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# The Landscape Art of Daniel Urban Kiley

John F. Nivala



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# THE LANDSCAPE ART OF DANIEL URBAN KILEY

JOHN NIVALA\*

Man is an animal who consciously creates landscape: the only species which deliberately alters the design of its environment for no other reason than to give itself aesthetic pleasure.<sup>1</sup>

## INTRODUCTION

Daniel Urban Kiley, an internationally renowned American artist, died on February 21, 2004.<sup>2</sup> In its obituary, the *New York Times* described his work as “seminal,” combining “modernist functionalism with classical design principles.”<sup>3</sup> Described by his peers as an elegant, inspirational, innovative, and distinguished artist, Mr. Kiley was “revered in his field.”<sup>4</sup> His death was noted “with sorrow” by the American Academy of Arts and Letters which said his “passing will be deeply mourned.”<sup>5</sup>

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\* Professor, Widener University School of Law.

<sup>1</sup> NAN FAIRBROTHER, *THE NATURE OF LANDSCAPE DESIGN: AS AN ART FORM, A CRAFT, A SOCIAL NECESSITY* 3 (1974).

<sup>2</sup> See Douglas Martin, Obituary, *Dan Kiley, Influential Landscape Architect, Dies at 91*, N.Y. TIMES, Feb. 25, 2004, at C13. The *Boston Globe* said that Kiley was “considered one of the world’s foremost landscape architects . . . .” Obituary, *Daniel Kiley; Regarded as Leading Landscape Architect*, BOSTON GLOBE, Feb. 23, 2004, at A13. The *Chicago Tribune* said that Kiley was “one of the nation’s greatest landscape architects” with an “international body of work.” Blair Kamin, Obituary, *Dan Kiley, 91; Transformed Landscape Architecture*, CHI. TRIB., Feb. 26, 2004, at C11.

<sup>3</sup> Martin, *supra* note 2, at C13.

<sup>4</sup> Adam Bernstein, *Landscape Architect Daniel Urban Kiley Dies*, WASH. POST, Feb. 25, 2004, at B6. See also Editorial, *Preserving Our More Recent Past*, WASH. POST, Mar. 23, 2003, at B8 (describing Kiley as “the dean of American landscape architects”); Adrian Higgins, *Hollin Hills: A New Look at a Fifties Landscape*, WASH. POST, Sept. 4, 1997, at 12 (describing Kiley as “one of the great landscape architects of our time”).

<sup>5</sup> Obituary, *Kiley – Daniel Urban*, N.Y. TIMES, Feb. 26, 2004, at B10.

Daniel Kiley's work also received plaudits during his lifetime. The U.S. Army awarded him the Legion of Merit, a top military honor, for his work.<sup>6</sup> Harvard University, which Kiley attended without graduating, established a lectureship in his honor, gave him an outstanding lifetime achievement award, and established an exhibition fund in his name.<sup>7</sup> The American Academy in Rome named him as artist in residence and later held a celebration to honor his work.<sup>8</sup> The National Endowment for the Arts gave him a distinguished fellowship and later awarded him the National Medal of Honor in the Arts, the highest honor given to an American artist.<sup>9</sup> The Smithsonian's Cooper-Hewitt National Design Museum gave him a National Design Award for lifetime achievement.<sup>10</sup> This is merely a skimming review of the awards and honors Kiley received.<sup>11</sup>

So why does his name not ring many bells? Because he was a landscape designer.<sup>12</sup> His work "sought ways to express human order on the land, but with a touch that would reveal nature, not decorate with it."<sup>13</sup> He was a master of the landscape, "the Mies van der Rohe and Le Corbusier of landscape architecture" who "conceived some of the greatest urban green spaces of our time."<sup>14</sup> Kiley's art was a complement to the architecture. "Light, space, flora: these were the basic elements of the modern building's

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<sup>6</sup> See BOSTON GLOBE Obituary, *supra* note 2.

<sup>7</sup> See Martin, *supra* note 2; DAN KILEY & JANE AMIDON, DAN KILEY: THE COMPLETE WORKS OF AMERICA'S MASTER LANDSCAPE ARCHITECT 203 (1999).

<sup>8</sup> KILEY & AMIDON, *supra* note 7, at 203.

<sup>9</sup> *Id.* See also Dinitia Smith, *Clinton Awards Medals in Arts and Humanities*, N.Y. TIMES, Sept. 26, 1997, at E27.

<sup>10</sup> See Linda Hales, *An Award That Was Made in the Shade; Museum Honors Daniel Kiley for His Landscapes*, WASH. POST, July 11, 2002, at C2 (describing Kiley as "America's preeminent landscape architect").

<sup>11</sup> For a more complete list, see KILEY & AMIDON, *supra* note 7, at 203.

<sup>12</sup> See Herbert Muschamp, *If Not Utopia, What Is It? The World by Kiley*, N.Y. TIMES, Mar. 1, 1996, at C29 [hereinafter Muschamp, *If Not Utopia*].

<sup>13</sup> BOSTON GLOBE Obituary, *supra* note 2. Kiley was said to have created "landscapes in the hearts of titanic industrial cities that are at once rational and deeply poetic." *Id.* (internal citation omitted).

<sup>14</sup> Matt Tyrnauer, *Modern's Masters*, VANITY FAIR, Jan. 2004, at 106.

context,” and Kiley was “the man who fashioned those elements into art.”<sup>15</sup>

Kiley’s best work was deceptively simple; it made “spaces unfold like a walk in nature.”<sup>16</sup> And, like a walk in nature, the observer may contemplate the Creator, not a creator.<sup>17</sup> Kiley’s designs revealed a spiritual sense of the land and moved the observer through space, creating a sense of the infinite.<sup>18</sup> Nature was latent art; his art was nature revealed.

Yet, unlike other artists, his work has not consistently been accorded the respect due a master. For example, Kiley was a landscape designer for Lincoln Center in New York City, one of America’s most visible and frequented public spaces. He created a “glade of tall elegant sycamores,” four trees to a twenty-square-foot planter, which “sculptured the air in a spatial pattern that echoed the strong horizontal and vertical planes of the surrounding

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<sup>15</sup> See Muschamp, *If Not Utopia*, *supra* note 12. See also Calvin Tomkins, *The Garden Artist*, THE NEW YORKER, Oct. 16, 1995, at 139.

Even a partial listing of Kiley’s more important commissions makes you wonder why his name is not better known outside his profession. People who are familiar with the work of twenty or more living architects may have never heard of Kiley, whose landscape designs have provided the settings for so many buildings by those very architects.

*Id.*

<sup>16</sup> Hales, *supra* note 10, at C2.

<sup>17</sup> See Martin, *supra* note 2, at C13. “He once wrote that the greatest contribution a designer could make was to ‘link the human and the natural in such a way as to recall our fundamental place in the scheme of things.’” *Id.* See also JOHN BRINCKERHOFF JACKSON, *LANDSCAPE IN SIGHT: LOOKING AT AMERICA* x (Helen Lefkowitz Horowitz ed., 1997) (introducing the writings of John Brinckerhoff Jackson).

He establishes that the way we build our cities and countryside reveals our society and culture. Implicitly, he states what he later explicitly proclaimed: “Landscape is history made visible.” He demonstrates how landscape makes manifest our strivings, how the basic human motive for creating landscape, especially the domestic landscape, is “the recreation of heaven on earth.”

*Id.* (citations omitted).

<sup>18</sup> See Anne Raver, *Moving Heaven With Earth*, N.Y. TIMES, Oct. 5, 2000, at F1 [hereinafter Raver, *Moving Heaven*].

architecture.”<sup>19</sup> Kiley gave strict instructions for maintaining this work. But when the trees became diseased and needed replacement, no one at Lincoln Center consulted Kiley or even looked for his instructions. His sycamores were removed and “replaced by big fat stranded-looking pear trees,” a devastating change that Kiley said made the design look “kind of silly.”<sup>20</sup>

However, such a result may be a perverse tribute to Kiley’s art. As one critic noted, “that’s what happens when a landscape is invisible.”<sup>21</sup> Kiley said he was “always searching for the purest connection that holds us all together. Some form of sacred geometry. Sometimes the prevailing order is unseen, unknown.”<sup>22</sup> And, in the case of Lincoln Center, unappreciated.

In his landmark article, *The Refrigerator of Bernard Buffet*, John Henry Merryman, in discussing an artist’s rights under the French *droit moral*, said that a component of that law was

the right of integrity (of the work of art), also sometimes called the right to respect of the work. The notion is that the work of art is an expression of the artist’s personality. Distortion, dismemberment or misrepresentation of the work mistreats an expression of the artist’s personality, affects his artistic identity, personality, and honor, and thus impairs a legally protected personality interest.<sup>23</sup>

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<sup>19</sup> Anne Raver, *Cherishing Landscapes as Living Art*, N.Y. TIMES, Nov. 30, 1995, at C1 [hereinafter Raver, *Cherishing Landscapes*].

<sup>20</sup> *Id.* Kiley said that he “was trying to get a sense of the relationship of this architectural grove of trees with the building itself . . . . And to give a wonderful kind of shady retreat. With one little tree in there, it just looks kind of silly.” *Id.* at C6. The assault on Kiley’s work continues. See Robin Pogrebin, *Preservationists Criticize Plans to Change Some of Lincoln Center’s Open Spaces*, N.Y. TIMES, Jan. 22, 2005, at B9.

<sup>21</sup> *Id.*

<sup>22</sup> Raver, *Moving Heaven*, *supra* note 19.

<sup>23</sup> John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1027 (1976). See Symposium, *Reports From the Front Lines of the Art and Cultural Property Wars*, 19 CARDOZO ARTS & ENT. L.J. 1, 1 (2001) (noting that “this conference honored John Henry Merryman, whose writings over several decades have defined with incisive clarity and prescience these seminal topics”).

Bernard Buffet had decorated a refrigerator that was auctioned at a charity benefit. He considered the refrigerator, which had six panels, to be one work. When the owner subsequently sought to sell one of the panels, Buffet sued under French law to prevent the sale. He won.

As Merryman noted, treating “one of the six panels . . . as a separate work distorted and misrepresented the artist’s intention.”<sup>24</sup> In addition, there was an interest involved that relates directly to what Lincoln Center management did to Kiley’s sycamore grove:

On the level of individual interest there is more at stake than the concern of the artist and his heirs for the integrity of his work. There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted and “unimproved” by the unilateral actions of others, even those with the best intentions and the most impressive credentials. We yearn for the authentic, for contact with the work in its true version, and we resent and distrust anything that misrepresents it.<sup>25</sup>

As the designer, however, Kiley had no way to protect his work during his lifetime under both past and present federal law. This

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See also Philip Vineyard, “No One Expects the Spanish Inquisition”—*Twice: Subduing the Moral Rights Monster*, 6 TUL. J. TECH. & INTELL. PROP. 223, 227 (2004) (“Starting with Professor John Henry Merryman’s *Hastings Law Journal* article, . . . the moral rights movement seemed to be gaining the momentum necessary for widespread acceptance.”) (citations omitted).

<sup>24</sup> Merryman, *supra* note 23, at 1027.

<sup>25</sup> *Id.* at 1041 (citation omitted). Merryman continued as follows:

Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture. We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.

*Id.* (citations omitted).

is an unworthy gap in the law, which otherwise recognizes the value of art.<sup>26</sup>

As Kiley demonstrated through his work, landscape design is both a visual art and a visual resource.<sup>27</sup> It is beyond prosaic; it is aesthetic, and, as such, maintaining its integrity promotes the general welfare.<sup>28</sup> It is more than cultivated; it is cultural and, as such, its protection is in the public interest.<sup>29</sup> Yet, because it does not easily fit the definition of architecture, sculpture, or art, it falls into a legal crack after completion.<sup>30</sup>

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<sup>26</sup> See *id.* at 1048; Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM.-VLA J.L. & ARTS 297 (2003).

<sup>27</sup> See Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 697-98 (1995):

Protection of visual resources has been an acknowledged goal of environmental management for at least a generation . . . . [It] operate[s] on the assumption that such visual resources provide an opportunity for "aesthetic experiences," which are highly valued by the public. Yet the visual landscape rightly has been called our "most maligned, ignored, [and] unappreciated natural resource."

*Id.* (citations omitted).

<sup>28</sup> See *id.* at 718.

[A]esthetic goals have been accepted in a majority of jurisdictions as a legitimate exercise of the police power . . . . Without much fanfare, courts in these states have found that ordinances that seek "to protect the unique aesthetics" of an area or promote "the preservation or enhancement of the visual environment" promote objectives sufficiently related to the general welfare to fit within that prong of the police power.

*Id.*

<sup>29</sup> See Eve Darian-Smith, *Legal Imagery in the "Garden of England,"* 2 IND. J. GLOBAL LEGAL STUD. 395, 407 (1995) ("[T]he garden is a strong cultural metaphor for law and order, perpetuity, security, and intrinsically ethnic purity. It is a symbol of cultivation and, by association, deems its protectors cultivated.") (citation omitted).

The question is where are the protectors? See Anne Raver, *When It Goes It's Gone: Manhattan's Vanishing Oases*, N.Y. TIMES, Dec. 2, 1999, at F1 ("[M]any of New York City's modern landscapes are vanishing . . . . [o]r being so radically altered that the power of their bold designs, as abstract and minimalist as a Mondrian painting, as curving as a Noguchi sculpture, have been lost.").

<sup>30</sup> See Peter H. Karlen, *What's Wrong With VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 907-08 (1993) ("[W]here is the

Does this work warrant protection? Kiley's landscapes were the result of a creative and disciplined design process. Yet, perhaps with the exception of Frederick Law Olmsted's work, landscape design is not regarded as art.<sup>31</sup> Landscape art is not just nature, it is nature designed; it is the designer's personality, philosophy, and aesthetic craft.<sup>32</sup> The vocabulary may be flora, not words, but the skillfully designed work can be poetic and culturally significant.<sup>33</sup>

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borderline between a sculpture . . . and an environmental, landscape, or architectural work[?] . . . . Because the [law] does not provide a broad definition of "fine art" . . . many works will fall into the cracks, and there will be much litigation about basic definitions."). *See also* Bobrowski, *supra* note 27, at 724.

