

# CHALLENGES FOR EMERGING ART FORMS UNDER THE VISUAL ARTISTS RIGHTS ACT

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## INTRODUCTION

The Visual Artists Rights Act (“VARA”) was enacted to bring moral rights into United States copyright law. It was established for two purposes: (1) to achieve the goal of preserving and protecting “certain limited categories of works of visual art that exist in single copies or in

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limited editions,”<sup>1</sup> and (2) to achieve this goal “without interfering, directly or indirectly, with the ability of U.S. copyright owners and users to further the constitutional goal of ensuring public access to a broad, diverse array of creative works.”<sup>2</sup> The statute grants the “author of a work of visual art the right (a) to claim authorship of that work, and (b) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”<sup>3</sup> VARA protections apply to a limited range of mediums, including paintings, drawings, prints, sculptures, and still photographic images produced for exhibition purposes.<sup>4</sup>

In its current form, the VARA fails to contemplate art practices that fall outside the statute’s list of protected mediums. For example, “site-responsive art” is an emerging form of public art that is described as a “response” to the history or character of a particular place. Because site-responsive art may involve multiple collaborators and mediums beyond those listed in the statute, it provides an opportunity to analyze the VARA’s deficiencies.

Part I of this note provides a brief history of moral rights as they were established on an international level. It describes how the formation of moral rights has influenced the common law and statutory conceptualization of moral rights in United States copyright law. Part II briefly describes the challenges for the application of moral rights to “emerging mediums,” historical examples of which include photography and public art. Part III provides an in-depth description of site-responsive art practice. Site-responsive art serves as the most recent example of an “emerging medium” that is hindered by moral rights in their current form. This section concludes that in light of the unanticipated characteristics of emerging art forms, such as site-responsive art, moral rights should be re-designed as natural rights in order to ensure protection for all artists.

## I. THE MORAL RIGHTS DEBATE

### A. *The Origins of Moral Rights*

In the late nineteenth century, as authors became increasingly cosmopolitan, their susceptibility to piracy increased.<sup>5</sup> Authors living outside of their home countries attempted to pressure their host governments into offering them, and their work, copyright protections

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1. 136 Cong. Rec. E3716-03, 1990 WL 207029, E3717.

2. *Id.*

3. 17 U.S.C. §106A(a)(1)(a-b).

4. 17 U.S.C. §101.

5. See Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 8 (1988).

comparable to those protections afforded to domestic authors.<sup>6</sup> Although many countries expressed interest in providing protection for foreign authors' rights on the condition of reciprocity, very few international treaties formalizing such an agreement were entered into prior to 1852.<sup>7</sup> Prompted to take matters into their own hands, a group comprised only of literary authors and led by Victor Hugo assembled with the goal of achieving international copyright protection.<sup>8</sup> The group referred to themselves as the *International Association* ("IA"), but they would later be named *L'Association Littéraire et Artistique Internationale* ("ALAI"), after they incorporated the interests of artists into their mission.<sup>9</sup> The group declared its objectives to be "the propagation and defense of the principles of intellectual property in all countries, the study of international conventions, and working toward their improvement."<sup>10</sup> The group drafted five resolutions that would later provide the basis for the Berne Convention of 1886.<sup>11</sup>

The IA believed that the only way to successfully achieve international copyright protection would be through the formation of a union. In 1883, the IA called a meeting of parties interested in participating in such an alliance in Berne, Switzerland.<sup>12</sup> At the Conference, a committee of seven members was charged with preparing a draft treaty, which ultimately consisted of ten articles providing for copyright protection.<sup>13</sup> Three days after the Conference commenced, the group that assembled at Berne approved the ten proposed provisions.<sup>14</sup> In an addendum to the Committee's proposed provisions, the Swiss government stated that a fundamental principle of the Union was to establish that an "author of a literary or artistic work, whatever his nationality and the place of publication, must be protected in every country the same as the nationals of such country."<sup>15</sup> The addendum went on to say that the most "shocking differences in international law will gradually disappear and a new regime will be established, more uniform, and consequently more secure for authors."<sup>16</sup>

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6. *Id.*

7. *Id.* (quoting Stephen P. Ladas, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 24 (1938)).

8. *Id.* at 11.

9. *Id.*; see also Ladas, *supra* note 7, at 74. The ALAI is still active today. Its membership consists of national entities and individuals. The United States is a member of ALAI. Its U.S. office is based at Columbia University School of Law. See <http://www.alai.org/index-a.php?sm=0>.

10. Ladas, *supra* note 7, at 74.

11. Burger, *supra* note 5, at 12.

12. *Id.*

13. Ladas, *supra* note 7, at 76.

14. *Id.*

15. *Id.*

16. *Id.*

### B. The Berne Convention

In 1884, the Swiss government hosted representatives from fourteen nations in the first official iteration of the Berne Convention.<sup>17</sup> Several countries did not approve of the proposal set forth by the IA and therefore did not attend. Among these were: the Dominican Republic, Greece, Mexico, Nicaragua, and the United States.<sup>18</sup> Instead of the ten articles drafted by the committee, the Swiss government used the Berne Convention of 1884 to propose an eighteen-article treaty to the convening parties.<sup>19</sup> The 1884 treaty provisions pertained to national treatment,<sup>20</sup> abolition of formalities as a prerequisite for copyright protection,<sup>21</sup> recognition of a translation right during the entire term of copyright, and the establishment of an International Bureau of the Union (“the Union”).

