2000).

86 *See The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyright and Trademarks of the Senate Comm. on the Judiciary,* 100th Cong. 65-6

legislation might even preempt the growth of state law by borrowing portions of certain common law doctrines and leaving the remaining, or un-federalized, portion of the common law doctrines in an uncertain state.[87]

While legislatures and courts were traditionally reticent to try to reconcile moral rights with existing American law, many artists and politicians attempted to introduce the concept into the United States via court cases and lobbying. Although some state legislatures did eventually mandate moral rights by codifying the rights of attribution and integrity, state and federal courts have traditionally refused to recognize the doctrine.[88]

(1988) [hereinafter *Berne Convention Hearings*] (Carlos J. Moorhead, Chairman, Subcomm. on Courts and Intellectual Prop.) (supporting adherence to Berne Convention with explanation of how compliance could be achieved without adopting the moral rights doctrine).

87 *See id.* at 46 (statement of Rep. Robert Kastenmeier, Wis.).

88 In the late 1970s, states independently began to respond to artists' needs for rights distinct from the economic rights of their works' owners. Two separate approaches emerged, with California pioneering the Preservation Act in 1979, see CAL. CIV. CODE § 987 (West Supp. 1999), and New York introducing the Artists' Rights Act in 1984, see N.Y. ARTS & CULT. AFF. LAW §§ 14.01 *et seq.* (McKinney 1999). The California approach aims at preserving works of art for the public good and out of respect for the artist's moral rights. This is a preservationist approach. *See* CAL. CIV. CODE § 987. The New York approach aims at protecting the artist's reputation and can be invoked only if there is evidence that the artist's reputation had been damaged in the course of public display. This is an artist's rights approach. *See* N.Y. ARTS & CULT. AFF. LAW §§ 14.01 *et seq.* While the California Preservation Act, and similar state preservationist statutes, is primarily aimed at preserving the artwork, the New York Act aims at preventing damage to the artist's reputation. What resulted were two camps of state statutes with some states legislating preservation acts and others legislating artists' rights acts.

The California Preservation Act seeks to preserve works of art for the benefit of society and protect the artist's moral rights. The Act legislates the moral rights of attribution and integrity by prohibiting the defacement, mutilation, alteration or destruction of a work, and mandating that the artist has a right to claim authorship of her work. These rights may be waived in a written agreement. One exception to those rights arises when an artist installs her work in a building in a manner that renders destruction inevitable in the event that the building owner decides to remove the work. If the owner wants to remove an installed work, and she can do so without damaging the work, she must notify the artist of her intention, and give the artist an opportunity to remove the work, in order to avoid liability. *See* CAL. CIV. CODE §§ 987(c) and (d). But if the work cannot be removed without damage or destruction, the statute dictates that moral rights are waived unless the parties have contracted otherwise. *Id.* Contrary to the artists' rights statutes, the California Preservation Act does not require that the owner publicly display the damaged artwork for an artist to assert her moral rights. In fact, threat to the artist's reputation is not necessary, as simply damaging the artwork constitutes a violation under the California Preservation Act.

Like California, Connecticut, CONN. GEN. STAT. ANN. § 42-116s – 42-116t (West 1999), Massachusetts, MASS. GEN. LAWS. ANN. ch. 231, § 855 (West Supp. 1999), and Pennsylvania, Pa. Stat. Ann. tit. 73, §§ 2101-2110 (Purdon Supp. 1999) have enacted preservation statutes that protect artists' moral rights of integrity and attribution and aim at preserving the artwork. *See* WAIVER REPORT, *supra* note 75, at 12.

The New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW §§ 14.01 *et seq.*, (New York Act) prohibits the knowing display of an artwork in an "altered, defaced, mutilated, or modified form." *Id.* The New York Act also provides for the right of attribution.

2. *Judicial Determination of the Doctrine*

Meliodon v. School District of Philadelphia[89] is an early example of a court's resistance to preserving the integrity of an artwork at the expense of the owner's autonomy over her property. In that case, decided in 1938, an artist sought equitable relief from a Philadelphia school district when the district altered sculptures it had commissioned the artist to design.[90] The artist sought an injunction directing the school district to tear down the altered sculptures and permit the artist to replace the works at the school district's expense.[91] The Pennsylvania Supreme Court dismissed the artist's bill in equity and denied his request for an injunction.[92] The court denied the relief because the school district, not the artist, owned the artwork and at that time American law did not recognize a moral rights exception to the art owners' complete autonomy over her work.[93]

In *Shostakovich v. Twentieth Century-Fox Film Corporation,*[94] decided in 1948, a New York court refused to recognize that placing a work in an unintended context, and thereby misrepresenting the underlying meaning of the art, constituted a violation of the artist's rights. In *Shostakovich,* a group of composers asserted that a movie studio violated its moral rights when the studio used the plaintiffs' musical compositions as background music in the film "The Iron Curtain," which depicts acts of espionage in Canada attributed to representatives of the Union of Soviet Socialist Republic.[95] Although they had not copyrighted their work, the plaintiffs, who were internationally renowned and who were citizens of the U.S.S.R., objected to the unauthorized use of their music and the use of their names in the credit lines of the film.[96] They contended that the use of their music and their names wrongfully implied that they supported the film's anti-Soviet theme, and thereby cast upon them "'the false imputation of being disloyal to their country.'"[97] They therefore

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See id. Since the New York Act aims primarily at protecting the artist's reputation, it does not guard against complete destruction. States that have enacted artists' rights statutes similar to the New York Act include, Louisiana, LA. REV. STAT. ANN. §§ 51:2151-2156 (Purdon West 1999), Maine, ME. REV. STAT. ANN. tit. 27, § 303 (West 1999), New Jersey, N.J. STAT. ANN. §§ 2A:24A-1 – 2A:24A-8 (West 1999), and Rhode Island, R.I. GEN. LAWS. §§ 5-62-2 - 5-62-6 (Michie 1994).

89 195 A. 905 (Sup. Ct. Pa. 1938).

90 *Id.* at 905.

91 *Id.* at 906.

92 *Id.*

93 *Id.* The court noted in dicta that although the artist was not entitled to equitable relief, he was certainly entitled to commence an action in tort against the superintendent of the Board of Education, at whose direction the alterations had taken place. *Id.* at 905.

94 80 N.Y.S.2d 575 (Sup. Ct. 1948).

95 *Id.* at 576-77.

96 *Id.*

97 *Id.* at 578.

asserted that the use of their work and names in an objectionable context violated their moral rights.[98] The court rejected that theory on grounds that the moral rights doctrine was not recognized in the United States.[99] Denying relief, the court stated:

> The application of the doctrine presents much difficulty. . . With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated . . . In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.[100]

Accordingly, the court dismissed the case because the plaintiffs had not established a valid cause of action.[101]

In the 1947 case *Vargas v. Esquire*,[102] the Seventh Circuit refused to recognize the moral right of attribution. In that case, the artist Vargas entered into an agreement with Esquire Magazine, by which Esquire employed Vargas to produce artwork for the magazine and for a calendar published by the magazine.[103] While the artwork – a series of individual pictures – initially bore the name "Vargas," the parties agreed to change the name to "Varga," and the pictures were later published with the words "Varga Girls."[104] However, after Vargas cancelled his contract with Esquire, the company published his pictures with the words "The Esquire Girl" on each without attributing the work to Vargas.[105] Although Esquire had paid for the pictures, Vargas asserted that the company had a duty to credit Vargas as the author of the work.[106] The Seventh Circuit contended that since the contract explicitly stated that the pictures and the names "Varga," "Varga Girl," and "Varga Esq." be-

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98 *Id.* at 577.

99 *Id.* at 579.

100 *Id.* at 578-79.

101 *Id.* After being denied relief in New York, Plaintiffs filed a case in a French court, alleging the same facts and legal theories, and won. *See* Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox American Twentieth Century, CA Paris, Jan. 13, 1953, Gaz. Pal. 1954, 2, pan. jurispr., *construed in* DaSilva, *supra* note 10, at 435-36 (discussing the disparity in ways the American court and the French court handled the same case).

102 164 F.2d 522 (7th Cir. 1947).

103 *Id.* at 523.

104 *See id.* at 523-24.

105 *See id.* at 524.

106 *Id.*

longed exclusively to Esquire, Vargas "divested himself of every vestige of title and ownership of the pictures, as well as the right to their possession, control and use."[107] Accordingly, the court found in favor of the magazine.[108] In so ruling, the court rejected the artist's theory that his moral right to attribution had been violated. The court stated that such rights did not exist in the United States and that it would not "make any new law in this respect."[109]

Two years after *Vargas*, the New York State Supreme Court employed similar reasoning when it refused to find that the complete destruction of an artwork violated the artist's moral rights. In *Crimi v. Rutgers Presbytarian Church in the City of New York*,[110] artist Alfred Crimi brought an action against Rutgers Presbytarian Church after it painted over a fresco that it had commissioned Crimi to paint several years earlier.[111] Although the contract regarding the project designated the church as "Owner" and Crimi as "Artist," assigned copyright to the church, and specifically provided that the fresco would become part of the church building as soon as it was affixed to the chancel wall, Crimi maintained that the obliteration of his work constituted a breach of custom and usage and violated his continued limited proprietary interest in the work to the extent necessary to protect his "honor and reputation as an artist."[112] Along with that right, Crimi asserted, came the right to prevent his work from being destroyed, mutilated, obliterated or altered.[113]

Considering whether Crimi had any continued interest in the fresco, the court addressed the European moral rights doctrine.[114] The court determined that the complete destruction of Crimi's work, as opposed to mere distortion, would not give the artist a right under the doctrine. Analogizing the case to the French case *Lacasse et Welcome v. Abbe Quenard*,[115] the court noted that the prevailing sentiment was that an artist cannot prevent the complete destruction of her work since such disposal would not compromise her honor or reputation.[116] The court further reasoned that even if Crimi could claim his moral rights had been

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107 *Id.* at 525.