[T]here is ample support for the proposition that enhancement of the visual resource constitutes a valid public purpose. The historical, philosophical, and psychological literature of landscape aesthetics describes a link between the scenic visual resource and aesthetic experience. Aesthetic experience has intrinsic value; it is also a component of leisure, recreation, and stress-reduction.

*Id.*

<sup>31</sup> *See* Jane Holtz Kay, *Earth In The Balance*, THE NATION, Feb. 14, 2000, at 28 ("Anonymous is a landscape architect. Not for these placemakers the recognition given to their peers in building . . . . But those who fashion rolling greenswards, transform wasted landscapes into common ground or turn sordid waterfronts into shared edges are unsung, if not unknown."). *See also* Fay Sweet, *Down To Earth*, DESIGN WEEK, Oct. 29, 1999, at 26 ("[T]he skills to mould and shape outdoor space are becoming highly prized. As a creative discipline [landscape architecture] is part of the mix of many three-dimensional projects, and is looking to improve its standing among other practitioners, particularly architects.").

<sup>32</sup> *See* Galina Krasilovsky, *A Sculpture is Worth A Thousand Words: The First Amendment Rights of Homeowners Publicly Displaying Art on Private Property*, 20 COLUM.-VLA J.L. & ARTS 521, 539 (1996).

<sup>33</sup> Marilyn Bethany, *Seeing the Forest for the Trees*, N.Y. TIMES MAG., Feb. 28, 1982, at 58 ("The key to understanding landscape design: think very big. 'A collection of choice plants is not a landscape any more than a list of choice words is a poem . . . .' The merit is in the design, not the materials it is expressed in."). Landscape design can be an "integrating force for nature and culture." Robert Z. Melnick, *Considering Nature and Culture in Historic Landscape Preservation*, in PRESERVING CULTURAL LANDSCAPES IN AMERICA 22, 43 (Arnold R. Alanen & Robert Z. Melnick eds., 2000).



The work reveals what is otherwise repressed, unveiling what is vital, beautiful, and complex.<sup>34</sup> It can legitimately be considered art.<sup>35</sup>

This legitimacy, however, is hard to come by for landscape art. Its makeup is fragmented, its settings are often secondary, its true meaning is often ephemeral.<sup>36</sup> That does not necessarily put it outside the scope of art. There is a creator, a designer at work whose dignity and spirit are reflected in the work which, perhaps more than other works, is offered up to public inspection, evaluation, and use.<sup>37</sup>

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<sup>34</sup> See AARON BETSKY, *LANDSCRAPERS: BUILDING WITH THE LAND* 23 (2002); Robin Karson, *Preface*, in *PIONEERS OF AMERICAN LANDSCAPE DESIGN* xi (Charles A. Birnbaum et al. eds., 2000). See also ANNE WHISTON SPIRN, *THE LANGUAGE OF LANDSCAPE* 49 (1998) (“[L]andscape authors tell similar stories by shaping landscape directly: siting the paths along which others experience landscape, choosing what people will see (and what they will not see), and in what order, framing the view . . . . Landscape literature is the product of life not a mere representation of it.”)[hereinafter SPIRN, *LANGUAGE OF LANDSCAPE*].

<sup>35</sup> See JACKSON, *supra* note 17, at 366.

A formal garden . . . is by way of being a work of art in the strictest meaning of the term. It is conceived and executed by an artist in accordance with the traditional canons of his art, and its purpose is to give esthetic pleasure. The fact that he may be called . . . a landscape architect and that the garden . . . is also used as a place for sociability and games does not really change the essential nature of the formal garden as a work of art . . . .

*Id.* See also Christopher Hall, *Avant-Green: Landscaping As a Fine Art*, N.Y. TIMES, Aug. 15, 2004, at AR25.

<sup>36</sup> See PETER WALKER & MELANIE SIMO, *INVISIBLE GARDENS: THE SEARCH FOR MODERNISM IN THE AMERICAN LANDSCAPE* 3 (1994) (“Landscape architecture . . . is made up of too many preexisting fields and disciplines to have a clear focus. Landscape architects typically create settings for more prominent objects . . . . Works of landscape architecture tend to be ephemeral, and their moments of perfection (between long periods of growth and decay) are fleeting.”).

<sup>37</sup> See Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 211-12 (1994) (“Artists express themselves through their work. While providing beauty and wonder to those who enjoy their works, they give a part of themselves to their audience . . . . Artists’ reputations and honor are also at stake whenever they submit their work for public inspection.”).

We treat creators differently if we regard their creations as art.<sup>38</sup> We acknowledge that altering or improperly displaying an artist's work can cause a variety of personal and public harms.<sup>39</sup> By that acknowledgment, we express our appreciation and continued encouragement of the creative effort.

This treatment is a social judgment regarding the value of public art.<sup>40</sup> If we understand public art "to include visual works of any medium . . . which are displayed in a location accessible to the public," then Kiley's work—such as his Lincoln Center design—is public art.<sup>41</sup> His work was designed for that particular site,

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<sup>38</sup> See Thierry Joffrain, *Deriving a (Moral) Right for Creators*, 36 TEX. INT'L L.J. 735, 737 (2001) ("Creative individuals may deserve a particular status in society simply for making lives less drab. Besides the value of color to human life, creativity also may be an irreplaceable cornerstone in many endeavors. Independent of any value, perhaps humankind has an inherent affinity for creativity.") (citations omitted); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 103 (1997) (stating that we regard as art "those works . . . which are typically unique and highly individual works that require substantial skill and effort").

<sup>39</sup> Hansmann & Santilli, *supra* note 38, at 102.

Physical alteration of an artist's work . . . or prejudicial display of the work, can harm the artist in a variety of ways. The most direct is simply the subjective personal anguish the artist feels from seeing his work abused, quite apart from—and even in spite of—what anyone else might think about it.

*Id.* See also Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 50-51 (1998).

The right of integrity protects the artist . . . . Prohibiting changes without permission shows respect for the art work, its creator, and the process by which she created. This right avoids value judgments as to the quality of the art and the seriousness of the artist's undertaking. The society that recognizes this right recognizes the value of all creative efforts and uses it to encourage more.

*Id.*

<sup>40</sup> See Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 463 (1994).

<sup>41</sup> Vera Zlatarski, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM.-VLA J.L. & ARTS 201, n.1 (1999).

designed to enhance the observer's total experience.<sup>42</sup> It was an ensemble.

Kiley said his designs began "with a clearly stated structure . . . the expression of human order on the land."<sup>43</sup> He sought to inspire the design, "to bring a sense of mystery, loose rhythm and infinite expansiveness to a design."<sup>44</sup> But there was an aspect to his work that could not "really be designed at all; it consists of the phenomena that occur as a landscape evolves throughout seasons and time."<sup>45</sup> His work, at its best, "is not 'seen'; . . . not understood as something that has been designed and deliberately constructed."<sup>46</sup> It looks as if it grew naturally in place.

Frederick Law Olmsted, best known for his work on New York City's Central Park, was recently characterized as "an artist who chose to work in a medium that then—even more than now—lacked public recognition."<sup>47</sup> Olmsted, who constantly had to repel those seeking to alter his design for Central Park, said

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<sup>42</sup> See Francesca Garson, Note, *Before That Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203, 237 (2001) ("The specificity of site-oriented works means that they are conceived for, dependent upon and inseparable from their location. . . . Based on the inter-dependence of work and site, site-specific works address the content and context of their site critically. . . . Site-specific works primarily engender a dialogue with their surroundings.") (citation omitted).

<sup>43</sup> KILEY & AMIDON, *supra* note 7, at 109.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Anne Whiston Spirn, *Seeing and Making the Landscape Whole*, PROGRESSIVE ARCHITECTURE, Aug. 1991, at 92 [hereinafter Spirn, *Seeing and Making*].

<sup>47</sup> WITOLD RYBCZYNSKI, A CLEARING IN THE DISTANCE: FREDRICK LAW OLMSTEAD AND AMERICA IN THE NINETEENTH CENTURY 23 (1999). As the author noted,

Olmsted was frustrated by people's unwillingness to recognize landscape architecture as an art. Olmsted thought that this was chiefly because they confused it with what he called decorative gardening. According to him, landscape architecture involved composition and perspective in which details were subordinate to the whole, contrary to decorative gardening, which treated "roses as roses, not as flecks of white or red modifying masses of green."

*Id.* at 396.

“[T]he only solid ground of resistance to dangers of this class will be found to rest in the conviction that the Park throughout is a single work of art, and as such, subject to the primary law of every work of art, namely, that it shall be framed upon a single, noble motive, to which the design of all its parts, in some more or less subtle way, shall be confluent and helpful.”<sup>48</sup>

Olmsted considered his work to be art, integrated in its parts, its integrity deserving of protection.<sup>49</sup>

Olmsted’s consideration has passed down to the present. Kiley saw his work as an amalgam, comprised of different elements to be considered as a whole. He fashioned those elements into art.<sup>50</sup> His

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<sup>48</sup> NORMAN T. NEWTON, *DESIGN ON THE LAND: THE DEVELOPMENT OF LANDSCAPE ARCHITECTURE* 286 (1971) (citation omitted). See also RYBCZYNSKI, *supra* note 47, at 396.

He considered landscape architecture akin to landscape painting, except that the landscape architect used natural materials instead of pigments. That, of course, was the root of the problem. Since the medium—as well as the subject—was nature itself, the public often failed to discriminate between the two. No one would think of altering a landscape on canvas, but a garden was different.

*Id.*

<sup>49</sup> Olmsted’s contention still applies today. In an editorial regarding the winning design for the September 11 memorial at the World Trade Center site, the *New York Times* said that the “memorial design presented . . . is a vision of how all the elements that might come into play can be combined to greatest effect. . . . The real memorial is the single coherent work of art created by [the designers], and it must be protected as such.” Editorial, *A Memorial Worth Preserving*, N.Y. TIMES, Jan. 19, 2004, at A18.

<sup>50</sup> Kiley wrote that “[t]he best part of design is that there are no rules. . . . Design is truly a process of discovery. It is an exciting dialogue that draws upon all of one’s knowledge, intuitions, values and inspirations. To be good, the designer has to trust his or her instinct . . . .” KILEY & AMIDON, *supra* note 7, at 176. Another pair of authors said that Kiley “often insisted that there is no real difference between architecture and landscape design. His work is a fusion of the two. It is also a kind of sculpture—not merely a setting.” WALKER & SIMO, *supra* note 36, at 173.

is a dynamic, evolving art whose components “are moving and growing in a related, organic way; that’s what is exciting, this sense of space and release and movement.”<sup>51</sup> He was an artist working with a living medium; the work’s integrity could be compromised by neglect or act, whether indifferent or deliberate.<sup>52</sup>

What happened to Kiley’s work at the Lincoln Center is an example of curatorial neglect, which led to the replacement of his plantings without consulting him. The result “just looks kind of silly.”<sup>53</sup> More poignantly, Kiley wrote that “this action emasculated the volumetric power of the original planting and severed the link between the architecture of plantings and buildings that together form a civic space of integrity.”<sup>54</sup> Landscape design is design that needs time.<sup>55</sup> It requires curatorial attention if the result is not to be haphazard or distorted. Kiley’s work was by design, and the

<sup>51</sup> KILEY & AMIDON, *supra* note 7, at 13. See also Deborah Weisgall, *Fighting Over the Future of an American Arden*, N.Y. TIMES, Nov. 15, 1998, at AR26 (“Designed landscapes imply a tension between nature and art. Nature, messy and evolving, behooves us to leave it be; art grants the illusion of stillness. Landscape, then, is the most fragile of art forms; its permanence relies on constant change.”).

<sup>52</sup> Kiley put it this way:

It is the bane, or perhaps the beauty, of many designed landscapes that significant and ongoing care is required not only to preserve day-to-day appearances, but to ensure that the design’s structure evolves fully. . . . As architects of a living medium, landscape designers have a mandate to guide their work through its successive evolutionary stages—or relinquish its integrity.

KILEY & AMIDON, *supra* note 7, at 96.

<sup>53</sup> Raver, *Cherishing Landscapes*, *supra* note 19, at C6.

<sup>54</sup> KILEY & AMIDON, *supra* note 7, at 57.

<sup>55</sup> See SPIRN, LANGUAGE OF LANDSCAPE, *supra* note 34, at 207. Kiley described it as follows:

[P]lants and other materials are chosen with current as well as future dimensions in mind, with awareness of summer as well as winter habit and so on. Specific effects are crafted to be vocal at various stages of development, and it is precisely these dynamic changes that measure the spirit of a place. . . . The intrigue of the design is being revealed over time in all the permutations of its physicality.

KILEY & AMIDON, *supra* note 7, at 136.

integrity of that design—and the designer—should have been respected.<sup>56</sup>

Part I of this Article discusses how legislatures and courts have attempted to define landscape architecture and will suggest that landscape design is a more accurate term when discussing the work of a master like Daniel Kiley. Part II discusses how the integrity of landscape designs is left unprotected by the basic federal copyright law and its two specialized provisions: the Architectural Works Copyright Protection Act and the Visual Artists Rights Act. Part III discusses the possibility that the integrity of landscape designs might be protected by state legislation despite the Copyright Act's preemption provision. Part IV concludes that landscape design should be accepted as a visual art and its integrity—including that of the artist—should be respected.