108 *Id.* at 525-26.

109 *Id.*

110 89 N.Y.S.2d 813 (Sup. Ct. 1949).

111 *Id.* at 815.

112 *Id.* at 815-16.

113 *Id.* at 816.

114 *Id.* at 816-18.

115 CA Paris, Apr. 27, 1934, D.P. II, 1934, 385, *construed in* Merryman, *supra* note 52, at 1034. In *Lacasse et Welcome*, the Paris Court of Appeals ruled that the artist could not prevent the church owner from destroying the artist's fresco because total destruction would not threaten the artist's reputation. *Id.*

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

violated under the civil law doctrine, that doctrine was not recognized in the United States.[117] Denying relief, the court stated: "The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract with the church."[118]

By the mid-seventies, the Second Circuit in *Gilliam v. American Broadcasting Cos.*[119] suggested that an American court might be willing to accept the doctrine. In that 1976 case, a group of British comedic actors known as Monty Python sought to preliminarily enjoin the American Broadcasting Company from airing edited versions of three programs originally written and performed by the group for the British Broadcasting Company.[120] The actors contended that the editing impaired the integrity of their work by mutilating it, and they sought redress from the alleged deformation.[121]

Monty Python claimed that the editing and subsequent broadcast of the altered works violated Section 43(a) of the Lanham Act,[122] 15 U.S.C. § 1125(a). They claimed that, although the Act dealt with trademark, it could be invoked to prevent misrepresentations that might injure one's business or personal reputation even where no trademark is involved.[123] The court agreed with the artists, holding that "an allegation that a defendant has presented to the public a 'garbled,' distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act . . . and should be recognized as stating a cause of action under that statute."[124]

The court in *Gilliam* noted that American copyright law did not recognize moral rights because copyright seeks only to vindicate economic rights.[125] Still, the court emphasized, "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."[126] In noting the integral relationship between public perception of an artist and an artist's financial gain, the court highlighted a loophole in traditional construction of copyright law. Specifically, the court pointed to how failure to prevent the physical disruption of a work could negate the purpose of copyright pro-

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117 *Id.* at 818.
118 *Id.* at 819.
119 538 F.2d 14 (2d Cir. 1976).
120 *Id.* at 17.
121 *Id.* at 24.
122 15 U.S.C. §§ 1051-1127 (2000).
123 *See Gilliam*, 538 F.2d at 24.
124 *Id.* (citations omitted).
125 *Id.*
126 *Id.* (citations omitted).

tection altogether by diminishing an artist's profit potential and reducing incentive to create further.[127] In recognizing the importance of ensuring such protection, the court in *Gilliam* opened a potential channel for artists to assert moral rights under American law.

Despite the *Gilliam* ruling, in 1987 the Southern District of New York ruled in *Serra v. United States*[128] that an artist had no cause of action when the federal government removed commissioned site-specific artwork from its context. The Second Circuit later affirmed.[129] In 1979 the General Services Administration of the Federal Government (GSA) commissioned Richard Serra to create a sculpture for 26 Federal Plaza at Foley Square in Manhattan.[130] Serra installed his sculpture, *Tilted Arc*, in 1981.[131] The 120'x 12' slab of curved Cor-Ten steel that bisected the plaza was "conceived and created in relation to the particular conditions of a specific site."[132] Serra contended that the work was "artistically inseparable" from the Federal Plaza, and thus that its removal would destroy it.[133] When the GSA decided to remove and relocate *Tilted Arc* in response to the public's distaste for the work, Serra filed a suit against GSA and its administrators.[134] He protested the removal on the grounds that it would constitute a breach of contract, an infringement of his copyright and trademark rights, a violation of his moral rights under state law, and a violation of his free speech and due process rights under the First and Fifth Amendments.[135] The district court dismissed Serra's case against the GSA administrators in their individual capacities on the basis of qualified immunity.[136] In a later opinion, the district court dismissed some of Serra's remaining claims for lack of subject matter jurisdiction and ruled that the constitutional claims lacked merit.[137] Affirming, the Second Circuit noted with regards to the free speech claim:

> Notwithstanding that the sculpture is site-specific and may lose its artistic value if relocated, Serra is free to express his artistic and political views through the press

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127 *Gilliam*, 538 F.2d at 26 ("[T]he economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.") (citations omitted).

128 Serra v. United States Gen. Servs. Admin., 664 F. Supp. 798 (S.D.N.Y. 1987) [Serra I], *dismissed in part*, 667 F. Supp. 1042 (S.D.N.Y. 1987) [Serra II].

129 Serra v. United States Gen. Servs. Admin., 847 F.2d 1045 (2d Cir. 1988) [Serra III].

130 *Id.* at 1046-47.

131 *Id.* at 1047.

132 *Id.* (quoting Richard Serra).

133 *Id.*

134 *Id.* at 1048.

135 *See* Serra I, 664 F. Supp. at 801-02.

136 *Id.* at 807.

137 Serra II, 667 F. Supp. at 1057.

> and through other means that do not entail obstructing the plaza.[138]

And regarding Serra's due process claim, the court wrote:

> Moreover, though Serra might suffer injury to his reputation as a result of relocation of the sculpture, such an injury without accompanying loss of government employment would not constitute a constitutionally cognizable deprivation of property or liberty.[139]

Ultimately, the GSA removed *Tilted Arc* in March 1989, hauling the crafted material to "a federal motor pool yard."[140] The work effectively ceased to exist.

Serra's lawyers advised him not to assert a moral rights claim because such rights were not recognized under American law at the time.[141] However, if moral rights legislation had existed, the circuit court's statements, particularly the ones noted above, indicate that the court may have been receptive to a claim that removing a site-specific work from its context constitutes destruction in violation of an artist's integrity right.

II. THE UNITED STATES' STATUTORY APPROACH TO MORAL RIGHTS: THE VISUAL ARTISTS RIGHTS ACT OF 1990

A. LEGISLATIVE HISTORY OF VARA

Despite Congress' resistance to the moral rights doctrine, on March 1, 1989, the United States became a member of the international Berne Convention for the Protection of Literary and Artistic Works.[142] The Berne Convention explicitly recognizes the moral rights of attribution and integrity in Article 6bis.[143] The United States' decision to join the Berne Convention was influenced by the fact that, at the time, seventy-

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138 Serra III, 847 F.2d at 1050.

139 *Id.* at 1052.

140 *See* S.F. CHRON., Mar. 17, 1989, at E3 col. 1.

141 N.Y. TIMES, Mar. 16, 1989, at B2 col. 6.

142 *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

143 *See* Berne Convention, *supra* note 48. Article 6bis of the Berne Convention states in relevant part:

> 6bis.1. This Article, introduced into the Convention in Rome (1928), is an important provision since it underlines that, in addition to any pecuniary or economic benefits, copyright also includes rights of a moral kind. These stem from the fact that the work is a reflection of the personality of its creator, just as the economic rights reflect the author's need to keep body and soul together.
>
> 6bis.3. This provision enshrines two of the author's prerogatives: first and foremost, to claim the paternity of his work—to assert that he is its creator. Usually he does so by placing his name of the copies (title pages or fly leaves, Film subtitles, signatures on pictures, sculpture). This right of paternity may be exercised by the author as he wishes . . . Under it, an author may refuse to have his name applied to a work that is

six countries around the world were signatories,[144] and some legislators believed that joining the Convention would enhance international protection of intellectual property by encouraging consensus on the rules of authors' rights between the United States and its global trading and cultural partners.[145] Congressional supporters also anticipated that joining the Convention would ensure the United States' leadership in international trade and avoid copyright piracy of valuable United States innovations and export commodities.[146]

Congress mitigated concerns about the Convention's moral rights provisions by adopting a "minimalist" approach to Berne.[147] That is, Congress maintained that the Berne Convention was not "self-executing" and that "[t]he obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law."[148] Further, Congress justified its refusal to amend the Copyright Act to comply with the Convention's moral rights provisions by noting that varying United States laws already provided moral rights protection.[149] For additional support, Congress referred to comments published by the World Intellectual Property Organization, the Convention's administrative entity, which suggested flexibility in complying with the treaty's moral rights provisions.[150] Thus, the United States entered the Berne Convention, and amended the Copyright Act accordingly, without en-

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> not his; nor can anyone filch the name of another by adding it to a work the latter never created . . .
>
> 6bis.4. The second prerogative is that of objecting to any distortion, mutilation or other modification of, or other derogatory action in relation to the work which would be prejudicial to the author's honor or reputation . . .
>
> 6bis.6. Note that the moral right exists "independently from the author's economic rights" and even "after transfer of the said rights." This protects the author against himself and stops entrepreneurs from turning the moral right into an immoral one.

Id. at 41-42.

144 *Berne Convention Hearings, supra* note 86, at 41 (statement of Sen. Hatch).

145 *Id.* at 50-51 (statement of Rep. Kastenmeier).

146 *See id.* at 50-51, 67, 70 (statements of Reps. Kastenmeier and Moorhead, and Sen. Verity). According to Sen. Verity:

> All over the world people enjoy our music, our movies, our videos, and our books and magazines. They run their computers with our software. With these items, we export not just our goods, but a large bit of our national character as well.
>
> But much of this is in jeopardy. Piracy remains a problem costing us well over $1 billion annually. Compulsory licensing or other forms of legalized blackmail can lead to lost sales, lost markets, or loss of our technological edge.

Id. at 70.

147 *See* Gerald Dworkin, *Moral Rights in Common Law Countries, in* MORAL RIGHTS, *supra* note 14, at 44 ("[I]n framing the Berne Convention Implementation Act of 1988, the dominating theme was a 'minimalist' approach: no changes would be made to United States copyright law unless deemed to be absolutely necessary in order to comply with the Berne Convention obligations.").

148 Berne Convention Implementation Act, *supra* note 142, § 2.

149 *See* Damich, *supra* note 9, at 945 (citing H.R. REP. NO. 100-609, at 38 (1988)).

150 *Id.* at 945-46.

larging or diminishing the rights that were already protected by state and federal laws.[151]

But, as those who opposed joining Berne had anticipated, ratifying the treaty created fertile soil for the planting of American moral rights law. A number of artists, politicians, and legal scholars disagreed that existing law sufficiently protected moral rights, and petitioned Congress to enact moral rights legislation.[152] Additional encouragement for change came from the United Kingdom which, motivated by an effort to comply with the Berne Convention, amended its copyright law to explicitly provide moral rights protection.[153]

As a result, in 1989 Representative Robert Kastenmeier introduced House Bill 2690, the Visual Artists Rights Act of 1989, proposing to protect artists' moral rights, to the House of Representatives and Senator Edward Kennedy introduced a companion bill, Senate Resolution 1198, to the Senate.[154] Both bills proposed to grant the author of a work of visual art the moral rights of attribution and integrity. Both aimed to prevent individuals, including art owners, from mutilating or destroying artworks by making individuals liable for such actions.[155]

Despite earlier concerns over enacting moral rights legislation,[156] Congress had become increasingly convinced of its necessity. That was due, at least in part, to a number of art horror stories circulating at the time.[157] For example, in hearings on Senate Resolution 1198, Senator Markey recalled that two Australian entrepreneurs had chopped up Pablo Picasso's *Trois Femmes* into 500 original Picasso pieces, then sold the pieces individually.[158] Without the protection of a moral rights statute, the seminal cubist work was "brutally mutilated," and the artist's name was "exploited for the financial gain of the two profiteers."[159] One attorney testifying before the Senate subcommittee recounted a case in which an artist had installed certain murals near a construction site and construction workers cut the murals up, used some of the pieces as gates,

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151 *See* Berne Convention Implementation Act, *supra* note 142, § 2.; *see also Berne Convention Hearings*, *supra* note 86, at 41 (statement of Sen. Hatch) ("[C]urrent copyright laws and practices would not be altered now or in the future by implementation of Berne.").

152 *See* Damich, *supra* note 9, at n.5.

153 *See* Damich, *supra* note 9, at 946.

154 H.R. 2690, 101st Cong. (1989); S. 1198, 101st Cong. (1990).

155 *See* 135 CONG. REC. S. 6811 (daily ed. June 16, 1989) (statement of Sen. Kennedy).

156 *See* 135 CONG. REC. E. 2199 (daily ed. June 20, 1989) (statement of Rep. Kastenmeier) (noting that related legislation had been introduced in the past with little success).

157 *See* 135 CONG. REC. S. 6811 (daily ed. June 16, 1989) (statement of Rep. Kastenmeier) ("We have all heard the horror stories about paint being removed from sculpture, murals painted over, paintings altered. We have to commit ourselves to the fundamental premise that even when an artist has sold his work he has the moral and legal right to see the integrity of that work preserved."); *see also* WAIVER REPORT, *supra* note 75, at 6.

158 *Moral Rights Hearings*, *supra* note 76, at 25 (statement of Sen. Markey).

159 *Id.*

and piled dirt on the others.[160] Tom Van Sant, an artist and founder of the Los Angeles Mural Conservancy, recounted how one of his murals was destroyed when the building it was installed in was sold: during remodeling, the new owner tore down Van Sant's work without notifying him.[161] Stories like these convinced Congress that moral rights legislation, with provision for waiver of the rights, was necessary to protect the visual arts in America.[162] Accordingly, Congress passed House Bill 2690 and it became the Visual Artists Rights Act of 1990.[163]

B. AMENDMENT TO THE COPYRIGHT ACT TO REFLECT MORAL RIGHTS: VARA

In enacting the Visual Artists Rights Act of 1990, Congress amended the United States Copyright Act[164] to include the moral rights of attribution and integrity for artists who create certain works included in a narrowly defined category of visual art.[165] These rights, as codified

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160 *Id.* at 109 (statement of Peter H. Karlen, Attorney, La Jolla, California).

161 *See id.* at 121-22 (statement of Tom Van Sant, artist, on behalf of the Artist Equity Association, Santa Monica, California).

162 Due to concerns about the negative effect moral rights legislation would potentially have on the art market, Congress decided that such legislation could not pass unless the artist could waive her rights. *See* WAIVER REPORT, *supra* note 75, at 3. While S. 1198 did not provide for waiver, H.R. 2690, which Congress ultimately adopted, did. *Compare* S. 1198, 101st Cong. (1990) *with* H.R. 2690, 101st Cong. (1989).

163 H.R. 2690 was amended to require one joint author who waives moral rights to have waived the rights of coauthors in a joint work. *See* WAIVER REPORT, *supra* note 75, at 7. The Senate was slower to pass S. 1198. On the last day of the 101st Congress, sponsors of a major bill authorizing eighty-five new federal judgeships included the VARA proposal to appease senators who would traditionally have opposed the addition of the federal judgeships. With that compromise, the full Senate passed VARA. *See* Roberta Rosenthal Kwall, *How Fine Art Fares Post Vara*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997).

164 17 U.S.C. §§ 101-810 (2000).

165 17 U.S.C. § 101 defines a work of visual art as:

> 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 cast, 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.
>
> A work of visual art does not include—
>
> (A)(i) 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;
>
> (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
>
> (iii) any portion or part of any item described in clause (i) or (ii);
>
> (B) any work made for hire; or
>
> (C) any work not subject to copyright protection under this title.

in § 106A of the Copyright Act, endow an artist with the right to attribution, as well as the right to protect her work from being distorted, mutilated, modified and, in cases where the work is of recognized stature, destroyed by others.[166] Thus, an art owner may not use the artwork she purchased in any manner she wants, because changing it in a way that results in a misrepresentation of the artist's conception renders the owner liable under VARA.[167] As with the civil law moral rights doctrine, rights under VARA are personal to the artist and are distinct from the economic rights of the copyright holder.[168] Thus, the artist retains the rights of attribution and integrity regardless of whether or not she is the copyright holder.[169] Furthermore, the artist retains such rights even once she has sold her work to another.[170]

While in the civil law doctrine, moral rights protection lasts at least until the expiration of copyright,[171] VARA provides that an artist's moral rights only endure for the artist's life.[172] Further, in another departure from the traditional doctrine, VARA provides that an artist may waive her moral rights in a signed written instrument that specifically identifies the work covered by the waiver.[173] In addition, the artist waives her rights when she signs a written instrument consenting to install a work in a building and acknowledging that the work is installed in such a way that removing the work would cause its distortion, mutilation or destruction.[174]

Id.

166 17 U.S.C. § 106A(a)(3)(A)-(B).

167 *See* Damich, *supra* note 9, at 949 ("The right of [integrity] is the author's right to ensure that the work always authentically expresses his vision or concept."). Of course, there are limitations to this rule. For example, an artist will not have a cause of action against an art owner for hanging her painting in one corner as opposed to another. *See* 17 U.S.C. § 106A(c)(2).

168 *See Moral Rights Hearings*, *supra* note 76, at 75-76 (statement of Sen. Grassley). *See also* Kwall, *supra* note 163, at 1.

169 *See Moral Rights Hearings*, *supra* note 76, at 75-76 (statement of Sen. Grassley).

170 135 CONG. REC. S. 6811 (daily ed. July 16, 1989) (statement of Rep. Kastenmeier).

171 The international Berne Convention treaty provides that an artist shall retain moral rights, "after his death . . . at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed." Berne Convention, *supra* note 48, at art. 6*bis*, ¶ 2, 43.