## I. WHAT IS LANDSCAPE ARCHITECTURE?

Although Kiley frequently referred to his work as landscape design, he was generally known as a master of landscape architecture. But what is landscape architecture?<sup>57</sup> In an early effort to define it, one court said “[l]andscape architecture has been recognized . . . as a profession embracing a field of highly technical and specialized knowledge and activities ‘between the professions of architecture and engineering.’”<sup>58</sup> The court upheld the following statutory definition:

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<sup>56</sup> See WALKER & SIMO, *supra* note 36, at 173 (“Kiley’s work . . . is architecture, in its rhythmic modulation of geometric point grids, its direct extension of ground planes, and its often flawless extension of interior space to the larger, continuous space out of doors.”).

<sup>57</sup> See *id.* at 315 (“For more than a century, landscape architecture has been a field difficult to define. . . . [L]andscape architecture still depends on rich, varied combinations of skills, insights, and bodies of knowledge, continually recombined and redefined by the individuals who practice landscape architecture.”). See generally G.B. TOBEY, A HISTORY OF LANDSCAPE ARCHITECTURE: THE RELATIONSHIP OF PEOPLE TO ENVIRONMENT (1973).

<sup>58</sup> *Paterson v. Univ. of the State of N.Y.*, 40 Misc. 2d 1023, 1030-31, 244 N.Y.S.2d 394, 403 (Nassau County, Spec. Term 1963) (internal citation omitted).

A person practices landscape architecture . . . where, and to the extent that the dominant purpose of such services is the preservation, enhancement or determination of proper land uses, natural land features, ground cover and planting, naturalistic and aesthetic values, the settings and approaches to structures or other improvements, natural drainage and the consideration and determination of inherent problems of the land relating to erosion, wear and tear, blight or other hazards.<sup>59</sup>

This definition, or a close variation of it, has been adopted by many states.<sup>60</sup>

It is not, however, universal. In *People ex rel. Department of Registration & Education v. Hund*,<sup>61</sup> the Illinois Attorney General filed a complaint against two individuals doing business as "Classic Landscape Engineers."<sup>62</sup> The complaint alleged that the business name implied that the defendants were registered engineers, which they were not. When the defendants' attorney emphasized that the defendants were primarily landscapers performing relatively simple tasks, the court responded that "landscaping in its highest form is both an art, and a science, involving a complex integration of social, ecological and physical

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<sup>59</sup> *Id.* at 399.

<sup>60</sup> See, e.g., ARK. CODE ANN. § 17-36-102(a)(2) (Michie 2001 Replacement); COLO. REV. STAT. § 24-30-1402(4) (2002); CONN. GEN. STAT. § 20-367(2) (2003); DEL. CODE ANN. tit. 24, § 201(2)(a) (2004); FLA. STAT. ANN. § 481.303(6) (West 2004); GA. CODE ANN. § 43-23-1(3) (2004); IDAHO CODE § 54-3002(2) (Michie 2004); IND. CODE ANN. § 25-4-2-1(b) (Burns 2004); KAN. STAT. ANN. § 74-7003(g) (2003); MICH. COMP. LAWS ANN. § 339.2201(b) (2004); MISS. CODE ANN. § 73-2-3(b) (2004); MO. ANN. STAT. § 327.600(1) (West 2004); NEV. REV. STAT. ANN. 623A.060 (Michie 2004); N.Y. EDUC. LAW § 7321 (Consol. 2004); N.C. GEN. STAT. § 89A-1(3) (2004); OHIO REV. CODE ANN. § 4703.30(B) (Anderson 2005); 63 PA. CONS. STAT. ANN. § 902(4) (West 2004); S.C. CODE ANN. § 40-28-10(b) (Law. Co-op. 2003); WASH. REV. CODE § 18.96.030 (2004); W. VA. CODE § 30-22-2(a)(5) (2004).

<sup>61</sup> 385 N.E.2d 836 (Ill. App. Ct. 1979).

<sup>62</sup> *Id.*

considerations.”<sup>63</sup> As another court noted in the alternative, a landscape architect arranges and modifies “the effects of natural scenery over a tract of land so as to produce the best aesthetic effect with regard to the use to which the tract is to be put.”<sup>64</sup>

These views consider landscape architecture as more than horticulture.<sup>65</sup> It is seen as deliberate design, as “the art—or the science, if preferred—of arranging land, together with the spaces and objects upon it, for safe, efficient, healthful, pleasant human use.”<sup>66</sup> The profession’s patriarchs, Olmsted and Calvert Vaux, used the name landscape architecture “to convey their intent to bear toward the total landscape the same relation that an architect bears toward a building, with essential emphasis on *design*.”<sup>67</sup> Olmsted later came to believe that “what they had done in Central Park . . . was much more than horticulture. It *was* art. It was, however, a particular kind of art. At one point he referred to it as ‘sylvan art.’”<sup>68</sup> He did not then fancy the term landscape architecture, writing to Vaux that “[i]f you are bound to establish this new art . . . you don’t want an old name for it.”<sup>69</sup>

Several states have defined landscape architecture with similar emphasis on its aesthetic and public welfare aspects. Illinois defines it as “the art and science of arranging land, together with the spaces and objects upon it, for the purpose of creating a safe,

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<sup>63</sup> *Id.* at 837.

<sup>64</sup> Pub. Util. Dist. No. 1 v. Dep’t of Revenue, 96 Wash. App. 1052, 1999 WL 528028, at \*4 (1999).

<sup>65</sup> See NEWTON, *supra* note 48, at xxiii.

[L]andscape architecture continues to be regarded by many . . . as a horticultural field . . . . To be sure . . . the landscape architect must know plant materials, not only biologically but also as a visual factor in design . . . . It is obvious that spaces are what humans do their living in; *space* must therefore be comprehended as the major medium of design.

*Id.* See also JACKSON, *supra* note 17, at 305 (“A landscape is thus a space deliberately created to speed up or slow down the process of nature. . . . [I]t represents man taking upon himself the role of time.”).

<sup>66</sup> NEWTON, *supra* note 48, at xxi. See also WALKER & SIMO, *supra* note 36, at xi.

<sup>67</sup> NEWTON, *supra* note 48, at xxi (citation omitted).

<sup>68</sup> RYBCZYNSKI, *supra* note 47, at 261.

<sup>69</sup> *Id.*



efficient, healthful, and aesthetically pleasing physical environment for human use and enjoyment.”<sup>70</sup> In Kentucky, it is “the planning of outdoor space involving the relationships of people, flora and fauna, and facilities, with emphasis on the function, preservation, conservation, restoration, and enhancement of the physical environment . . . in accordance with the accepted professional standard of public health, welfare and safety.”<sup>71</sup> In Maine, a landscape architect’s “services must apply artistic and scientific principles to the research, planning, design and management of both natural and built environments.”<sup>72</sup> In Montana, landscape architecture “is the design discipline specifically oriented to addressing the problems involved in adapting man’s uses of land to the characteristics of the exterior environment both functionally and aesthetically.”<sup>73</sup> And, in Maryland, to practice landscape architecture is to “provide any service or creative work in the analysis or design of land and natural resources that requires training and experience in the application of the biological, physical, mathematical, and social sciences.”<sup>74</sup>

These definitions recognize the artistic aspect of man-made landscapes.<sup>75</sup> Landscape design requires composition, a creation of space upon the land to serve a human purpose. But can it be, as

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<sup>70</sup> 225 ILL. COMP. STAT. ANN. 315/3(e) (West 1998). *See also* N.M. STAT. ANN. § 61-24B-3(D) (West 2003) (“the art, profession or science of designing land improvements”); TEX. OCC. CODE ANN. 1051.001(6) (Vernon 2004) (“the art and science of landscape analysis, landscape planning, and landscape design”).

<sup>71</sup> KY. REV. STAT. ANN. § 323A.010(3) (Michie 2001).

<sup>72</sup> ME. REV. STAT. ANN. tit. 32, § 220(2)(A) (West 1999).

<sup>73</sup> MONT. CODE ANN. § 37-66-103(4) (2003). *See also* N.J. STAT. ANN. § 45:3A-2(b) (West 1990); VA. CODE ANN. § 54.1-400 (Michie 2001) (stating that, similar to the New Jersey statute, landscape architecture is “any service . . . relative to projects principally directed at the functional and aesthetic use of land”).

<sup>74</sup> MD. CODE ANN., BUS. OCC. & PROF. § 9-101(j)(1) (2004).

<sup>75</sup> *See* JACKSON, *supra* note 17, at 304-05.

[T]he formula *landscape as a composition of man-made space on the land* . . . says that a landscape is not a natural feature of the environment but a *synthetic* space, a man-made system of spaces superimposed on the face of the land, functioning and evolving not according to natural laws but to serve a community. . . .

this Article will argue, defined as an art?<sup>76</sup> Congress has done so in specialized legislation.<sup>77</sup> The states have not been consistent in their definitions.<sup>78</sup>

At its best (and Kiley's work was among the best ever), a landscape design can be considered "as 'object'—as a work of art that makes us think, or feel the wind, or sense the underground stream beneath our feet."<sup>79</sup> Kiley wrote that he had been searching for "a language with which to vocalize the dynamic hand of human order on the land—a way to reveal nature's power and create spaces of structural integrity. . . . [T]his is not about style of

<sup>76</sup> See Anne Whiston Spirn, *Reclaiming Territory: Four Books on Landscape*, PROGRESSIVE ARCHITECTURE, Feb. 1993, at 103 ("[L]andscape design is a difficult art. The ground plane is rarely flat; it rolls, twists, and tilts. Landscapes lie open to the sky; scales and boundaries are fluid. Landscapes are living, dynamic, ephemeral . . ."). See also Weisgall, *supra* note 51 ("Restoring a beloved landscape is as tricky as restoring the 'Mona Lisa.' 'It is difficult to understand landscape as art' . . . 'Places become beloved in their decrepitude; people have a visceral reaction against change.' Landscape is art, but it is also real estate . . .").

<sup>77</sup> See 42 U.S.C. § 8143(1) (2000) ("For the purpose of this subchapter — (1) the terms 'art' and 'arts' include . . . landscape architecture . . ."); 16 U.S.C. § 470w-5(f) (2000) ("For purposes of this section, the term 'building arts' includes . . . landscape architecture, preservation and conservation . . .").

<sup>78</sup> See, e.g., COLO. REV. STAT. § 24-80.5-101(d)(IX) (2002) (stating that "[w]orks of art' means all forms of original creations of visual art including . . . Environmental landscaping"). Compare CONN. GEN. STAT. ANN. § 4b-53(a) (West 1998) (stating that "[w]ork of art as used in this section shall not include landscape architecture or landscape gardening"), with D.C. CODE ANN. § 39-202(6) (2001) (stating that "[t]he term 'public art' shall not include landscape design . . . unless designed by a visual artist as part of an artwork design authorized by the [Arts] Commission").

<sup>79</sup> Anne Raver, *The New Crop*, N.Y. TIMES, Oct. 13, 1991, at HD42. Kiley said it was "a pleasure to work with artists as clients . . . for they have the capacity to envision spatial relationships and recognize the importance of form, colour and texture in the built environment." KILEY & AMIDON, *supra* note 7, at 150. See also Darian-Smith, *supra* note 29, at 395 n.1.

The meaning of landscape is extremely complicated and involves a long, intellectual genealogy. I treat landscape as a form of "cultural practice," and . . . "think of landscape, not as an object to be seen or a text to be read, but as a process by which social and subjective identities are formed."

*Id.* (citation omitted).

decoration but about articulation of space.”<sup>80</sup> Or, as another author wrote, a “conviction that landscape is language . . . seems natural to many landscape architects, for landscape is a language derived from the core activity of landscape architecture: artful shaping . . . to fulfill function and express meaning.”<sup>81</sup>

Perhaps the major conceptual problem is that, unlike most other art forms, landscape art is dynamic rather than static.<sup>82</sup> Its primary medium is organic; it is always in process and is never perfected. Jen Jensen, a renowned American landscape designer,

preferred to be called a maker of natural parks and gardens rather than a landscape architect, and he believed that his own brand of art making was a superior brand. “All other arts are founded on dead materials,” he wrote. “In these materials there is no growth . . . there is not the freedom, nor the mystery of the infinite, to as great a degree as in landscaping.”<sup>83</sup>

Landscape design is daily growth and change requiring constant curatorial concern if the work is to be appreciated as envisaged.<sup>84</sup>

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<sup>80</sup> KILEY & AMIDON, *supra* note 7, at 13.

<sup>81</sup> SPIRN, *LANGUAGE OF LANDSCAPE*, *supra* note 34, at 8. *See also* JACKSON, *supra* note 17, at 301 (“[W]e always need a word or phrase to indicate a kind of environment or setting which can give vividness to a thought or event or relationship; a background placing it in the world.”).

<sup>82</sup> *See* Jane Holtz Kay, *Making Dead Land Live Again*, N.Y. TIMES, Mar. 15, 1990, at C1. “Landscape architects are experienced with plants that demand time to mature and know how to paint a canvas as dynamic and changing as the earth itself.” *Id.* at C12.

<sup>83</sup> Jim Robbins, *Native Grounds*, N.Y. TIMES MAG., May 16, 2004, at 68, 70-71.

<sup>84</sup> Bethany, *supra* note 33, at 58 (“The green world . . . is an ever-changing composition of multidimensional materials. Not only must a design be effective the day it is installed, it must still work in 5, 10 or 25 years. Moreover, the design must do more than look pretty, it must make sense of the land.”). *But see* Ken Druse, *Where Victorians Met Their Match*, N.Y. TIMES, June 24, 2004, at F1.

But I sometimes wonder if a garden should be preserved after its maker has departed, or just allowed to melt back into the earth. Gardens should not be frozen like a decorative room in a

Unlike most other art, landscape art is designed to be used as well as viewed.

## II. FEDERAL PROTECTION?

### A. Copyright

The basic federal copyright law did not protect the integrity of Daniel Kiley's public works as a landscape designer. Copyright protection is extended to "pictorial, graphic, and sculptural works."<sup>85</sup> These include "works of artistic craftsmanship insofar as their form but not their . . . utilitarian aspects are concerned," unless "such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."<sup>86</sup>

A primary goal of copyright law is to encourage artistic activity for the public's benefit, and the protection afforded the creator is secondary to this purpose.<sup>87</sup> Landscape art might be

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museum, or like the eternally new plantings at Disney World. After all, the garden would not be static if its maker were still present: invention, discovery, growth and death would continue, along with the introduction of new plants.

*Id.*

<sup>85</sup> 17 U.S.C. § 102(a)(5) (2000) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . . Works of authorship include . . . pictorial, graphic, and sculptural works. . . .").

<sup>86</sup> 17 U.S.C. § 101 (2000).

<sup>87</sup> See Raleigh W. Newsam, II, *Architecture and Copyright—Separating the Poetic From the Prosaic*, 71 TUL. L. REV. 1073, 1101 (1997) ("Copyright law rewards authors for their contributions to society, but the benefits are considered 'secondary' to the advancement of the arts for society's benefit. Thus, 'the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.'") (citations omitted). Copyright is not moral right. See Gerstenblith, *supra* note 40, at 439 ("The purposes of copyright and moral right are . . . fundamentally different. Copyright is motivated exclusively by the benefit which the public is to derive. Moral rights . . . primarily vindicate the artist's individual rights, while the public derives secondary benefits from the recognition of the artist's rights.") (citations omitted).

protected as "pictorial, graphic and sculptural works" but likely only to the extent that those features can exist independently of the work's utilitarian function.<sup>88</sup>

At least for Kiley's public work, though, its utilitarian function was a primary reason for its existence. His work was not a collection of pieces, but a single piece. One author recently analyzed whether golf course holes, which "can be correctly classified as artistic creations of landscape architecture," could be copyrighted.<sup>89</sup> He concluded that copyright was "not a feasible method of protection" for golf holes, even if they "contain beautiful artistic creations of landscape design," because "most hole features serve a dual purpose of ornamentation and usefulness."<sup>90</sup>

At most, Kiley would have been able to copyright his designs to prevent misappropriation by others. The plaintiff in *Sparaco v. Lawler, Matusky, Skelly, Engineers LLP*<sup>91</sup> was a surveyor and planner who was commissioned to draft a site plan for an assisted living facility.<sup>92</sup> The court said that the plaintiff's site plan "included a basic survey map of the parcel of land, . . . a topographical survey," and a plan for the following improvements:

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<sup>88</sup> See Keri Christ, *Edifice Complex: Protecting Landmark Buildings as Intellectual Property—A Critique of Available Protections and a Proposal*, 92 TRADEMARK REP. 1041, n.144 (2002) ("Monuments, interior designs and landscape architecture have long been protected as 'pictorial, graphic and sculptural works' to the extent that the pictorial, graphic and sculptural features can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the design, under 17 U.S.C. § 101.") (citation omitted).

<sup>89</sup> Robert D. Howell, *Tee'd Off—Golf Course Designers Score Double Bogey in Search for Protection of Their Hole Designs*, 5 J. INTEL. PROP. L. 337, 343 (1997). Howell goes on to state that "[t]he courses' artistic nature is reflected in their beauty and design . . . . Classification as a form of 'art,' however, does little to advance a golf hole's chances of achieving copyrightability under [17 U.S.C. § 102(a)(5)].". *Id.* See also *Pebble Beach Co. v. Tour 18 I Limited*, 155 F.3d 526 (5th Cir. 1998).

<sup>90</sup> Howell, *supra* note 89, at 345.

<sup>91</sup> 303 F.3d 460 (2d Cir. 2002).

<sup>92</sup> *Id.*

(1) the location and contour of the building footprint; (2) location and contour of parking lots; (3) placement and design of curbs, driveways, and walkways; (4) placement of utilities and provision for sediment and erosion control; (5) landscape design, including the location for plants, trees, and lights; and (6) proposed changes to the contours and elevation of the terrain.<sup>93</sup>

The plaintiff copyrighted the site plan.

When the plaintiff was removed from the project, the developer hired another firm to prepare a site plan. The new firm essentially copied and submitted the plaintiff's work as its own. The plaintiff sued, claiming that the defendants had created a derivative work in violation of the Copyright Act.<sup>94</sup> The district court found that "copying the site plan would take nothing that is protected by copyright."<sup>95</sup>

In reversing, the Second Circuit noted that the site plan contained "renderings of two types of features: (1) the existing physical characteristics of the site; and (2) proposals for physical improvements to the site."<sup>96</sup> As to the first feature, the court said that "[t]o the extent that the site plan sets forth the existing physical characteristics of the site . . . it sets forth facts; copyright does not bar the copying of such facts."<sup>97</sup> As to the second, the court said "the question whether there has been infringement . . . turn[s] on whether the copying was only of the author's generalized ideas and concepts or of the author's more precisely detailed realization of those ideas."<sup>98</sup> The plaintiff's

site plan specifie[d] more than vague, general indications of shape and placement of the elements. It provide[d] detailed specifications for preparation of

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<sup>93</sup> *Id.* at 463.

<sup>94</sup> *Id.* at 464.

<sup>95</sup> *Id.* at 465.

<sup>96</sup> *Id.*

<sup>97</sup> *Sparaco*, 303 F.3d at 468.

<sup>98</sup> *Id.* at 467.

The protection afforded, however, is limited.<sup>107</sup> For example, if the building is in or is visible from a public place, anyone may make, distribute, and "public[ally] display . . . pictures, paintings, photographs, or other pictorial representations of the work."<sup>108</sup> In addition, the building owner "may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building."<sup>109</sup>

Consequently, even if Kiley's Lincoln Center design could have been copyrighted under AWCPA, the violation of the work's integrity could still have occurred without Kiley having any recourse. But AWCPA does not apply to landscape design. And, perhaps, that is how it should be. Landscape designers are not architects.

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<sup>107</sup> See Scaglione, *supra* note 105, at 195-96.

Three major problems exist with the Act and its legislative history. First, the legislative history's definition . . . is too restrictive and may exclude works deserving architectural protection. Second, the legislative history's equivocal wording leads to confusion as to whether architectural works can receive dual protection as both sculptural and architectural works. Finally, the Act's legislative history proposes a "functionality test". . . . [I]f design elements are determined by functional considerations, they are not copyrightable.

*Id.* (citations omitted). See also Clark T. Thiel, *The Architectural Works Copyright Protection Gesture of 1990, Or, "Hey, That Looks Like My Building!"*, 7 DEPAUL-LCA J. ART & ENT. L. 1, 8-9 (1996).

Currently . . . a utilitarian or useful article qualifies for copyright protection as to its form, but not its mechanical or utilitarian aspects. . . . [A]n author can copyright artistic, sculptural or decorative elements incorporated in a useful article only if they are physically or conceptually separable from the article . . . making it difficult for the courts to separate an article's form from its function.

*Id.* (citations omitted). This is a problem for architecture. Although the discipline "has long been viewed as one of the fine arts . . . most buildings serve utilitarian functions." Newsam, *supra* note 87, at 1077.

<sup>108</sup> 17 U.S.C. § 120(a) (2000).

<sup>109</sup> *Id.* § 120(b).

They deal with different questions in different ways.<sup>110</sup> Although the noted architect Antoine Predock has said that “[a]rchitecture is landscape in drag,” the aims and techniques of the two fields are completely different.<sup>111</sup> Even when a work commingles both, the difference is habitation versus habitat. Architecture concerns the former; landscape design the latter. Architecture produces a commodity; landscape design provides a context.<sup>112</sup>

It is true that both architecture and landscape design concern the making of a place, but it is the use of that place at which the

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<sup>110</sup> See Andrea O. Dean, *Listening to: Landscape Architects*, ARCHITECTURAL REC., Aug. 1997, at 44.

[A]rchitects and landscape architects tend to approach projects with different mindsets, the landscape architect being more inclined to give at least as much weight to process as to product. . . . [T]he architect represents the client, while the landscape architect feels an obligation to also represent the interests of the environment, the community, and even the culture.

*Id.*

<sup>111</sup> Robert Campbell, *Architecture As Geology? The Latest Definition Emerges*, ARCHITECTURAL REC., June 2003, at 16.

<sup>112</sup> See Gregory B. Hancks, *Copyright Protection for Architectural Design: A Conceptual and Practical Criticism*, 71 WASH. L. REV. 177, 191 (1996).

The AWCPA, however, takes no notice of the site-specific nature of architectural design. . . . [I]t creates the false presumption that sites are fungible—that buildings are commodities that can be arbitrarily located on any site. The AWCPA places a value on an architectural design completely divorced from the design’s context.

*Id.* Compare the Roden Crater project where, since 1974, a designer’s “working life has centered on the effort to turn an extinct volcano . . . into a naked-eye observatory for celestial events. . . . ‘to capture and apprehend light’ from the sun and the moon and the stars—and also to demonstrate how we create and form our perceptions of the visible world.” Calvin Tomkins, *Profiles, Flying Into the Light, James Turrell*, THE NEW YORKER, Jan. 13, 2003, at 62. One observer said the Roden Crater project “is one of the purest revelations of time and space ever attempted, and it promises to make a landscape at such a vast and otherwise undefinable scale that the true act of experiencing the earth will be liberated within its confines.” BETSKY, *supra* note 34, at 141 (citation omitted). See *id.* at 146-49 for a picture of this project.



line is drawn.<sup>113</sup> Architecture can enclose, landscape design can expose. Architecture results in a structure; landscape design results in an image. Architecture is captured space; landscape design is spatial organization. At their best, both architecture and landscape design deserve protection, but the basis for that protection must recognize the differences in the art forms.<sup>114</sup>

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<sup>113</sup> See Campbell, *supra* note 111, at 62.

Architecture is certainly an art, but it is not principally the art of sculptural form or beautifully proportioned facades. It differs from all other arts in that its subject is places. . . . Architecture is the art of all places intended for human habitation. One experiences a work of architecture not by looking at it like a painting, or even walking around it like a sculpture, but rather by imaginatively inhabiting it.

*Id.* See also Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1615 (1992).

Organizations of space, such as gardens, parks, and golf courses . . . should not be protected by the AWCPA. Works that are not enclosed by any structure, although perhaps requiring much time, effort, and expense for an architect to prepare, and having a large potential for copying, simply cannot be considered buildings.

*Id.*

<sup>114</sup> See Gerstenblith, *supra* note 40, at 446-47.

[AWCPA's] legislative history indicates that the word "building" should be interpreted broadly. As such, "buildings" include not only structures inhabited by humans but also those used by humans . . . . It has been suggested that . . . protection should not be extended . . . to works such as gardens and parks which represent primarily spatial organizations rather than enclosed structures.

*Id.* See also Winick, *supra* note 113, at 1613.

Architecture critic Paul Goldberger has stated that the two greatest works of architecture in New York City are Central Park and the Brooklyn Bridge, neither of which would receive protection under the AWCPA. Golf courses, gardens, tunnels, bridges, overpasses, fences, and walls are only a few of the structures designed by architects that would not fit the common definition of "building."

*Id.* (citation omitted).

The different art forms, however, are compatible. Landscape design can inform architecture. Kiley designed a landscape for the Chicago Art Institute. One critic wrote that

[t]o understand such a Mecca of architecture as Chicago, one should consider the small garden landscape architect Dan Kiley created in front of the south wing of the Chicago Art Institute . . . . A few feet below street level, surrounded by orthogonal boxes that thrust up to the sky in celebration of human achievement and measured by a grid of trees that recalls the simple clarity with which we organize the land to make such ambitious construction possible, this small garden is the essence of what we build on the land.<sup>115</sup>

Unlike a building, the completed effect was not instantaneous because the design took time to mature and thus to reveal.<sup>116</sup> In addition, the effect was to complement, not supplant, the architecture. It was, in essence, a frame, but it was also a work of art.

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<sup>115</sup> BETSKY, *supra* note 34, at 13. Chicago recently opened “a spectacular new park and performance center” described as “the latest of the grand architectural statements for which Chicago is renowned.” Stephen Kinzer, *A Prized Project, a Mayor and Persistent Criticism*, N.Y. TIMES, July 13, 2004, at A12. The park, “Chicago’s \$475 million celebration of design,” includes a 2.5 acre garden created by Kathryn Gustafson, “the American-born landscape architect known for her sculptured parks and lively waterworks” reflecting “her bold, minimalist sensibility.” Anne Raver, *Softening a City With Grit and Grass*, N.Y. TIMES, July 15, 2004, at F1.

<sup>116</sup> See Spirn, *Seeing and Making*, *supra* note 46, at 92 (“It is . . . no surprise that the landscape, particularly the public landscape, is undervalued in the United States. Landscapes are not readily perceived as objects; they may take years to mature, requiring careful attention and ample resources. Buildings, by contrast, provide immediate gratification . . . .”). See also Muschamp, *If Not Utopia*, *supra* note 12, at C29 (“[H]istorically, we have tended to see a building as the picture, the landscape as its frame. But today there’s wider recognition that frames possess inherent interest. Frame-making is itself an art form; a frame can powerfully affect our experience of the object it encloses.”).

There was art in Kiley's landscape designs. He was not a gardener, although gardening informed his work.<sup>117</sup> He was an artist who revealed or embodied the spirit of the places where he worked. He created a place, not a structure—an idea visualized, rather than a building realized.<sup>118</sup> His work was dynamic and open, not completed and enclosed.<sup>119</sup> It was not architecture as defined by Congress, and its protection merits more than that which Congress has provided for architecture.<sup>120</sup>

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<sup>117</sup> See BETSKY, *supra* note 34, at 24.

Landscape architecture today is not simply about planting flowers and creating outdoor spaces with plants. . . . [I]t is the act of scraping off the products of human interference on the land to reveal the nature of a place. . . . This is the most efficient and . . . the most utopian form of architecture . . . one that restores nature and our understanding of it to a prominent position in our culture.

*Id.*

<sup>118</sup> See *id.* at 13.

Many landscape architects today see their practices as a way of unearthing and clarifying what already exists. . . . [T]hey combine human shaping with the force of the land. Landscape architecture that exists at the intersection of the geological, the geographical and the human is the most fundamental exposition of architecture I know.