172 *See* 17 U.S.C. § 106A(d)(1)-(3). Copyright protection, on the other hand, generally endures for the life of the author plus seventy years. *See id.* § 302(a).

173 *See id.* § 106A(e). Under French law, for example, moral rights cannot be waived. *See* I.P. Code, *supra* note 41, Title II Ch. Ier Art. L. 121-1 (Fr.). Most countries that recognize moral rights do not allow for waiver. *See generally* MORAL RIGHTS, *supra* note 14, at 244-85.

174 *See* 17 U.S.C. § 113(d)(1).

III. PREVENTING THE DESTRUCTION OF ARTWORK UNDER VARA: PRELIMINARY HURDLES FOR ARTISTS TO OVERCOME

A. WORK MUST NOT BE "MADE-FOR-HIRE"

Artists may rely on VARA to prevent the destruction of their work only if they create the work as independent contractors. Under the Copyright Act, "A work of visual art does not include . . . any work made for hire."[175] Accordingly, an artist creating a work within the scope of her employment does not have a right under VARA to prevent destruction of that work.

In *Carter v. Helmsley-Spear*,[176] three artists working as a collective installed a sculpture in a building lobby pursuant to an agreement with the building's then tenant.[177] This "walkthrough" sculpture consisted of recycled materials that were attached to the walls and ceiling, and a large mosaic embedded in the walls and floor.[178] Upon assuming the building lease, the building's new management company sought to remove the artists' work.[179] The artists sued, claiming that removal would destroy their artwork and thereby constitute a violation of their rights under VARA.[180] While the trial court determined that the artists had a valid claim under VARA and issued a permanent injunction enjoining the removal of the sculpture for the duration of the three artists' lifetimes,[181] the Second Circuit reversed, finding that the sculpture was a work made for hire and, therefore, not protected under VARA.[182]

Courts apply a common law agency test to determine whether an artist is an employee of her patron. A number of factors are relevant to that inquiry, including the right to control the manner and means of production; requisite skill; provision of employee benefits; tax treatment of the hired party; and whether the hired party may be assigned additional

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175 17 U.S.C. § 101. Under the statute, a work made for hire is "a work prepared by an employee within the scope of her employment." *Id.*

176 861 F. Supp. 303, 325 (S.D.N.Y. 1994) [Carter I], *rev'd and vacated in part and aff'd in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996) [Carter II].

177 *Carter II*, 71 F.3d at 80.

178 *Id.*

179 *Id.* at 81.

180 *Id.*

181 *Id.*

182 *Id.* at 85. While both the district court and the circuit court applied a multi-factor balancing test, to determine the meanings of the Copyright Act terms "employee" and "scope of employment," the circuit court determined that the district court's factual findings were clearly erroneous. *Id.* The circuit court's decision was most influenced by the fact that the original tenant afforded the artists employment benefits, a weekly salary, and particularized tax treatment, all of which "strongly" suggested an employer-employee relationship. *Id.* at 86-87.

projects.[183] If the relationship between the artist and the patron satisfies those factors, the court will deem the artist an employee ineligible to assert the right of integrity to prevent destruction under VARA.[184] However, determining whether an artist is an employee rather than an independent contractor is a fact-specific inquiry, and "future cases involving the work for hire question will not always fit neatly into an employee or independent contractor category."[185]

B. WORK MUST BE OF "RECOGNIZED STATURE"

Section 106A(a)(3)(B) of the Copyright Act provides that the author of a visual work of art has the right to "prevent any destruction of a work of recognized stature."[186] Therefore, before a court will consider whether removing the work from its site constitutes a destruction of the art in violation of VARA, the artist must show, as a threshold matter, that her work is of "recognized stature." Although VARA does not define the phrase "recognized stature," both Senate Resolution 1198 and House Bill 2690 propose that a court should 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 marketing of works of visual art."[187] The recognized stature requirement acknowledges that society could suffer a significant loss when art that is recognized by other artists, art experts, or the community at large, is completely destroyed.[188]

The district court in *Carter* set forth a two-part test to determine what constitutes an artwork of recognized stature under § 106A(a)(3)(B) of the Copyright Act.[189] First, the art in question has stature if it is viewed as "meritorious."[190] Second, the stature must be "recognized" by "art experts, other members of the artistic community, or by some cross section of society," which will generally require the artist to rely on expert testimony.[191] To make such a showing, the court explained, "[a] plaintiff need not demonstrate that his or her artwork is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti."[192]

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183 *See id.* at 85 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989), which set forth thirteen specific factors, drawn from common law agency, to consider when determining work-for-hire inquiry).

184 As was the case, for example, in *Carter*. *See Carter*, *supra* note 176.

185 *Carter II*, 71 F.3d at 87.

186 17 U.S.C. § 106A(a)(3)(B). For a compelling critique of the recognized stature requirement under VARA, *see* Kwall, *supra* note 163, at 14-15.

187 S. 1198, 101st Cong. (1990); H.R. 2690, 101st Cong. (1989).

188 *Carter I*, 861 F. Supp. at 324-25.

189 *See id.* at 325.

190 *Id.*

191 *Id.*

192 *Id.*

Site-specific artworks installed in public spaces, such as John Snyder's *Silent City,* would seem to satisfy the recognized stature requirement as interpreted by the district court in *Carter.* That is, public officials offer commissions either to already distinguished artists ("recognized by art experts, etc." prong) or to competition winners who, in the course of their victories, enjoy much publicity such that their proposed works elevate to the level of recognized stature ("meritorious" prong).[193] Thus, whether a government entity chooses an artist to design a site-specific work based on past achievement or on a competition entry does not negate the artwork's recognized stature, as an artist who wins a competition to design for a community space generally receives a great deal of publicity following her victory.

C. ARTIST MUST NOT HAVE WAIVED MORAL RIGHTS

Before an artist can assert her integrity right under VARA to prevent the destruction of her artwork, she must make sure that she does not waive her moral rights in a written contract. While most countries that recognize moral rights prohibit waiver, and would consider such a provision in a contract null and void, VARA explicitly permits artists to waive moral rights.[194] As a result, in America, patrons with leveraged bargaining power are often able to circumvent the moral rights doctrine.

There are two waiver provisions under VARA. The first waiver is codified in § 106A(e)(1) of the Copyright Act, and provides that an artist may waive moral rights if she explicitly consents to such a waiver in a written agreement that she signs.[195] The agreement must specifically identify that the waiver applies to the work, and must clearly define the use of that work.[196] The clause also notes that, with co-authored works, one author's waiver suffices to waive the moral rights of all authors.[197]

The second waiver is codified in § 113(d) of the Copyright Act, and pertains to works installed in buildings. That clause provides for a waiver of rights when an artist installs a work in a building in such a way that removing the work would physically harm it in a manner generally prohibited under VARA.[198] The waiver is only effective if: (1) the artist installed the work prior to VARA taking effect; or (2) if the artist and building owner sign a written agreement, which explicitly states that installation may subject the work to such physical harm if the owner chooses to remove the work.[199] Though, if the owner is able to remove

193 *See id.* at 325.
194 *See* 17 U.S.C. § 106A(d)(1)-(3).
195 § 106A(e)(1).
196 *Id.*
197 *Id.*
198 17 U.S.C. § 113(d)(1).
199 § 113(d)(1)(B).

the work without physically harming it, the artist retains her moral rights under VARA unless the owner makes an unsuccessful good faith attempt to notify the artist of the removal, or the owner provided notice and the artist failed to remove the work or pay for its removal within 90 days of receiving such notice.[200]

Patrons will often include a waiver-of-moral-rights clause in the written agreement that they present to artists when negotiating a commission. Generally, particularly when dealing with a government agency, the contracts are recycled standard form agreements. The alluring magnitude of such commissions combined with the considerably leveraged bargaining power of the patron often makes it difficult for artists to avoid waiving their rights in order to secure the commission.[201]

Artists who waive their moral rights in a written agreement with the art owner may not rely on the statute to prevent the destruction of their artwork. Due to concerns about the negative effect moral rights legislation could have on the art market, Congress decided that this legislation could not pass unless the artist could waive her rights.[202] To allay its concerns about reconciling non-economic moral rights with United States copyright law, Congress determined that a VARA provision that would allow artists to waive the rights of attribution and integrity would provide effective balance of moral and economic rights.[203]

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200 *Id.* § 113(d)(2).

201 Members of Congress who opposed the waiver provisions remained concerned that an imbalance in bargaining power between the artist and the commissioning party would "force authors to sign waivers of 106A rights if waiver were available, and render the grant of moral rights meaningless in the real world." WAIVER REPORT, *supra* note 75, at 27. To address that concern, upon enacting VARA, Congress mandated that the Register of Copyrights study the extent and circumstances under which artists have waived their moral rights, and submit a final report on the effects of the waiver provision no later than five years after VARA's enactment. *See* Pub. L. No. 101-650, § 608(2), 104 Stat. 5128 (1990). Accordingly, in March 1996 the Register of Copyrights issued a Final Report on the effect of the waiver provisions. *See generally id.*

In light of testimony offered by artists, art experts, scholars, and attorneys, the report concluded that the waiver contained in § 113(d) for works installed in buildings was favorable to prevent artwork from rendering real estate inalienable, but allowing for waiver for "movable works"—i.e., paintings, free-standing sculptures, etc.—may not be desirable due to artists' general unfamiliarity with VARA, and limited bargaining power making it easy for patrons to coax artists into waiving rights that they may not want to waive if they fully understood the implications of their actions. *See id.* at 158-59.