*Id.*

<sup>119</sup> See James S. Russell, *Landscape Urbanism: It's the Future, Not a Contradiction*, ARCHITECTURAL REC., Aug. 2001, at 70, 72.

It's easier for landscape architects to accept process as product because they are used to dealing with a living entity that will change over time no matter what. . . . "A building doesn't die if it doesn't get water or sunshine. Landscape architecture is feral—it's about design thinking, but it's always partly wild."

*Id.*

<sup>120</sup> See Gerstenblith, *supra* note 40, at 449.

[T]he right of integrity . . . was specifically denied to architectural works. This was done so that a building owner could alter or destroy the building without seeking a transfer of the copyrights from the owner of the copyright or the architect. . . . The AWCPA's potential to preserve architectural works is thus nullified.

*Id.*

### *C. Visual Artists Rights Act*

When Congress enacted AWCPA, it also enacted the Visual Artists Rights Act of 1990 ("VARA").<sup>121</sup> A "work of visual art" includes "a painting, drawing, print, or sculpture" existing as a single copy or in limited editions.<sup>122</sup> The artist is afforded special rights including a right of integrity enabling the artist "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."<sup>123</sup> If the work is one "of recognized stature," the artist has a right "to prevent any destruction of [that] work . . . and any intentional or grossly negligent destruction of that work is a violation of that right."<sup>124</sup> However, if the modification results from "the passage of time or the inherent nature of the materials," that is not a violation.<sup>125</sup> If the modification results from "conservation" or "public presentation," there is no violation "unless the modification is caused by gross negligence."<sup>126</sup>

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<sup>121</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990). The law was codified in scattered sections of title seventeen of the United States Code. *See, e.g.*, 17 U.S.C. §§ 101, 411-12, 501, 506 (2000).

<sup>122</sup> 17 U.S.C. § 101 (2000). For a recent history of VARA, see Christopher R. Mathews, *VARA's Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future*, 10 UCLA ENT. L. REV. 139, 140-42 (2003).

<sup>123</sup> 17 U.S.C. § 106A(a)(3)(A) (2000).

<sup>124</sup> 17 U.S.C. § 106A(a)(3)(B) (2000). *See* Scott v. Dixon, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

Works of recognized stature, within the meaning of VARA, are those works of artistic merit that have been "recognized" by members of the artistic community and/or the general public. . . . To achieve VARA protection, an artist must show not only the work's artistic merit but also that it has been recognized as having such merit.

*Id.* (internal citations omitted). *See also* Keshawn M. Harry, Note, *A Shattered Visage: The Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990*, 9 J. INTELL. PROP. L. 193 (2001).

<sup>125</sup> 17 U.S.C. § 106A(c)(1) (2000).

<sup>126</sup> 17 U.S.C. § 106A(c)(2) (2000).

VARA offers more protection to architectural works that are not utilitarian but monumental, defined as sculptural works that are aesthetic, not functional.<sup>127</sup> VARA acknowledges the public interest in encouraging and preserving aesthetic work; if the work is visual art, VARA protects the public interest by empowering the artist with authority to protect the work's integrity.<sup>128</sup>

VARA leaves much to judicial interpretation.<sup>129</sup> In *Carter v. Helmsley-Spear, Inc.*,<sup>130</sup> the Second Circuit made an early and highly influential interpretation. The plaintiffs, three professional sculptors, had created "a very large 'walk-through sculpture' occupying most, but not all," of a lobby in a building owned by the

<sup>127</sup> See Thiel, *supra* note 107, at 35-36 ("[B]ecause [VARA] covers sculptural works, architects creating nonfunctional architecture enjoy considerably more protection than those creating useful architectural works. This dichotomy reintroduces the problem of classifying structures as either functional or aesthetic, and providing significantly different protection based on this determination."). See also Scaglione, *supra* note 105, at 203; Melissa M. Mathis, *Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law*, 22 CARDOZO L. REV. 595 (2001).

<sup>128</sup> See Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1936 (2000).

VARA recognizes a public interest in the encouragement of artists to work and in the preservation of their work once created. Appealing to the public interest on a narrow front helped ensure the passage of the legislation . . . Public interest thus justified the intervention of federal law into what many considered a private contractual matter.

*Id.* This public interest, however, may encounter other interests. See Garson, *supra* note 42, at 205 ("[I]nterpreting VARA to allow a government-commissioned artist to prevent the removal of her site-specific artwork would potentially bind public property indefinitely. . . . Unfettered moral rights protection for such artists would effectively privatize public land—and a lot of it.").

<sup>129</sup> See Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 410 (1995).

The House Committee report on VARA does, however, leave to the courts the more detailed work of defining what qualifies as a [protected work] . . . [C]ourts are not locked into narrow definitions and can "find" that certain category-defying works fit into one of the types of work protected by VARA.

*Id.* (citations omitted).

<sup>130</sup> 71 F.3d 77 (2d Cir. 1995).

defendants.<sup>131</sup> When the defendants told the sculptors that they intended to remove the work, the sculptors sued for an injunction under VARA.<sup>132</sup>

The court, finding it “necessary to review briefly the concept of artists’ moral rights” and its influence on VARA, said that the term had

its origins in the civil law and is a translation of the French *le droit moral*, which is meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved. . . . Because they are personal to the artist, moral rights exist independently of an artist’s copyright in his or her work.<sup>133</sup>

The court said “the right of integrity allows the author to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred.”<sup>134</sup>

The court’s first task was to “determine whether the trial court correctly found that the work is a single piece of art, to be analyzed under VARA as a whole, rather than separate works to be considered individually.”<sup>135</sup> This finding, “a factual one,” was correct; the

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<sup>131</sup> *Id.* at 80. The court described the piece as follows:

The artwork consists of a variety of sculptural elements constructed from recycled materials, much of it metal, affixed to the walls and ceiling, and a vast mosaic made from pieces of recycled glass embedded in the floor and walls. Elements of the work include a giant hand fashioned from an old school bus, a face made of automobile parts, and a number of interactive components. These assorted elements make up a theme relating to environmental concerns and the significance of recycling.

*Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 81 (internal citations omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *Carter*, 71 F.3d at 83.

sculpture “was a thematically consistent, inter-related work whose elements could not be separated without losing continuity and meaning.”<sup>136</sup> However, the court ultimately concluded that the sculptors were employees of the defendants, making the work one done for hire, and, therefore, not protected by VARA.<sup>137</sup>

VARA’s definition of visual art could, with some sympathetic interpretation, encompass Kiley’s landscape designs. It has been argued that “environmental art can be classified as sculpture” as “the conceptual basis is the same as it is for all art—to relate to people in perhaps an inarticulable and intangible, but very real,

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<sup>136</sup> *Id.* at 83-84.

<sup>137</sup> *Id.* at 88. In reaching this conclusion, the court said that while the existence of payroll formalities alone would not be controlling . . . in combination with other factors, it may lead to a conclusion that a given work is one made for hire. Such other factors include: plaintiffs under their contract could be and were in fact assigned projects in addition to the work in the lobby; they were paid a weekly salary for over two years for a contracted 40 hours of work per week; they were furnished many of the needed supplies necessary to create the work; and plaintiffs could not hire paid assistants without defendants’ consent. These factors, properly considered and weighed with the employee benefits granted plaintiffs and the tax treatment accorded them, are more than sufficient to demonstrate that the artists were employees, and the sculpture is therefore a work made for hire as a matter of law.

*Id.* at 87-88 (internal citation omitted). See Benjamin S. Hayes, Note, *Integrating Moral Rights into U.S. Law and the Problem of the Work for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1020 (2000).

[I]t seems that American courts are instinctively hostile to the right of integrity, and have relied on the work for hire doctrine to avoid granting it. Common law courts have always been loathe to infer servitudes, and the right of integrity is basically a form of equitable servitude. . . . Thus, the right of integrity may well meet strong resistance from the courts on the theory that it is inconsistent with the free alienability of property.

*Id.* (citations omitted). See also Colleen Creamer Fielkow, *Clashing Rights Under United States Copyright Law: Harmonizing an Employer’s Economic Right with the Artist-Employee’s Moral Rights in a Work Made for Hire*, 7 DEPAUL-LCA J. ART & ENT. L. 218 (1997).

way.”<sup>138</sup> The judgment exercised in such works is artistic, the resulting composition can be considered visual art.<sup>139</sup>

Kiley’s work was not an object created for or placed in a certain space.<sup>140</sup> His work was the site, the adding and removing, the shaping and revealing that produces a *genus loci*, a spirit of the place. The result was a singular expression, not just the addition of a free standing piece. Yet VARA does not appear to protect the integrity of landscape art.

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<sup>138</sup> Jay Orlandi, Comment, *Gargoyles in Gotham: A Sculpture Incorporated into an Architectural Work Should Retain Independent Copyright Protection*, 29 SW. U. L. REV. 617, 623 (2000). See also Michael Kimmelman, *Modernism Wasn’t So American After All*, N.Y. TIMES, July 2, 2004, at E27.

Much of this [exhibit] entails developments in sculpture, which during this time [the 1940s through the 1970s] came to include almost anything and everything. The exhibition demonstrates how sculpture changed back then from something static, three-dimensional and made mostly out of traditional materials like stone or wood or clay into a medium that pretty much defied definition.

*Id.*

<sup>139</sup> See Russell, *supra* note 119 (stating that a landscape architect, describing how she “artfully composed the soil,” said her “peers say I’m more of sculptor than a landscape architect”). See also JACKSON, *supra* note 17, at 299-300 (“Just as the painter used his judgment as to what to include or omit in his composition, the landscape gardener . . . took pains to produce a stylized ‘picturesque’ landscape . . . . The results were often extremely beautiful, but they were still pictures, though in three dimensions.”).

<sup>140</sup> See BETSKY, *supra* note 34, at 140.

Site-specific work means to reveal the nature of its location in time and space, the history of its making, the hand of its maker, and the cultural assumptions that maker and viewer bring to an experience of the work. . . . The work creates an environment, but is also an object (or set of objects) in its own right.

*Id.* See also Garson, *supra* note 42, at 230.

Since site-specific artwork is designed for a particular place, it is inherently dependant on its context. . . . [T]he 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.

*Id.*



Landscape art is not land art.<sup>141</sup> Land art is created to be observed; landscape art is created to be used. Land art is often created away from population; landscape art is almost always created within a population. The observer does not have to trek to experience landscape design; it is an aspect of the observer's daily life.<sup>142</sup>

Landscape art could, with some imagination, be regarded as sculpture. Designers and sculptors select what to reveal, use their skills to effect the revealing, and use their techniques to refine what is revealed. Both are visual artists.

[T]he visual artist, whatever the medium, expresses a view of the world. In a very real sense, the artist

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<sup>141</sup> See BETSKY, *supra* note 34, at 13.

Land artists of the 1960s and 1970s pointed the way toward a reduction of human marks in or on the land. . . . The pure abstraction of such pieces makes us aware of the relationship between the land and our own construction. We experience a tension between what we know through our rational senses and what we feel is present on a site.

*Id. Compare id.* at 8-9:

Just as a sculptor chisels away at a rock, the architect selects which strata to reveal, polishes them to change their appearance, and hones them down to show new forms that were always inherent in the material itself. Architecture in this sense is not the making of something new, but the reformation of what already exists in a form that accepts the mark of human intervention.

<sup>142</sup> See Michael Kimmelman, *Art's Last, Lonely Cowboy*, N.Y. TIMES MAG., Feb. 6, 2005, at 33; Melissa Sanford, *The Salt Of the Earth Sculpture*, N.Y. TIMES, Jan. 13, 2004, at E1 (discussing Robert Smithson's *Spiral Jetty*, an earth sculpture built into the Great Salt Lake in Utah at a point "about 100 miles northwest of Salt Lake City, on state-owned land accessible by a 15-mile dirt road with giant potholes that can trap small cars; four-wheel drive is recommended"). See also John Rockwell, *Preserve Performance Art? Can You Preserve the Wind?*, N.Y. TIMES, Apr. 30, 2004, at E5; Simon Schama, *The Stone Gardener: A Land Artist Comes to Lower Manhattan*, NEW YORKER, Sept. 22, 2003, at 126-27 ("Land art was to be landscape's come-uppance. The place would own the beholder, not the other way around, since to experience [it] . . . one had to travel a very long way from Madison Avenue.").

imposes her own order upon nature and the universe. When an artist creates, she is shaping a new reality, a form to signify a feeling, and a certain order among perceptions and sensations. . . . [F]rom the perspective of the audience artistic expression functions to eliminate mankind's alienation from nature through communication by symbols.<sup>143</sup>

Landscape designers are visual artists, possessing an "ability to see, feel, and think—all with clarity—and to communicate visually as well as verbally."<sup>144</sup> Done as Kiley did it, landscape design is art.<sup>145</sup>

Richard Serra, perhaps America's greatest living sculptor, says that his work, monumental in scale, "is not creating static objects but shaping space" to be experienced by walking through or around it.<sup>146</sup> Unlike literature or music, Serra's work, like Kiley's, is not meant to be replicated, copied, or distributed, a situation that

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<sup>143</sup>Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime, and The First Amendment*, 1987 WIS. L. REV. 221, 223 (1987) (citations omitted). See also Marcus C. Johnson, Note, *Let Freedom Reign*, 53 RUTGERS L. REV. 485, 503 (2001) ("Courts have confirmed the high place that visual art occupies among expressive activities. . . . [T]he viewer may not always interpret the artwork the way the artist intended. In fact, artistic expression is a powerful communicative tool precisely because it is capable of evoking a variety of interpretations from viewers.").

<sup>144</sup>NEWTON, *supra* note 48, at 391.

<sup>145</sup>See WALKER & SIMO, *supra* note 36, at 318 ("[A]lthough the works we have considered are not all masterpieces, many are works of art. Together they bear witness to a continuing quest for beauty, meaning, mystery, and the perhaps unattainable garden of myth.")

<sup>146</sup>Tomkins, *supra* note 105, at 52. See Carol Vogel, *A \$20 Million Bilbao Project for Serra*, N.Y. TIMES, Feb. 27, 2004, at E27; Andrew Blum, *A Serra Sculpture Emerges From Its Tomb*, N.Y. TIMES, Nov. 23, 2003, at AR45. Serra stated that "[t]o protect your work and be responsible for your work is a lifetime job. There's always something. There's always the cow that knocks over the fence." *Id.* Serra was involved in one of the most significant pre-VARA cases, where the cow knocked over a fence he created. See *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988). For Serra's account of this, see Richard Serra, *The Tilted Arc Controversy*, 19 CARDOZO ARTS & ENT. L.J. 39 (2001).

The court concluded that “[i]n the artistic community, ‘models’ such as the clay sculpture are considered works of art in their own right.”<sup>154</sup> The contrary conclusion “would lead to an absurd result” because “then sculptors would enjoy less protection than photographers and painters, even though all three types of artists . . . were the intended beneficiaries of VARA.”<sup>155</sup>

The Second Circuit in *Pollara v. Seymour* confronted the question of whether the plaintiff’s work, “a banner, approximately ten feet high and thirty feet long,” was VARA-protected visual art.<sup>156</sup> The banner, commissioned by a non-profit group providing legal services to the poor, was designed to protest, in words and pictures, the lack of state funding for such services. The banner, which was erected in a public square on state grounds, was subsequently removed and destroyed by state employees. The artist then sued the state under VARA.

The court said “VARA protects only things defined as ‘work[s] of visual art,’ . . . a definition that is ‘a critical underpinning of the limited scope of [VARA].’”<sup>157</sup> Congress had instructed the courts “to ‘use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.’”<sup>158</sup> So, was the artist’s banner a work of visual art eligible for protection under VARA? The court said it was not:

Protection of a work under VARA will often depend, as it does here, upon the work’s objective and evident purpose. VARA does not protect advertising, promotional, or utilitarian works, and does not protect works for hire, regardless of their artistic merit, their medium, or their value to the artist or the market. . . . VARA may protect a sculpture that looks like a

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<sup>154</sup> *Flack*, 139 F. Supp. 2d at 533 (citations omitted).

<sup>155</sup> *Id.* at 534 (citations omitted).

<sup>156</sup> 344 F.3d 265, 266 (2d Cir. 2003).

<sup>157</sup> *Id.* at 269 (internal citation omitted).

<sup>158</sup> *Id.*

piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture. Drawings and paintings are protected, but only if they do not advertise or promote.<sup>159</sup>

Because the artist's banner "was created for the purpose of promoting and advertising," it was not a VARA-protected work.<sup>160</sup>

A non-fanciful argument can be made that Kiley's Lincoln Center work was sculptural and thus protected by VARA.<sup>161</sup> The plaintiffs in *English v. BFC & R East 11th Street LLC*<sup>162</sup> were six artists who had adorned a community garden by painting murals on walls around it and placing sculpture in it.<sup>163</sup> The space, which had been city owned, was sold to a private developer. The artists sued to prevent development of the garden claiming, in part, that "the Garden itself constitutes a single work of art. They describe it as 'a large environmental sculpture encompassing the entire site and comprised of thematically interrelated paintings, murals, and individual sculptures of concrete, stone, wood and metal, and plants.'"<sup>164</sup> They argued that the garden was protected by VARA.

The court took the artists' claim seriously, saying "the merits of the litigation turns in part on whether the Garden is conceived of as a single work of Visual Art." Whether the Garden constituted "a single piece of art, to be analyzed under VARA as a whole, rather than separate works to be considered individually," was a

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<sup>159</sup> *Id.* (internal citations omitted).

<sup>160</sup> *Id.* at 270.

<sup>161</sup> See Pilar Viladas, *The Constant Gardener*, N.Y. TIMES MAG., May 16, 2004, at 39, 39-40. Belgian landscape artist Jacques Wirtz is

[r]enowned for his sculptural treatment of time-honored garden staples . . . he has done for them what Richard Serra has done for steel—Wirtz also possesses a virtuoso knowledge of plants and flowers. His painterly handling of light and shadow, like that of 17th-century Flemish painters, gives him "a great power to evoke space". . . .

*Id.* (quoting Spanish landscape designer Fernando Caruncho).

<sup>162</sup> 1997 WL 746444 (S.D.N.Y. 1997).

<sup>163</sup> *Id.* at \*1.

<sup>164</sup> *Id.*

question of fact.<sup>165</sup> However, the court did not answer that question because the artists could not “claim a protectable interest in the Garden itself—even were it deemed to be a single unified work of art—because it was illegally placed on City property.”<sup>166</sup>

Had the court concluded that the garden was VARA-protected visual art, the protection afforded would have been limited. During an artist's lifetime, he or she can act “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”<sup>167</sup> If the work is one “of recognized stature,” the artist may act “to prevent any destruction of [the] work.”<sup>168</sup> However, any “modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification.”<sup>169</sup> In addition, any “modification of a work of visual art which is the result of conservation, or of the public presentation . . . of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.”<sup>170</sup>

Moreover, even the intentional destruction of a work of recognized stature brings only limited relief under VARA. The artist in *Martin v. City of Indianapolis*<sup>171</sup> had erected a large metal sculpture on private land later acquired by the city as part of its urban renewal plan. Although the artist had designed the piece to be disassembled in case it needed to be moved, the city had the piece demolished without prior notice to the artist. The artist then sued under VARA.

Because the work had been destroyed, the primary question was whether it had been one of “recognized stature,” a term which was “not defined in VARA, leaving its intended meaning and

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<sup>165</sup> *Id.* at \*3 (internal citation omitted).

<sup>166</sup> *Id.* at \*5.

<sup>167</sup> 17 U.S.C. § 106A(a)(3)(A) (2000). These rights “shall endure for a term consisting of the life of the author.” *Id.* § 106A(d).

<sup>168</sup> *Id.* § 106A(a)(3)(B).

<sup>169</sup> *Id.* § 106A(c)(1).

<sup>170</sup> *Id.* § 106A(c)(2).

<sup>171</sup> 192 F.3d 608 (7th Cir. 1999).

application open to argument and judicial resolution.”<sup>172</sup> The court elected to apply the following test, which requires

(1) that the visual art in question has “stature,” i.e. is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.<sup>173</sup>

The artist’s problem in *Martin* was that his work “was destroyed by the City without the opportunity for experts to appraise the sculpture in place.”<sup>174</sup>

The artist did submit “certain newspaper and magazine articles, and various letters, including a letter from an art gallery director and a letter to the editor” which he said supported the sculpture’s stature as a recognized work.<sup>175</sup> The court affirmed that the artist “had met his ‘stature’ burden of proof” with this evidence.<sup>176</sup> However, despite “the City’s conduct resulting in the intentional destruction of the sculpture,” the court did not consider “that the City’s conduct was ‘wilful’ . . . so as to entitle the plaintiff to enhanced damages.”<sup>177</sup> The court said that such conduct “appear[ed] to be a case of bureaucratic failure within the City government, not a wilful violation of plaintiff’s VARA rights. . . . As unfortunate as the City’s unannounced demolition . . . was, it [did] not qualify plaintiff for damages under VARA.”<sup>178</sup>

The artist was awarded the maximum amount of statutory damages for a non-wilful violation, plus attorney’s fees and costs.

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<sup>172</sup> *Id.* at 612.

<sup>173</sup> *Id.* (quoting *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994)).

<sup>174</sup> *Martin*, 192 F.3d at 612.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (internal citation omitted).

<sup>177</sup> *Id.* at 614.

<sup>178</sup> *Id.*

But that was, as the trial court acknowledged, small relief for the injury suffered.<sup>179</sup>

### III. STATE PROTECTION?

Many states have VARA-like statutes and, in fact, had them prior to VARA's enactment.<sup>180</sup> However, the protection offered by the state statutes is limited by VARA's preemption provision.

On or after the effective date . . . of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred . . . with respect to works of visual art . . . are governed exclusively by [VARA]. . . . Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.<sup>181</sup>

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<sup>179</sup> See *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808, 812 (S.D. Ind. 1998).

Although we have awarded Martin the full statutory damages available to him, we recognize that \$20,000 does not compensate Martin fully for the complete loss of his artwork. . . . [W]e are confident that the statutory maximum . . . does not cover the loss caused by the City's destruction of a large-scale, unique sculpture . . . . If we did not award costs and fees in plaintiff's favor, it would have the effect of reducing further the adequacy of the damages award. . . . An award of attorney's fees is also warranted in this case to encourage artists like Martin to assert their VARA rights in court. In addition, we hope and expect that by awarding attorney's fees to Martin it will serve to deter municipalities and others from wantonly destroying works of art . . . in future development projects.

*Id.*

<sup>180</sup> See, e.g., Cambra E. Stern, Comment, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 854-55 (2004); Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM. & ENT. L.J. 953 (1993); Brian T. McCartney, "Creepings" and "Glimmers" of the *Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35 (1998).

<sup>181</sup> 17 U.S.C. § 301(f)(1) (2000). See Mathews, *supra* note 117, at 166-68; Joshua H. Brown, Note, *Creators Caught in the Middle: Visual Artists Rights Act*

A state statute might still apply if the work was created before VARA's effective date but after the state statute's effective date.<sup>182</sup>

The effect of preemption is illustrated in *Board of Managers of SoHo International Arts Condominium v. City of New York*.<sup>183</sup> The condominium managers wanted to remove a work of visual art installed on the building's exterior in 1973. The managers sought a declaratory judgment that the artist had no rights under either VARA or a similar state statute.

The court said that "Congress enacted VARA in 1990 in order to protect 'the reputations of certain visual artists and the works of art they create.'"<sup>184</sup> The artist in this case was "seeking to use VARA to enforce his right of 'integrity,' i.e., the right to protect the Work from modification or destruction which would prejudice his artistic honor or reputation."<sup>185</sup>

The court, though, refused to resolve the VARA question. Because the work had been made a part of the building, the court said the key issue was "whether the Work is removable or non-removable"; VARA "contemplates one scheme of protection for non-removable works" and another for works "whose removal from the structure would not destroy, distort or mutilate them."<sup>186</sup> The court, with some exasperation, found "that the record contain[ed] no evidence addressing the consequences of removing the

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*Preemption of State Moral Rights Laws*, 15 HASTINGS COMM. & ENT. L.J. 1003 (1993).

<sup>182</sup> See 17 U.S.C. § 301(f)(2)(a) (2000); *Pavia v. 1120 Ave. of the Ams. Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1995); *Wojnarowicz v. Am. Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990). But see *Grauer v. Deutsch*, 64 U.S.P.Q.2d 1636, 1637 (S.D.N.Y. 2002) ("Plaintiff's vague claim that the state statute is not preempted by the VARA because it conceivably might be construed to provide greater and different relief is insufficient.").

<sup>183</sup> 2003 WL 21403333 (S.D.N.Y. 2003). The court subsequently upheld restoration of the sculpture, denying the owner's claim of a First Amendment violation. 2004 WL 1982520 (S.D.N.Y. 2004). See David W. Dunlap, 'Wall' Dispute in SoHo Lands in Court, N.Y. TIMES, Mar. 15, 2001, at B4.

<sup>184</sup> *Soho Int'l Arts Condominium*, 2003 WL 21403333, at \*7 (citation omitted).

<sup>185</sup> *Id.* (citation omitted).

<sup>186</sup> *Id.* at \*8-9.



[Work].”<sup>187</sup> The court therefore had no evidentiary basis for a ruling and denied both parties’ motions for summary judgment under VARA.

The court then turned to New York’s Artists’ Authorship Rights Act, noting that it appeared “to confer substantially similar rights” to those conferred by VARA, thus requiring the court to “turn to the question of pre-emption.”<sup>188</sup> The court said VARA’s legislative history said it would preempt state law “if two conditions are met: 1) if the work . . . falls within the ‘subject matter’ of copyright as specified in 17 U.S.C. §§ 102 and 103 and 2) if the right is the same or ‘equivalent’ to those granted by VARA.”<sup>189</sup>

In this case, it was “beyond doubt that § 102 expressly includ[ed] within its definition of copyrightable material a sculptural work such as the one at issue here.”<sup>190</sup> The state statute also “grants artists rights ‘equivalent’ to those contained in VARA.”<sup>191</sup> The court concluded that “any state statute enacted to protect artists’ moral rights, specifically those of attribution or integrity (and even those which afford greater protections to artists), would be pre-empted by VARA.”<sup>192</sup>

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<sup>187</sup> *Id.* at \*10.

<sup>188</sup> *Id.* at \*11 (citations omitted). See N.Y. ARTS & CULT. AFF. LAW § 14.03 (Consol. 1991). See also Edward J. Damich, *The New York Artists’ Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984).

<sup>189</sup> *Soho Int’l Arts Condominium*, 2003 WL 21403333, at \*12 (internal citations omitted).

<sup>190</sup> *Id.* at \*13 (citation omitted).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* The court held that VARA’s legislative history clearly supported the result.

[I]f a State attempted to grant an author the rights of attribution or integrity for works of visual art as defined in this Act, those laws will be preempted. For example, the new law will preempt a State law granting the right of integrity in paintings or sculpture, *even if the State law is broader than Federal law*, such as by providing a right of attribution or integrity with respect to covered works without regard to injury to the author’s honor or reputation.