Nonetheless, the Register of Copyrights concluded that, due to inconclusive evidence on whether removing the waiver provision for movable art would strengthen artists' bargaining power, no legislative amendment to eliminate that waiver was necessary at that time. *See id.* at 190-91.

202 *See* WAIVER REPORT, *supra* note 75, at i. While S. 1198 did not provide for waiver, H.R. 2690, which Congress ultimately adopted, did.

203 *Id.* at 27.

IV. VARA AND SITE-SPECIFIC ARTWORK: STATUTORY INTERPRETATION AND A PROPOSAL FOR AMENDMENTS

A. THE AMBIGUOUS STATE OF SITE-SPECIFIC ARTWORK UNDER VARA

While VARA mandates that an artist who creates a visual work of art[204] has the moral right to prevent any intentional distortion, mutilation, modification, and, in some cases, destruction of her work, it is not clear from the statute or relevant case law whether VARA recognizes an artist's moral right to prevent her site-specific artwork from being removed without physical damage. Since site-specific artwork is designed for a particular place, it is inherently dependant on its context. Thus, site-specific art can be considered a combination of a readymade work and a crafted work: the site is the readymade work, from which the artist draws her inspiration, and upon which the artist adds a crafted material. Together, the readymade and the crafted material exist as the artwork. If the readymade site is stripped of the crafted material, the art ceases to exist—that is, it is destroyed—despite the fact that the crafted part of the piece may remain intact at another location. As discussed above, this sort of "conceptual destruction" is not explicitly contemplated by VARA. Instead, the statute only prohibits "any destruction," and does not further define what constitutes such destruction.[205] Thus, the question of whether an artist has the moral right to prevent her site-specific work from being conceptually destroyed is left to judicial interpretation of what constitutes "destruction" of an artwork. To date, courts have only applied VARA to matters involving actual physical destruction.[206]

Further complicating the issue is the fact that national, state, and local governments often commission artists to create these works for public spaces like plazas and national parks.[207] Under the moral rights doctrine, the result of these commissions is that government-owned spaces are transformed into works of art. If VARA were to give the

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204 A "visual work of art" is defined in § 101 of the Copyright Act, and includes paintings, drawings, prints, and sculptures. 17 U.S.C. § 101(1). For statutory text, *see supra* note 165.

205 17 U.S.C. § 106A(a)(3)(B) (stating that "the author of a work of visual art shall have the right . . . 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." (emphasis added)).

206 *See* Martin v. City of Indianapolis, 982 F. Supp. 625 (S.D. Ind. 1997), *modified by* 4 F. Supp. 2d 808 (S.D. Ind. 1998), *aff'd* 192 F.3d 608 (7th Cir. 1999); *Carter I*, 861 F. Supp. 303; *Carter II*, 71 F.3d 77.

207 For example, the General Services Administration of the Federal Government (GSA) commissioned sculptor Richard Serra to design a work for Foley Square in Manhattan, and architect and artist Maya Lin was commissioned to design a monument for the Mall in Washington, D.C.

artist the right to prevent the conceptual destruction of her artwork, in spite of her lack of actual ownership, the artist could constrain the use of the public-owned space. Government officials would be liable for removing the artwork even if such removal were in the public's interest. While § 113 of the Copyright Act provides for the waiver of moral rights when an artist agrees to install a work in a building,[208] the Copyright Act contains no like provision regarding the installation of site-specific art, despite suggestions offered in the course of the congressional hearings on VARA.[209]

B. COURTS MUST CONSIDER SITE-SPECIFIC ARTWORK CONCEPTUALLY DESTROYED WHEN IT IS REMOVED FROM ITS CONTEXT

Following the removal of *Tilted Arc* from Foley Square in Manhattan, but before Congress enacted VARA, Richard Serra refused commissions to create site-specific sculptures when the patron would not contractually guarantee the integrity of the work.[210] Prior to the enactment of VARA, he specifically complained that the right of property in the United States wrongfully trumped other important rights in artwork including the right to protect one's own creations.[211] In 1989, he explicitly called for moral rights legislation, asserting that:

> Such coverage now exists in every other civilized country in the world. In the U.S., this new rule would ac-

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208 17 U.S.C. § 113(d) does not apply to movable artworks such as paintings or sculptures that can easily be transported from one location to another. *See also* WAIVER REPORT, *supra* note 75, at 158-59. For additional discussion on the effects of waiver under VARA, *see* discussion *infra* Part III.C.

209 Some did propose to include a waiver for public installations, though the ultimate draft of § 113(d) excludes mention of such works. *See Moral Rights Hearings*, *supra* note 76, at 117 (statement of Peter H. Karlan, Attorney, La Jolla, California). Karlan proposed that the following language be included in VARA:

> Where a work of visual art has been incorporated in or made part of a building or public structure in such a way that removing the work from the building *or public structure* will cause the destruction, distortion, mutilation, or other modification of the work . . . and the author . . . consented to the installation of the work in the building or public structure in a written instrument signed by the owner of the building or public structure . . . then the rights conferred by . . . section 106A shall not apply, except as may otherwise be agreed by written instrument signed by such owner and the author . . . .

Id. at 117 (emphasis added). Karlan goes onto describe a "public structure" as:

> [A]ny bridge, aqueduct, or other public edifice either owned or operated by the United States Government, a State, a political subdivision thereof, or any government agency therein, or erected on land owned by the United States Government, a state, a political subdivision thereof, or any governmental Agency therein.

Id. at 118.

210 *See* Patricia Failing, *An Unsitely Mess*, ARTNEWS, Oct. 1994, at 151 (discussing Serra's withdrawal of his plans for a site-specific sculpture for the Fine Arts Museum of San Francisco).

211 *See* Richard Serra, *'Tilted Arc' Destroyed*, ART IN AMERICA, May 1989, at 43.

> knowledge a relationship between an artist and his work even after the work had been sold . . . This legislation would allow the artist . . . to sue to reverse or redress the alteration of any art work.[212]

Although Congress has since enacted VARA, it is not clear whether a court would interpret the statute to protect against the sort of conceptual destruction that befell *Tilted Arc*. The issue of whether removing site-specific art from its context constitutes destruction in violation of the artist's moral rights under VARA has not been squarely before a court. As discussed above, post-VARA cases dealing with destruction of artwork have involved only actual physical destruction. Yet while the courts have yet to test the degree of protection afforded to site-specific artists under VARA,[213] artists, critics, and legal scholars lend support to

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212 *Id.*

213 One case that has taken a pass at the issue is English v. BFC&R E. 11th St., L.L.C., 1997 U.S. Dist. LEXIS 19137. In that case, the court intimated that artists could not prevent the conceptual destruction of their art under VARA. The case did not deal with government-commissioned site-specific installations.

In *English*, six artists created artwork in a community garden, which consisted of five murals and six sculptures. *Id.* at *2. The artists sued the New York City Partnership Housing Development Fund and developers BFC&R E. 11th Street LLC when the latter planned to erect a building on the land where the art was located. *Id.* at *3. Because the artists placed pieces on the site without the permission of the city, the court ruled that they were not protected by VARA, reasoning that artists "could not effectively freeze development of vacant lots by placing artwork there without permission." *Id.* at *11.

The court further noted that, even if the artists had permission to install the sculptures in the garden, removing them would not constitute a violation of VARA because § 106A(c)(2) of the Copyright Act excluded placement or display from the definition of destruction, distortion, mutilation or modification. *Id.* at *14. The court referred to the legislative history of VARA, which states: "removal of a work from a specific location comes within [this] exclusion . . . because the location is a matter of presentation." *Id.* at *15 (quoting H.R. REP. No. 101-514 (1990)). The court further concluded that erecting a building on the site would not destroy the murals, but would simply obstruct people from viewing them. *Id.* at * 16. This sort of obstruction, the court concluded, is not actionable under VARA. *Id.*

There are two significant problems with the reasoning in *English*. First, the court takes a simplistic approach in its reading of § 106A(c)(2). That section 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 described in subsection (a)(3) unless the modification is caused by gross negligence." 17 U.S.C. § 106A(c)(2) (emphasis added). The language of that clause is plainly directed at protecting art owners, museums or galleries from liability based on moral rights claims by artists who disapprove of how a painting is hung, where a sculpture is placed, or what color light shines on their work. *See, e.g. Moral Rights Hearings*, *supra* note 76, at 134 (statement of Marc F. Wilson, Director, Nelson-Atkins Museum of Art, expressing concern about the effects the moral right of integrity would have on the display of art).

For example, in testifying before the subcommittee on patents, copyrights and trademarks, Marc Wilson, Director of the Nelson-Atkins Museum of Art, expressed his concern about the effects the moral right of integrity would have on display. *See Moral Rights Hearings*, *supra* note 76, at 134 (statement of Marc F. Wilson, Director, Nelson-Atkins Museum of Art, Kansas City, Mo.). Specifically, Wilson was concerned with the word 'distortion:' "This term might be so extended as to apply to the manner of installation or framing of an art work

the proposition that removing site-specific work from its context constitutes a destruction of the art.