*Id.* (internal citation omitted). See also Sheldon W. Halpern, *Of Moral Rights and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65, 85 (1997) (“[A]llowing state extension generally into areas of moral right not now covered by the

Although preemption would seem to be a primary issue whenever a VARA-type claim is made under a state statute, it is not an issue if the work is not considered VARA-protected visual art. Preemption was not even mentioned in *Phillips v. Pembroke Real Estate, Inc.*,<sup>193</sup> a case raising “novel and important issues about the rights of artists” under both VARA and Massachusetts’ Art Preservation Act (“MAPA”).<sup>194</sup> In 1999, the artist was commissioned to work on the creation of a park, in which he agreed to create and place twenty-seven sculptures. Working closely with the landscape architect, the artist helped design paths, walls, and other features. He also had final say on the siting of the sculptures. Within a year of completion, the owner decided to redesign the park and remove all of the artist’s work. The artist sued for injunctive relief under both VARA and MAPA.

Starting with VARA, the court stated “[t]he first question is whether [the artist’s] twenty-seven (27) sculptures constitute a single work of visual art or instead are discrete works of art.”<sup>195</sup> Related to this question was “whether the Park as a whole should be treated as a work of visual art.”<sup>196</sup>

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federal laws, particularly extension beyond unique, single copy works of visual art is an invitation to legal-aesthetic chaos.”).

<sup>193</sup> 288 F. Supp. 2d 89 (D. Mass. 2003).

<sup>194</sup> *Id.* at 92. Massachusetts’ Art Preservation Act is based on a finding that the physical alteration or destruction of fine art, which is an expression of the artist’s personality, is detrimental to the artist’s reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

MASS. GEN. LAWS ANN. ch. 231, § 85S(a) (West 2004). Fine art is defined as “any original work of visual or graphic art of any media which shall include, but not limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof, of recognized quality.” *Id.* § 85S(b). To determine whether a work “is of recognized quality, the court shall rely on the opinions of artist[s], art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art and other persons involved with the creation or marketing of fine art.” *Id.* § 85S(f).

<sup>195</sup> *Id.* at 97.

<sup>196</sup> *Id.* See Garson, *supra* note 42, at 239.

Relying on "the integrated marine theme and recurring spirals, as well as the use of marine granite boulders and pavers," the court, found that a certain number of the sculptures were "one integrated 'work of visual art.'"<sup>197</sup> However, the remaining sculptures "that do not lie along the axis are not part of the same work of visual art."<sup>198</sup> They were "individual free-standing pieces of sculpture, which are not integrated into the other pieces by spirals or granite."<sup>199</sup>

The court rejected the argument "that the Park as a whole is a work of visual art."<sup>200</sup> The park did "not fit within the traditional definition of sculpture" although, the court acknowledged, "a sculptor could design a sculpture garden that includ[ed] multiple inter-related sculptural elements that form[ed] an integrated work of visual art."<sup>201</sup> In this case, however, the artist did not

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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.

*Id.*

<sup>197</sup> *Phillips*, 288 F. Supp. 2d at 98.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* But see John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 356 (1989) [hereinafter Merryman, *Cultural Property*].

Physical preservation of discrete objects themselves may not be enough. Every cultural object is to some extent a part of a larger context from which it draws, and to which it adds, meaning. Separated from its context . . . the object and the context both lose significance. At the extreme the object becomes anonymous, an orphan without reliable indication of its origin, its significance, its place and function as a part of something else.

*Id.*

<sup>200</sup> *Phillips*, 288 F. Supp. 2d at 99.

<sup>201</sup> *Id.* (internal citation omitted). After Kiley designed a sculpture garden in Kansas City to display the work of Henry Moore, one critic asked:

But this is a sculpture garden, is it not? And one given over entirely to work that does a good job of domination when domination is called for? So where does the garden stop and the

himself create “many elements in the Park” and “[s]ubstantial areas of the Park [were] unrelated to [the] sculpture and not integrated with it.”<sup>202</sup> The artist was “not responsible for the plantings or any of the landscape architecture apart from the stone elements.”<sup>203</sup> Although the artist “certainly assisted in designing the stone elements in the paths and walls and in placing his own sculptures, the Park as a whole is not an integrated work of art.”<sup>204</sup>

Turning to the state statute, the court said “[t]he rarely-litigated [MAPA] provides broader protection to artists than” VARA.<sup>205</sup> MAPA’s “definition of ‘fine art’ . . . is significantly more expansive than the definition of ‘work of visual art’ in VARA because it is not limited to the specific enumerated types of art (i.e., sculpture) and expressly includes art forms not covered by

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sculpture begin? “Nowhere” is the answer, because this is not a peremptory sculpture garden. It is a confidential sculpture garden, a place of secrets and seclusions where the duet of art and nature is perfectly in tune.

John Russell, *Moore Sculptures in a Kansas City Garden*, N.Y. TIMES, June 5, 1989, at C13.

<sup>202</sup> *Phillips*, 288 F. Supp. 2d at 99.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* But see Rebecca J. Martel, *The Should-It-Stay or Should-It-Go Spotlight: Protection of Site-Specific Work under VARA*, 13 DEPAUL-LCA J. ART & ENT. L. 101, 119 (2003).

If the work was created for a specific surrounding and the meaning of the work is based on those surroundings, the artist’s chosen public presentation of the work is where it is because that is where the work was created to reside. Therefore, by changing the placement of the artwork, the whole meaning of the work changes and it is no longer the same sculpture with the same expression.

*Id.*

<sup>205</sup> *Phillips*, 288 F. Supp. 2d at 100. See Mathews, *supra* note 122, at 161-66; Laura Nakashima, Comment, *Visual Artists’ Moral Rights in the United States: An Analysis of the Overlooked Need for States to Take Action*, 41 SANTA CLARA L. REV. 203 (2000). For example, the rights granted under VARA last only “for a term consisting of the life of the author.” 17 U.S.C. § 106A(d)(1) (2000). MAPA says its provisions “shall, with respect to the artist, or if any artist is deceased, his heir, legatee, or personal representative, continue until the fiftieth anniversary of the death of such artist.” MASS. GEN. LAW. ANN. ch. 231, § 85S(g) (West 2004).

VARA.”<sup>206</sup> Because of MAPA’s elastic definition of “fine art,” the court concluded that “a ‘park’ can be a work of ‘visual art’ under the statute.”<sup>207</sup> However, because the artist presented “only conclusory evidence as to whether the quality of the Park design itself has been ‘recognized’ by a cross-section of the artistic community or by artistic experts in the field,” the artist had failed to show that “the Park itself . . . is of ‘recognized quality’ as a work of ‘fine art.’”<sup>208</sup>

#### IV. BUT IS IT ART?

Frederick Law Olmsted, who, more than 100 years after his death, remains America’s best known landscape designer, produced works that reflected “[t]wo aspects of [his] work and thought in particular—his efforts to establish landscape architecture as an ‘Art of Design’ and his dedication to the social purposes of his

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<sup>206</sup> *Phillips*, 288 F. Supp. 2d at 101.

<sup>207</sup> *Id.* See Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 27 (2001).

This distinction between work and framework means that there is a difference between removing a work from its context and dismembering an integrated artwork into constituent pieces . . . Recognizing that we tend to draw such a line between work and context, some artists have argued that the framework is part of the work and therefore the “work” must be understood expansively.

*Id.* See also Garson, *supra* note 42, at 234 (“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.’”) (citation omitted).

<sup>208</sup> *Phillips*, 288 F. Supp. 2d at 101 (internal citation omitted). See MASS. GEN. LAWS ANN. ch. 231, § 85S(f) (West 2004) (directing the court, faced with deciding whether a work is of recognized quality, to “rely on the opinions of artist[s], art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art and other persons involved with the creation or marketing of fine art.”). VARA gives the artist a 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.” 17 U.S.C. § 106A(a)(3)(B) (2000). VARA, however, does not tell the court how to make the determination of recognized stature. See *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999).

work”; these two “were inextricably interwoven, mutually reinforcing, and generally well balanced.”<sup>209</sup> Today, “we can hope . . . that an enlightened public will recognize that the landscape-shaping, earth-tending profession is the best promise to restore the health and beauty of this exhausted earth.”<sup>210</sup>

Landscape design, when practiced with the imagination and intelligence of Kiley, results in “an ‘ideal state’ quite independent of ‘real estate,’” and “a ‘poetic’ property . . . rather than a material one.”<sup>211</sup> Such design, done publicly, creates an accessible place that is quite real and beautiful, and that also evokes emotions and spirits like those evoked by other art forms.<sup>212</sup> The design can be at once poetic and real. It is dynamic, organic, and artistic. It is a resource both material and spiritual.<sup>213</sup>

<sup>209</sup> WALKER & SIMO, *supra* note 36, at 5. See Patricia Leigh Brown, *A Park Offers Nature, Not Just Hoops*, N.Y. TIMES, Dec. 28, 2000, at F1 (“In a sense, we’ve come full circle back to Olmsted . . . . We’re rediscovering the idea of wild, romantic landscapes in the city as a way of balancing social, physical and economic issues.”); David W. Dunlap, *A Chip Off the Old Park*, N.Y. TIMES, Sep. 30, 2004, at B1 (quoting Olmsted).

<sup>210</sup> Kay, *supra* note 31. See Patricia Leigh Brown, *He Measures Oakland’s Beat, and Parks Bloom*, N.Y. TIMES, Mar. 21, 2004, at A1 (“Landscape architects are serving an increasingly visible role in reshaping cities . . . . Mr. Hood is among those rejuvenating the forgotten urban edges of cities—the vacant, often environmentally devastated stretches of land once consigned to industry and often in low income neighborhoods.”).

<sup>211</sup> LANDSCAPE AND POWER 15 (W.J.T. Mitchell ed. 1994).

<sup>212</sup> See Darian-Smith, *supra* note 29, at 402-03 (“The garden ‘is a model for everything that reality is not.’ This ambiguity, this fluidity of meaning, challenges and mediates a tangible and metaphorical manifestation of what is accepted as the garden landscape. It opens up its symbolism to various interpretations, possibilities, and manipulations.”) (citation omitted).

The author said “the garden may function . . . as a utopian site of innocence, pleasure, and leisure.” *Id.* at 402. See also THE MEANING OF GARDENS: IDEA, PLACE, AND ACTION 8 (Mark Francis & Randolph T. Hester, Jr. eds., 1990) (“The garden exists not only as an idea or a place or an action but as a complex ecology of spatial reality, cognitive process, and real work.”).

<sup>213</sup> See Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23, 25 (2002).

Urban parks should be treated as a scarce natural resource.

Once depleted, this resource is practically irreplaceable and is irretrievably removed from use by the public. Under the public

In *Unionville-Chadds Ford School District v. Chester County Board of Assessment Appeals*,<sup>214</sup> the Pennsylvania Supreme Court had to decide whether Longwood Gardens, "a very large and world-renowned public garden," was entitled to a tax exemption as a public charity.<sup>215</sup> The court said Longwood featured

an expansive arboretum where trees and shrubs are cultivated, immaculate flower gardens, collections of rare plants, a huge conservatory and greenhouse complex, architectural displays, a water garden, fountains, an open air theater for the performing arts, managed meadow and forest lands, wetlands, wildlife habitats, walking trails, picnic areas, and a variety of educational and research facilities.<sup>216</sup>

The school district conceded that "Longwood advances a charitable purpose . . . including public use of the park-like grounds as well as educational and research activities."<sup>217</sup>

However, the school district argued that under Pennsylvania law, the only "legitimate subjects of charity" were "the poor, the infirm, and the needy."<sup>218</sup> The court responded that

a facility as large and multi-faceted as Longwood is a unique resource that virtually no individual could

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trust doctrine, [governments] serving as public trustees . . . would acquire a duty of loyalty to the trust beneficiaries (the public) and a duty of care over the trust assets (the park).

*Id.* (citing *Slocum v. Borough of Belmar* 569 A.2d 312, 317 (N.J. Super. L. Div. 1989). New York City recently spent \$37 million to rehabilitate parks in lower Manhattan. See David W. Dunlap, *Greening Ye Olde Manhattan*, N.Y. TIMES, July 9, 2004, at E25.

<sup>214</sup> 714 A.2d 397 (Pa. 1998).

<sup>215</sup> *Id.* at 398. See Survey of Selected Court Decisions, *Unionville-Chadds Ford School District v. Chester County Board of Assessment Appeals: The Commonwealth Court Undertakes an Expansive, Yet Justified, Review of the Pennsylvania Tax Exemption Law*, 8 WIDENER J. PUB. L. 937 (1999).

<sup>216</sup> *Unionville-Chadds*, 714 A.2d at 398.

<sup>217</sup> *Id.* at 399.

<sup>218</sup> *Id.* at 400.

afford to maintain on his or her own. It is in this regard comparable to a public library, museum, or art gallery. Such institutions have qualified as purely public charities notwithstanding the fact that many, indeed probably most, of their visitors are not incapacitated or poor.<sup>219</sup>

Pennsylvania had “long provided support for public parks and recreation areas,” and “Longwood’s public park and cultural facilities fall clearly within the scope of burdens that are routinely shouldered by government.”<sup>220</sup>

The benefits of such landscape design are public benefits. The public deserves “a built environment of beautiful, inviting places where they feel part of the larger community.”<sup>221</sup> The public should expect “places that are at once designed landscapes and pieces of art.”<sup>222</sup> The attraction of such places is real, if not always rationally explicable.<sup>223</sup>

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<sup>219</sup> *Id.* (internal citations omitted).

<sup>220</sup> *Id.* at 401.

<sup>221</sup> William Callaway, *Strong Building Designs Are Often Diluted By a Lack Of Sensitivity To Setting: Landscape Architecture Must Be Given Its Due*, ARCHITECTURAL REC., Oct. 1999, at 24. See also Barbara Bender, *Introduction: Landscape—Meaning and Action*, in LANDSCAPE: POLITICS AND PERSPECTIVES 1, 3 (Barbara Bender ed., 1993) (“The landscape is never inert, people engage with it, re-work it, appropriate and contest it. It is part of the way in which identities are created and disputed, whether as individual, group, or nation-state.”).