A number of artists and critics have noted that the site is an integral component of the entire site-specific artwork, as opposed to a mere stage for presentation, supporting the argument that removing the crafted material from the site destroys the art. For example, critic Douglas Crimp writes about the interdependent relationship between object and context in site-specific work.[214] In his discussion of Richard Serra's *Strike*, an installation consisting of a steel plate bisecting a corner of the Lo Giudice Gallery in New York from 1969-71, Crimp explains:

> That steel plate was not, however, the work. To become the sculpture *Strike*, the steel plate had to occupy a site to assume its position wedged into the corner of the gallery room, bisecting the right angle where wall met wall . . . The place where the sculpture would stand would be the place where it was made . . .[215]

The term "site-specific" is sort of a catchall phrase for a variety of artworks that elevate, in varying degrees, the importance of the relationship between context and object. For example, artist Maya Lin has noted, "I don't design pure objects . . . I work with the landscape, and I

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in an exhibition setting, or even the color of the wall in the gallery containing the work." *Id.* While neither the House nor Senate bills originally proposed to include a clause stating that "public presentation, including lighting and placement," did not constitute a violation of moral rights, Congress ultimately included such a clause in VARA in response to concerns like those expressed by Marc Wilson. H.R. 2690, 101st Cong. (1989); S. 1198, 101st Cong. (1990).

Furthermore, legislative history indicates that removal of a work from a display location comes within the § 106A(c)(2) exception because its location is a matter of presentation. 17 U.S.C. § 106A(c)(2). This merely serves to emphasize the point that an artist cannot prevent a museum or gallery from hanging her work on one wall as opposed to another, but the provision does not contemplate works specifically created for the site in which they are installed. *See id.* In fact, there is nothing in the congressional hearings on either S. 1198 or H.R. 2690 to suggest that this exception is aimed at anything other than 'display' which is wholly separate from works that are created as part of a site. *See* H.R. REP. NO. 101-514 (1990).

The second problem with the court's reasoning in *English* is that the court refuses to consider the artistic value of the artwork in question by failing to recognize that the murals would be destroyed if a building were erected in a way that prevented people from seeing the art. It is difficult to dispute the point that murals that are painted on buildings are put there for others to see. If a work of art is not physically destroyed, but still cannot be seen, it might as well not exist. Art is usually created with the spectator in mind. To argue that a mural would not be destroyed when it is permanently sealed from sight by the side of a building is akin to arguing that one could still enjoy the view from a window that was similarly blocked. In both situations, the form of the thing is meaningless when it is stripped of its function.

214 DOUGLAS CRIMP, ON THE MUSEUM'S RUINS 150-86 (3d ed. 1997). Crimp provides a comprehensive discussion of the nature of site-specific art, and how removing crafted material from its intended context destroys the artwork. *Id.*

215 *Id.* at 159.

hope that the object and the land are equal players."[216] Yet other artworks that are site-specific, perhaps in the fullest-extent of the term, such as earthworks by Robert Smithson,[217] Andy Goldsworthy,[218] and Richard Long,[219] are completely inextricable from their sites because they are literally made from and imbedded in nature. For other artists, the object is even secondary to the context—a mere tool devised to orchestrate a certain behavioral relationship between the spectator and a particular space. As artist Richard Serra has explained, "I am interested in behavioral space in which the viewer interacts with the sculpture in its context."[220] Accordingly, certain site-specific art is not only dependant on a particular space, but on social, political, and psychological space as defined by the viewers of the art.[221] Regardless of the degree of intimacy between object and space, as one scholar has noted, "[site-specific] works elaborate the landscape: the landscape reveals the works. They . . . provide a focused experience of place."[222]

Artist and critic Brian O'Doherty offers a comprehensive discussion of the important role of context in site-specific work in his book *Inside*

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216 Elizabeth Hess, *A Tale of Two Memorials*, ART IN AMERICA, Apr. 1983, at 123 (interview with Maya Lin).

217 Perhaps Smithson's most notable work is *Spiral Jetty* (1970). The work is a coil made from mud, rocks, and salt crystals. It is 1500 feet long and 15 feet wide, and extends from the shore at Rozel Point into Great Salt Lake in Utah. The DIA Center for the Arts acquired the work from Smithson's estate in 1999. It remains submerged beneath water at its original site in Utah. For a comprehensive resource on Robert Smithson, *see generally* http://www.robertsmithson.com (n.d.).

218 Examples of Goldsworthy's work include *Knotweed Stalks Pushed into Lake Bottom* (February 20 and March 8-9, 1988), installed in Derwent Water, Cumbria, and *Storm King Wall* (1997-98), installed in Storm King Art Center, New York. Goldsworthy created both works exclusively using materials indigenous to the respective sites. For images of Goldsworthy's works, see http://www.getty.edu/artsednet/resources/Scope/Assignments/sample1a.html (n.d.), and http://www.stormkingartcenter.org/AndyGoldsworthy.html (n.d.).

219 Since 1967, Long has been making what he calls "map works" by walking through a landscape. In his first of such walks, he traversed a straight line through a grassy field leaving behind the imprint of his tracks. For more on Richard Long, see http://www.richardlong.com (n.d.).

220 Patricia Phillips, *Forum: Something There Is That Doesn't Love: A Wall,* 23 ARTFORUM INTERNATIONAL, Summer 1985, at 101 (quoting Richard Serra).

221 *See, e.g.,* Richard Serra, *supra* note 211, at 41 ("The preliminary analysis of a given site takes into consideration not only formal but also social and political characteristics of the site. Site-specific works invariably manifest a value judgment about the larger social and political context of which they are part."); Phillips, *supra* note 220, at 100 ("'Site' is a shifting compound of physical qualities and phenomena; it is also a psychological domain layered with perceptions and associations, individual dreams and shared mythologies. It is what people bring to it . . ."); Germano Celant, *Bonds Between Art and Architecture, in* ANDRE, BRUEN, IRWIN, NORDMAN: SPACE AS SUPPORT 11 (Mark Rosenthal ed., 1980) ("The distinctions made in the relationships between social structure and art are reflected in the concrete, not the theoretical-literary, relationships between art and the social, physical environment.").

222 Phillips, *supra* note 220, at 101 (quoting art scholar John Beardsley).

the White Cube.[223] He too emphasizes that site-specific artists are interested in orchestrating relationships between the object, its surrounding spaces, and the viewers.[224] It is those relationships, not the objects in and of themselves, that exist as the art.[225] He also addresses the role of context in his own artwork. Specifically, O'Doherty creates what he calls "rope drawings," which are three-dimensional illustrations rendered with colored ropes. The spectator walks through the art, as opposed to looking at it. O'Doherty does not conceive of his idea for the drawings until he sees the particular space he will be working in; thus no two rope drawings are the same. Once the ropes are removed from the site, the artwork ceases to exist. Since the rope drawing is so dependent on the particular space, it would be impossible to precisely recreate it at another location.[226]

Artists and art critics have considered the nature of site-specific art since the 1960s.[227] Its derivation can be traced to incentives to decomodify art and lift it from the sterile context of the museum space.[228] However, critic Germano Celant traces the important relationship between the object and its context in site-specific work to the early twentieth century:

> The awareness that each . . . piece hinged on its belonging to a context, and on the osmosis of context with piece, persisted and became stronger at the beginning of this [the twentieth] century. From Futurism and, more evidently, from Dadaism to today, we can assert that the meaning and value of the artistic action is determined by its placement in an environmental specific.[229]

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223 BRIAN O'DOHERTY, INSIDE THE WHITE CUBE: THE IDEOLOGY OF THE GALLERY SPACE (2d ed. 1986). While O'Doherty's entire book is applicable to an analysis of site-specific art, Chapter III, "Context as Content" is particularly relevant. *Id.* at 65-106.

224 *See generally* O'DOHERTY, *supra* note 223 (discussing transformed relationships among the space, object and viewer in various artworks created since the early 1970s).

225 *See id.*

226 Brian O'Doherty uses the working name Patrick Ireland. For further discussion on O'Doherty's rope drawings, *see, e.g.*, KENNETH BAKER ET AL., ROPE DRAWINGS, 1980-90 (1992). For images of O'Doherty's rope drawings, see http://www.charlescowlesgallery.com/ireland.html (n.d.). For a comprehensive list of O'Doherty's installations, see http://www.charlescowlesgallery.com/biorgaphies/IRELANDbio.html (n.d.).

227 *See* Mark Rosenthal, *Space as Support, in* ANDRE, BRUEN, IRWIN AND NORDMAN: SPACE AS SUPPORT 4 (Mark Rosenthal ed., 1980) ("[W]orks done for specific places—that is, 'site-specific, 'factual,' or *in situ* works—appeared about 1968.").

228 *See generally,* LUCY LIPPARD, SIX YEARS: THE DEMATERIALIZATION OF THE ART OBJECT (1973) (chronicling the conceptual, or "idea art," movement, beginning in the late 1960s, during which many artists began to dislodge art objects from the museum space and conceive of works for alternative contexts). *See also* Celant, *supra* note 221, at 12.