<sup>222</sup> Paul Bennett, *The Other Side of the Fence: What Drives Landscape Architecture Now*, ARCHITECTURAL REC., Jan. 2000, at 58. See also SPIRN, LANGUAGE OF LANDSCAPE, *supra* note 34, at 17-18 (“Humans are not the sole authors of landscape. . . . All living things share the same space, all make landscape, and all landscapes . . . are phenomena of nature and culture. . . . [B]ut only humans (as far as we yet know) reflect, worship, make art, and design landscapes . . .”).

<sup>223</sup> See Verlyn Klinkenborg, *Without Walls*, N.Y. TIMES MAG., May 16, 2004, at 15 (“When it comes to man-made landscapes, metaphors are largely a guide to that deep strand of emotion that runs through our experience of place. But whether we paint or build our landscapes, they end up evoking a response that runs right to the core of our beings.”). See also Merryman, *Cultural Property*, *supra* note 199, at 340-41 (“We cannot resolve cultural policy questions on rational grounds alone. . . . [C]ultural objects have a variety of expressive effects that can be described, but not fully captured, in logical terms.”).



For example, Central Park, which reflects both the public benefit and artistic merit that attach to top-level landscape design, “was created as . . . a place to uplift the spirit and improve the senses. The park was seen as a tangible manifestation of and way to advance democracy: the government was physically supporting culture and the arts, and providing a place for all citizens of all classes.”<sup>224</sup> Works such as Central Park “have a unique power to transform the way we interact with our environment, by providing us with new ways of redescribing and reinterpreting our existence.”<sup>225</sup> But the integrity of these works “need to be preserved if they are to continue to serve this function for us and for our descendants; if we destroy or alter them, future generations will not be able to share this experience.”<sup>226</sup>

As a culture, we project our views and expectations into the environment that we design and build around us.<sup>227</sup> Landscape design can produce an aesthetic experience, evoking individual

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<sup>224</sup> Cyane Gresham, Note, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 FORDHAM ENVTL. L.J. 259, 294-95 (2002) (citations omitted).

<sup>225</sup> Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 36-37 (1997) (citations omitted). See Clyde Haberman, *A Spot to Rest, And to Honor Love and Loss*, N.Y. TIMES, July 16, 2004, at B1 (describing a program where citizens can adopt a Central Park bench and have a message inscribed on a plaque installed on the back of the bench).

In this fashion, New Yorkers have expressed their undying love for one another and for the park. They have celebrated birthdays and wedding anniversaries. They have mourned the passing of a parent or, worse, a child. They have spoken in poetry and in prose. They have wept in pain and whooped in delight.

*Id.*

<sup>226</sup> *Id.* See *Students Against Apartheid Coalition v. O'Neil*, 671 F. Supp. 1105, 1107 (W.D. Va. 1987) (upholding the University of Virginia's policy against erecting structures on the lawn and stating that “the University has a valid interest in preserving the ‘esthetic integrity’ of its historic grounds”) (internal citation omitted). The University was permitted to “regulate the symbolic speech of its students to preserve and protect the Lawn area as an architectural landmark.” *Id.* at 1108.

<sup>227</sup> See Gordon Bermant, *Courting the Virtual: Federal Courts in an Age of Complete Inter-connectedness*, 25 OHIO N.U. L. REV. 527, 530 (1999).

responses across the emotional spectrum.<sup>228</sup> The design can evoke the spiritual and the romantic, can stimulate and relax, and can be awe inspiring and perceptually pleasing.<sup>229</sup> And public design is open to all—it is a resource that promotes the general welfare.

The aesthetic of landscape design is no accident. Designers like Kiley see in artistic and functional terms. They make the landscape visible and accessible.<sup>230</sup> “They have both the practical experience and the spiritual sensitivity to look over a region and select the natural configuration of open space around which the built world could arrange itself.”<sup>231</sup>

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<sup>228</sup> See Bobrowski, *supra* note 27, at 722 (“Much recent work concludes that there is an undeniable ‘aesthetic experience’ connected to the landscape. The nature of this aesthetic experience ‘refers to the subjective thoughts, feelings, and emotions expressed by an individual during the course of an experience.’”) (citations omitted).

<sup>229</sup> See Klinkenborg, *supra* note 223, at 15.

It’s a human instinct to try to create perceptual order wherever we look, no matter how much disorder surrounds us. . . . That’s why walking into a setting shaped by a landscape architect has such a powerful effect. All the disarray has been filtered out for us. We suddenly glimpse what the world would look like if it were the work of a single hand, a single eye, a world created to please our emotions of place.

*Id.*

<sup>230</sup> See Daralice D. Boles, *New American Landscape, Introduction*, PROGRESSIVE ARCHITECTURE, July 1989, at 51, 54 (“It is the word ‘art,’ even more than garden, that signifies the sea change in landscape architecture. ‘I’m seen as a radical because I think landscape can be practiced as an art’ . . . ‘My goal is to make the landscape visual.’”). See Robin Finn, *A Landscaper’s Presence in ‘Reflecting Absence’*, N.Y. TIMES, Jan. 22, 2004, at B2. Peter Walker, the landscape designer working on the 9/11 memorial in New York City

is secure that he, a landscape doctor with a proclivity for transforming negative urban spaces into positive ones, is the man to refine Mr. Arad’s design. “To cut two giant holes in the ground, and do it in a way that will get people to read it the most dramatic way, is the discipline behind the plan . . . [W]hat we’re trying to do is make emptiness visible.”

*Id.*

<sup>231</sup> Suzannah Lessard, *Sprawl Has Turned the World Inside Out: Landscape Architects May Be the Ones To Civilize It*, ARCHITECTURAL REC., Aug. 2000, at 58.

There is also an expressive component to art, no matter what medium, including the landscape, is used. In *Bery v. City of New York*,<sup>232</sup> the Second Circuit confronted a challenge to the city's vendor law, which barred "visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license."<sup>233</sup> The city considered the plaintiffs' work "as mere 'merchandise' lacking in communicative concepts or ideas," a position that the court characterized as "an unduly restricted view of the First Amendment and of visual art itself."<sup>234</sup> The court stated that visual art

is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing . . . . Indeed, written language is far more constricting because of its many variants . . . . The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are "a primitive but effective way of communicating ideas . . . a short cut from mind to mind."<sup>235</sup>

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<sup>232</sup> 97 F.3d 689 (2d Cir. 1996).

<sup>233</sup> See Christina A. Mathes, Note, *Bery v. New York: Do Artists Have a First Amendment Right to Sell and Display Art in Public Places?*, 5 VILL. SPORTS & ENT. L.J. 103 (1998).

<sup>234</sup> *Bery*, 97 F.3d at 695.

<sup>235</sup> *Id.* (citations omitted). See Krasilovsky, *supra* note 32, at 542-43.

[A]rt, unlike books . . . may be permanently displayed outdoors, and often has a more significant communicative impact than speech because it appeals to the human consciousness on many different levels other than verbal or linguistic ones. Art is a more powerful communicative medium because it does not depend on language, but on visual symbols, to convey meaning; the content may be understood across social and cultural boundaries without translation.

*Id.*

The court concluded that the “public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.”<sup>236</sup>

The extent of this analysis was tested in *Mastrovincenzo v. City of New York*.<sup>237</sup> The plaintiffs were “both trained freelance artists who employ[ed] what they label[ed] a ‘graffiti’ style of painting” to “paint articles of clothing, especially hats, using paint pens and spray cans, and sell them from sidewalk displays.”<sup>238</sup> The issue was whether these items were “expressive merchandise.”<sup>239</sup>

The court said that there are expressive means that “have a way to speak to us without words, and enable us to perceive what the artist may have had in mind simply by their quality to evoke.”<sup>240</sup> The court, based on this view, said

what is art may be defined and found in this two-way interchange, even in silence—a correspondence at the meeting point of recognition and understanding between an artist stirred enough by creative fluids to

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<sup>236</sup> *Bery*, 97 F.3d at 698. *But see* Krasilovsky, *supra* note 32, at 538.

[I]t may be unwise for courts to base the determination of whether or not something is art upon the reaction of the viewer; some viewers may not wish to ponder an artistic object, or may not see it as art at all. It may therefore be incumbent upon courts to look at the origin of the aesthetic object and seek the presence of a creative impulse in its genesis, or to create a rebuttable presumption that an aesthetic object is art.

*Id.* (citation omitted).

<sup>237</sup> 313 F. Supp. 2d 280 (S.D.N.Y. 2004).

<sup>238</sup> *Id.* at 283-84. *See* Michelle Bougdanos, Comment, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549 (2002).

<sup>239</sup> *Mastrovincenzo*, 313 F. Supp. 2d at 285.

<sup>240</sup> *Id.* *See* SPIRN, LANGUAGE OF LANDSCAPE, *supra* note 34, at 15 (“Landscape has all the features of language. It contains the equivalent of words and parts of speech—patterns of shape, structure, material, formation, and function. . . . Landscape is pragmatic, poetic, rhetorical, polemical. Landscape is scene of life, cultivated construction, carrier of meaning. It is language.”).

give expression to a thought through a chosen medium, and the audience that receives the idea so conveyed.<sup>241</sup>

The court noted that “[c]ivilization has traveled too far down the road in the evolution of art as embracing the whole spectrum of human imagination for the law to countenance a classification of an artist’s design as art only when imparted in conventional shapes and forms sufficiently familiar or acceptable to a government licensor.”<sup>242</sup>

If we accept “the notion that ‘art is expression,’ something to ‘express *feeling* and transmit *understanding*’ no matter the medium,” then landscape design is art—visual art.<sup>243</sup> It is also public art, which “does not merely present a collection of formal aesthetic attributes; it alters its environment, affects its viewer, and forges moral meaning.”<sup>244</sup>

Maya Lin, designer of the Vietnam Veterans Memorial, has said “I don’t design pure objects . . . I work with the landscape, and

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<sup>241</sup> *Mastrovincenzo*, 313 F. Supp. 2d at 285-86.

<sup>242</sup> *Id.* at 289. See Liemer, *supra* note 39, at 41 (“Just as creative work, i.e. art, mirrors life, so does the law pertaining to art. The law in a given society reveals the value of creativity in that society. As these values fluctuate over time, changes in the law reveal the nature of those fluctuations.”).

<sup>243</sup> Joffrain, *supra* note 38, at 785.

<sup>244</sup> Zlatarski, *supra* note 41, at 201 (citation omitted). The landscape design for the 9/11 Memorial in New York City “contributes more than prettiness: it confers meaning. It signifies the abundance that sometimes follows a rupture in the natural order of things.” Herbert Muschamp, *Strong Depth of Emotion and No Frills in 2 Footprints*, N.Y. TIMES, Jan. 15, 2004, at B1. In a *New York Times* editorial, the memorial’s design was described as “a vision of how all the elements that might come into play can be combined to greatest effect. . . . The real memorial is a single coherent work of art . . . and it must be protected as such.” Editorial, *supra* note 49, at A18.

I hope that the object and the land are equal players.”<sup>245</sup> Such landscape design realizes

a particular society’s, even a particular person’s, attitudes toward space and nature. The deliberately constructed milieu invokes selected forms and materials to express . . . some human response to and recognition of an environment; this environment will be physical, topographical, but it will also include less tangible, spiritual values.<sup>246</sup>

One author has even claimed that “landscape design may well be recognized as the most comprehensive of the arts.”<sup>247</sup> Landscape design has the “creative, imprecise nature of artistic expression.”<sup>248</sup>

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<sup>245</sup> Garson, *supra* note 42, at 233-34 (citation omitted). *See also* Louis Menand, *The Reluctant Memorialist*, THE NEW YORKER, July 8, 2002, at 55, 56.

Lin’s work is self-consciously beautiful, because she is obsessed with harmony—how we fit into the world and how the world shapes us. . . . Her impulse is not to impose form; it is to evoke from out of what is given—the landscape, the building, the light, the natural materials at hand. This impulse expresses itself in work that is simple, graceful, and, in its detachment, a little Zen.

*Id.*

<sup>246</sup> JOHN DIXON HUNT, GARDENS AND THE PICTURESQUE: STUDIES IN THE HISTORY OF LANDSCAPE ARCHITECTURE 9 (1992).

<sup>247</sup> GEOFFREY ALAN JELlicoe & SUSAN JELlicoe, THE LANDSCAPE OF MAN: SHAPING THE ENVIRONMENT FROM PREHISTORY TO THE PRESENT DAY 7 (1975) (“[M]an’s destiny being to rise above the animal state, he creates around him an environment that is a projection into nature of his abstract ideas. . . . [This] is promoting a landscape art on a scale never conceived of in history.”). *See also* Klinkenborg, *supra* note 223, at 16 (“Landscape architects and gardeners, and we who enjoy their creations without special instruction or persuasion, are responding to a deep genetic memory of mankind’s optimal environment.’ The taste with which we recreate that environment may vary, but the impulse to do so never does.” (citation omitted)).

<sup>248</sup> Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 388 (1997). *See also* Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 77 (1996) (“Art can carry ideas and information, but it also goes beyond logical, rational, and discursive communication. It

work communicates to observers.<sup>254</sup> Interfering with the integrity of the art is interfering with the integrity of the artist.<sup>255</sup> This is disrespect which the law should not countenance.

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<sup>254</sup> See Martin A. Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940) ("When an artist creates . . . he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use."). See also Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine", 74 S. CAL. L. REV. 1, 24 (2001).

At base, moral rights laws are concerned primarily with safeguarding an artist's dignity as an individual and as an author. The interest served by moral rights law is fundamentally a spiritual one which transcends the author's concern for property or even reputation. . . . [B]ecause an author's works "continue to embody the author's personality, acts done to them that impair their ability accurately to reflect the author's personality should be actionable."

*Id.* (citations omitted).

<sup>255</sup> See Liemer, *supra* note 39, at 50-51.

The right of integrity protects the artist . . . . Prohibiting changes without permission shows respect for the art work, its creator, and the process by which she created. This right avoids value judgments as to the quality of the art and the seriousness of the artist's undertaking. The society that recognizes this right recognizes the value of all creative efforts and uses it to encourage more.

*Id.*