229 *Celant, supra* note 221, at 11.

In the eighties, questions about the nature of site-specific art leapt from academic circles to the center of well-publicized government controversies. Both Maya Lin's *Vietnam Veterans Memorial* and Richard Serra's *Tilted Arc* stirred discussion of the importance of the relationship between site-specific art and its context. Lin's plans to build a site-specific memorial on the Washington Mall became the center of dispute on Capitol Hill in 1981, after she had been selected from a pool of over 1400 artist applicants.[230] The sculpture is comprised of two black granite walls that meet at a 125 degree angle. Lin designed the walls, which rise from ground level on either end to ten feet at the apex, specifically for a rise in the land such that the viewer cannot see the back of the walls.[231] Those who opposed the monument, and tried to block its installation, complained that its sinking placement in the land symbolized anti-war sentiment.[232] While opponents were unsuccessful in their campaign to block Lin's sculpture, they were able to commission a second artist, Frederick Hart, to design a figurative memorial to their liking that would be incorporated on the same site.[233] Lin protested that the inclusion of Hart's memorial would alter the context, and, therefore, her work. In a 1982 hearing before the Congressional Commission on Fine Arts, Lin explained:

> The original design gives each individual the freedom to reflect upon the heroism and sacrifice of those who served. It is not a memorial to politics or war, or controversy, but to all those men and women who served. It weaves the individual with the freedom of reflection and contemplation at a place where he is at once part of the Vietnam Veterans Memorial and a part of our memorialized history. These intrusions [Hart's sculpture] which treat the original work of art as no more than an architectural backdrop, reflect an insensitivity to the original design's subtle spatial eloquence. And the statues, nearly eight feet tall, are taller than most of the wall for most of its length. These intrusions rip apart the meeting of names, destroying the meaning of the design. I am not approving or disapproving of the sculpture per se. I disapprove of the forced melding of these two different memorials into one memorial.[234]

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230 Hess, *supra* note 216, at 122.

231 *Id.* at 122.

232 *Id.* at 125.

233 *Id.*

234 MAYA LIN: A STRONG CLEAR VISION (American Film Foundation 1994) (1982 statement of Maya Lin to the Cong. Commission on Fine Arts).

Nonetheless, Hart's work was installed in 1984, a matter of feet from Lin's memorial.[235]

During the course of a lengthy debate regarding Richard Serra's *Tilted Arc*, culminating in the court case discussed in Part I above, the artist unremittingly expressed the importance of context in a site-specific artwork. Serra offers a comprehensive explanation of the nature of site-specific artwork:

> Site-specific works deal with the environment components of given places. The scale, size, and location of site-specific works are determined by the topography of the site, whether it be urban or landscape or architectural enclosure. The works become part of the site and restructure both conceptually and perceptually the organization of the site. My works never decorate, illustrate, or depict a site.
>
> The specificity of site-oriented works means that they are conceived for, dependent upon and inseparable from their location. Scale, size and placement of sculptural elements result from an analysis of the particular environmental components of a given context . . . Based on the inter-dependence of work and site, site-specific works address the content and context of their site critically. A new behavioral and perceptual orientation to a site demands a new critical adjustment to one's experience of the place. Site-specific works primarily engender a dialogue with their surroundings.[236]

Serra maintains that, because of its nature, the removal of his site-specific work was tantamount to its destruction: " 'To remove the work is to destroy the work.' This has been accomplished; *Tilted Arc* is destroyed."[237]

Despite varying opinions on whether the government should have removed *Tilted Arc* from its site,[238] many artists and critics have agreed that the work was inherently dependant on its context. For example, art historian and critic Patricia Phillips notes, "Few can argue that [*Tilted Arc*] is not site-specific."[239] Artist Donald Judd has argued, "[there is] a need to revive a secular version of sacrilege to categorize the attempt to

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235 *See* http://vietnam-veterans-memorial.visit-washington-dc.com/ (n.d.).

236 Serra, *supra* note 211, at 41.

237 *Id.* at 35 (quoting himself).

238 At the public hearings on the proposed removal of *Tilted Arc*, fifty-eight people, mostly government employees, testified in favor of removing the work, while 122 people testified against removing the work. *See id.* at 36.

239 Phillips, *supra* note 220, at 101.

destroy [*Tilted Arc*] . . . Art is not to be destroyed, either old or new . . . . Those who want to ruin Serra's work are barbarians."[240] Similarly, artist Frank Stella has said: "To destroy [*Tilted Arc*] and simultaneously incur greater public expense in that effort would disturb the status quo for no gain. Furthermore, the precedent set would only have wasteful, unnecessary consequences."[241] Philosophy professor Gregg M. Horowitz explains how removing *Tilted Arc* annihilated the work: "Because *Tilted Arc* was designed specifically for, and so in part derived its identity from, its site, its expulsion from Federal Plaza was at the same time its destruction."[242]

Even beyond the scope of the *Tilted Arc* controversy, art critics have discussed how removing a site-specific work from its context results in conceptual destruction. For example, critic Germano Celant writes:

> This unchanging nature [of site-specific work] results in a unity integrated to the structure, and it does not lend itself to manipulations; the work is thus not allowed to be defined by environmental reasons other than those interacting with the given or chosen space.
> Art which binds itself to the context tends not to undergo successive metamorphoses. It has the characteristic of a realized praxis and it cannot be acted upon by others.[243]

Legal scholars lend further credence to the argument that removing a site-specific work from its context, even without damage to the object the artist creates, constitutes conceptual destruction. In his book, *Law Ethics, and the Visual Arts*, written before the enactment of VARA, Stanford Law School Professor John Merryman discusses the removal of one of artist Elio Benvenuto's site-specific sculptures.[244] Santa Clara County in California had commissioned Benvenuto to create and install a fountain in the county government center courtyard.[245] When the courtyard was renovated, the fountain was relocated to a storage facility, though it was not physically destroyed.[246] Professor Merryman quoted one San Francisco reporter who described the scene of the abandoned sculpture: "'It leans at a crazy angle, its mass crushing an old tire as it dies an

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240 Elizabeth Garber, *Teaching Aesthetics and Art Criticism, Richard Serra: The Case of Tilted Arc, available at* http://www.arts.arizona.edu/are476/files/tilted_arc.htm (quoting Donald Judd) (last modified Oct. 23, 2001).

241 *Id.* (quoting Frank Stella).

242 Gregg M. Horowitz, *Public Art/Public Space: The Spectacle of the Tilted Arc Controversy*, J. AESTHETICS & ART CRITICISM, Winter 1996, at 8.

243 Celant, *supra* note 221, at 12.

244 J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 157 (2d ed. 1987).

245 *Id.*

246 *Id.*

ignominious death of decay and tarnish.'"[247] Professor Merryman recounts this incident under a heading he titles: "Abuse of Publicly Funded Works: Some Horrible Examples."[248]

DePaul College of Law Professor Roberta Kwall defines the moral right of integrity as an artist's right to prevent another from destroying the "spirit and character" of a work.[249] According to Professor Kwall, "any distortion that misrepresents an artist's expression" violates the artist's moral rights.[250] In discussing whether removing site-specific work and placing it in an "objectionable context" constitutes a violation of an artist's moral rights, Kwall states: "[A] creator who can prove that an owner's display of his work will prejudice his honor and reputation should be able to enjoin display."[251] Additionally, Law Professor Marina Santilli, of the University of Pisa in Italy, has explicitly noted, "the removal of works designed for a particular environment might, under VARA, be regarded as (symbolic) destruction of the work."[252]

It is clear that the community of respected American artists and art authorities regard the crafted work and the site of site-specific artworks as an indivisible whole. The artists who create these works explain that the meaning and purpose behind the art lie squarely within its physical location. They are clear that relocation of the work destroys its meaning and purpose, effectively obliterating its existence. Further, in France—the birthplace of the moral rights doctrine—courts have long recognized that altering the context of an artwork in a manner that substantially changes the work constitutes a violation of the artist's moral rights. French case law supports the contention that removing site-specific work from its context destroys the art. The weight, therefore, of both contemporary American art and legal authority in addition to French legal authority support the proposition that removing site-specific work from its context, even without physical damage, conceptually destroys the work. American courts must determine that site-specific artists have a moral right of integrity under VARA to prevent the removal of their works from their contexts.

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247 *Id.*

248 *Id.*

249 Roberta Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 8 (1985).

250 *Id.* at 8-9.

251 *Id.* at 95-96.

252 Santilli, *supra* note 52, at 101.

C. CONGRESS MUST AMEND VARA TO INCLUDE A WAIVER CLAUSE FOR GOVERNMENT-COMMISSIONED SITE-SPECIFIC ARTWORK

> *The public has an interest in the existence of museums, but it also has an interest in not having all of its open spaces treated as though they were museums, in which esthetic [i.e. private] interests rightly dominate.*
> –Arthur C. Danto, philosopher and art critic[253]

Because a court should find that removing site-specific artwork from its context destroys the work and therefore violates the artist's moral rights under VARA, Congress should amend VARA to include a waiver clause, similar to § 113(d) of the Copyright Act, for site-specific artwork.[254] The waiver clause would provide that when an artist agrees in writing to install a work for a specific public space, and acknowledges that its removal would effectuate either its conceptual or physical destruction, the artist does not have a moral right to prevent such removal under VARA. Congress should include such a waiver clause for two reasons: (1) to eliminate the potential for artists to bind public-owned land for the durations of their lives, regardless of the public's interest in removing the artist's work; and (2) to prevent discouraged patrons from declining to commission such works which could, in turn, lead to substantial decline in commercial opportunities for artists.

Because site-specific artwork is comprised of crafted material *and* site, the waiver provision must reflect the compound nature of the art by addressing *both* the artist's moral right to protect the integrity of her entire work, as well as the integrity of her crafted material. For example, if the City of Ithaca were to remove John Snyder's *Silent City* from the Route 96 Bridge and place the aluminum towers in a storage facility without physically harming them, the removal would constitute a conceptual destruction of Snyder's work in violation of the artist's integrity right under VARA. But if the City of Ithaca were to remove *Silent City* from its context in a manner that tore apart the aluminum towers, such physical destruction would also violate the artist's integrity right—resulting in a two-fold infraction. To address the possibility of dual destruction, the artist must waive her moral rights to prevent *both* actual and conceptual destruction. Accordingly, a waiver provision for site-specific art cannot be conveniently accomplished by including site-specific installations within the installations-in-buildings waiver under the current § 113(d). Instead, Congress must draft a completely new waiver provision, or fully rewrite § 113(d), to specifically accommodate the unique nature of site-specific work.

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253 ARTHUR DANTO, THE STATE OF THE ART 93 (1987).
254 17 U.S.C. § 113(d).

As in § 113(d), a waiver for site-specific artwork would provide that an artist who agrees in writing to install a such a work in a public space, and specifies that installation may subject the work to conceptual destruction by virtue of its removal, waives her moral rights to prevent the commissioning government entity from removing her work from that space.[255] In the site-specific waiver, Congress should include a clause providing that, in addition to waving her rights to prevent conceptual destruction, the artist also waives her rights to prevent the physical destruction, distortion, or mutilation of her crafted material that might result from its removal.

An exception to the waiver regarding the crafted work would apply to distortion or mutilation that results from the owner relocating the crafted material to another site. Removal *and* relocation of a site-specific work does not only constitute destruction of the initial artwork, but is also a distortion of the crafted work that was specifically created to relate to the former site. Such distortion is *not* a direct result of removal. As in § 113(d), under the site-specific waiver provision, the artist would waive her right to prevent distortion that is an inevitable result of removal. However, since the owner can more readily prevent distortion that results from relocation—by simply not displaying the crafted material at an alternative site—the site-specific waiver would not require that the artist relinquish her right to prevent such distortion.

The inclusion of a site-specific waiver is important to ensure the alienability of public land. Balancing the interests at stake, the government's interest in preserving alienability appears more significant than the artist's interest in preventing the work's conceptual destruction. However, the government's interest in displaying the artwork in an alternative location appears less significant than the artist's interest in preventing the misrepresentation of her work, and the ensuing harm to her reputation, as a result of the government placing her work before the public in an unintended place. Accordingly, an artist should retain the right to prevent distortion of her work by virtue of its relocation unless she specifically waives that right in a written instrument that clearly allows for the owner to relocate her work. She would not negotiate that waiver under the site-specific provision, but, instead, under the waiver clause in § 106A(e)(1)(a).[256]

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255 *See id.* § 113(d)(1)(B).

256 17 U.S.C. § 106A(e)(1)(a). Section 106A(e)(1)(a) requires that the artist explicitly state the uses of the work to which the waiver applies. That section states in relevant part:

> The rights conferred by subsection (a) . . . may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. The instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.

Id.

In the event that removal of a work might not constitute actual destruction of the artists' crafted work, the site-specific waiver would also require that the owner make a good faith effort to notify the artist of her intentions before removing her work from the site.[257] As in § 113(d)(2), the owner would be able to remove the work without liability for subsequent physical damage to the crafted material, as long as the owner provides written notice of her intentions and the artist fails to remove, or pay for removal, of the work within 90 days of receiving such notice.[258]

While necessary to ensure alienability, a strict site-specific waiver would not leave much hope for the artist because, although she could potentially claim VARA protection to prevent removal, it is likely that she would have bargained away those rights when securing the commission. Accordingly, as a sort of compromise, the site-specific waiver clause must include a minimum display time provision requiring that the government permit the commissioned work to remain in its location for at least one year before removing it. That way, the government cannot decide to remove the work after only a month, a week, or even a few days, rendering the artist's hard work pointless. Since a government entity generally has greater bargaining power when negotiating art commissions, it is likely that an artist would have to waive her moral rights under the site-specific provision to sustain a public commission. Thus, unless the artist can successfully avoid having to sign a waiver provision, VARA protection of site-specific art would prove meaningless—an empty concession. A minimum display time requirement would mitigate that risk by ensuring that the community has the opportunity to view the work for a reasonable period of time.

The waiver clause for site-specific work protects both artists and owners, and encourages the government commission of artwork. A waiver clause for site-specific work would preclude an artist from binding public-owned land with her artwork by preventing an artist from holding the government-owner liable if it decides to remove the work. Without such a provision, VARA gives an artist the right to enjoin public owners from removing site-specific artworks for the duration of the artist's life, or to obtain damages from public owners upon completing a removal. Thus, if a government entity commissions an artist to install a work in a public space, it must commit itself to maintaining that work in that space, despite the fact that public interest may dictate otherwise. Assuming damages following removal, private individuals will be penalized because the government entity will draw tax dollars from its treasury to compensate the aggrieved artist. A waiver of VARA rights for site-specific works would obviate this problem.

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257 17 U.S.C. § 113(d)(2)(A).
258 17 U.S.C. § 113(d)(2)(B).

Further, a waiver clause for site-specific work would encourage patrons to commission art for public spaces, instead of discouraging them because of fears that such art could potentially bind the land, or expose them to liability.[259] These fears were the precise concern of those who opposed VARA's enactment.[260] It was also a concern that convinced many artists, art experts, scholars and attorneys that the § 113(d) waiver provision was necessary to ensure that property owners continued to commission artists to install works in their buildings.[261] By allaying such fears, and thus encouraging commissions, a waiver clause for site-specific work would promote the continued introduction of cultural and aesthetic works into communities by governments. In turn, this would give artists continued opportunities to express their ideas in a public forum. In sum, the process would encourage a viable art market.

CONCLUSION

When Congress enacted the Visual Artists Rights Act of 1990, it introduced a law wholly unlike any other law in the United States. While the common law traditionally rejected doctrines that vindicated personal, as opposed to economic, rights in artwork, VARA opened a channel for artists to protect their personal moral rights in the works they create, despite the fact that they may not own those works. In doing so, Congress took important strides toward establishing that an artist's personality, spirit and reputation, which infuse her work, are not commodities that can be assigned market values.

Nonetheless, granting commissioned artists of site-specific works the moral rights of attribution and integrity does not come without its own set of problems. Section 113(d) of the Copyright Act deals with the problem of art binding the use of real estate by providing for a waiver of moral rights when an artist agrees to install a work in a building. However, there is no similar provision regarding site-specific work installed in public spaces.

Part of the overall problem with regard to site-specific artwork and public property stems from the question of whether removing the site-specific work from its context without destroying the installed object constitutes a destruction contemplated by VARA. American and interna-

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259 *See* WAIVER REPORT, *supra* note 75, at xvi. As the Register of Copyrights has noted:

> [Installed works that are not structurally incorporated into a building, including site-specific works, major commissioned works, and large government commissions] . . . may not be covered by § 113(d), but . . . waiver for these works is necessary to protect buyer's investments and . . . absent waiver, buyers might be unwilling to contract for creation of such works . . .

Id.

260 *See Moral Rights Hearings*, *supra* note 76, at 19 (statement of Sen. Hatch).

261 *See* WAIVER REPORT, *supra* note 75, at 160.

tional legal scholars, artists and art scholars, and the French courts, have suggested that removal of such work from its context does indeed constitute a destruction of the work. This demonstrates that the contemporary understanding of site-specific artwork is that it is indivisibly composed of both object and location. Because this should be the correct interpretation of the nature of site-specific artwork, courts should read VARA to give site-specific artists a right to prevent commissioning government entities from removing site-specific works from their contexts. However, such a reading would, in effect, give artists a sort of control over the use of public-owned space that Congress did not contemplate when it enacted the statute.

To resolve this issue, VARA should provide for the limited waiver of moral rights when site-specific artworks are publicly commissioned. This waiver provision would serve two functions: (1) it would eliminate the potential for artists to bind public-owned land for the durations of their lives, regardless of the public's interest in removing the artist's work; and (2) it would prevent discouraged patrons from declining to commission such works which could, in turn, lead to substantial decline in commercial opportunities for artists. In the meantime, until courts and Congress address the complicated set of issues that arise under VARA with respect to public-commissioned site-specific work, the legal and artistic controversy surrounding works like *Silent City* in Ithaca, New York will continue to abound.