The second official iteration of the Berne Convention occurred on September 7, 1885.<sup>22</sup> This time, twenty countries, including the United States, were represented.<sup>23</sup> It was at this conference that the expression “*protection des oeuvres litteraires et artistiques*,” or, “protection of works of literary and artistic works” was adopted.<sup>24</sup> A major point of dispute stemmed from certain countries’ reluctance to derogate from their national law.

The final Berne Convention was held in 1886. With the language drafted at the previous convention unchanged, the only true function of the Convention was to sign the treaty.<sup>25</sup>

Berne participants agreed on three principal concepts: national treatment, country of origin, and the negation of formalities as a prerequisite for copyright protection.<sup>26</sup> Their agreement on each of these matters continues to be reflected in the international treaty that governs the treatment of moral rights among member nations. For example, national treatment, addressed in Article II of the treaty, provides for the

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17. *Id.* at 77. The countries represented included: Austria-Hungary, Belgium, Costa Rica, France, Germany, Great Britain, Haiti, Italy, the Netherlands, Paraguay, Salvador, Sweden, Norway, and Switzerland.

18. *Id.* at n.14.

19. The lengthier 1884 treaty did not fundamentally differ from the 1883 articles.

20. National treatment “requires each member State [of the Berne Convention] to accord to nationals of other member States the same level of copyright protection provided to its own citizens.” Edward J. Ellis, *National Treatment Under the Berne Convention and the Doctrine of Forum Non Conveniens*, 36 IDEA J.L. & TECH 327, 330 (quoting S. Rep. 352, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3707 (hereinafter S. Rep. 352)).

21. Examples of formalities include registration of a copyright or publishing the work with copyright notice.

22. Ladas, *supra* note 7, at 80.

23. *Id.*

24. *Id.* at 82.

25. *Id.*; see also Burger, *supra* note 5, at 15.

26. *Id.* at 16-17.

enjoyment by artists in other countries, “the rights which the respective laws do now or may hereafter grant to nationals.”<sup>27</sup> The Country of Origin, also described in Article II, is defined as the location in which the work was first published.<sup>28</sup> Because the Convention does not require formalities for authors to obtain protection, the Country of Origin determines the conditions with which an artist must comply in order to receive protection.<sup>29</sup>

Protected “literary and artistic works” are listed in Article IV of the 1886 Convention. They include:

[B]ooks, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.<sup>30</sup>

As evidenced by this list, the scope of works that can be protected under the Convention is extraordinarily broad. While this list is extensive, it is not exclusive.<sup>31</sup>

One interesting point of contention that occurred at the 1886 Convention involved photography as a protected medium. In the end, the Convention declared that countries that wished to protect photography, such as France, were to do so voluntarily.<sup>32</sup> With such critical decisions left in the hands of individual nations, the 1886 Convention’s goal of creating a uniform system of moral rights was only partially achieved.

Another considerable point of contention at the 1886 Convention was that of access to public information. While the main purpose of the Convention was to arrive at significant protections for authors, the countries represented agreed that depending on the laws of the country of origin, a work could be reproduced without the author’s permission for use by the public. The Convention did not provide protection for political discussion, news of the day, or current topics.<sup>33</sup>

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27. Ladas, *supra* note 7, at 1123, app. I (reprint of Article II of the ACTS OF THE INTERNATIONAL COPYRIGHT UNION, Berne Convention of 1886).

28. *Id.*

29. *See id.*; *see also* Burger, *supra* note 5, at 6.

30. Ladas, *supra* note 7, at 1124, app. I (reprint of Article IV of the ACTS OF THE INTERNATIONAL COPYRIGHT UNION, Berne Convention of 1886).

31. Burger, *supra* note 5, at 18.

32. Ladas, *supra* note 7, at 1131, app. I. (reprint of Final Protocol ¶ 1 of the ACTS OF THE INTERNATIONAL COPYRIGHT UNION, Berne Convention of 1886); *see also* 2 S. Ladas, *The International Protection of Literary and Artistic Property*, 79.

33. Burger, *supra* note 5, at 19.

Disagreements regarding photography and public information are indicative of the various conceptual camps that pervaded the Berne Convention. The first camp, which was advocated by the French, preferred shared universal protections among all member nations.<sup>34</sup> The second camp, most prominently favored by Great Britain, wished to leave protections to national law.<sup>35</sup> The third, which most accurately represents the point of view adopted by the Berne Convention of 1886, was a hybrid of the first two groups, and involved some shared protections while leaving others to national law. Although Berne members reached a compromise by fusing the French and British camps, the same inconsistencies that caused disagreement at Berne continue to exist today.

In addition to favoring shared universal protection for all member nations' artists, France prefers to view moral rights as a "natural right," or one that is a human or fundamental right.<sup>36</sup> Because moral rights are considered a natural right in France, a standard of taste, usefulness, or medium is not relevant to the determination of rights. Anything an artist creates may be a protected medium. Even today, France arguably offers the most extensive protection for moral rights in the world.<sup>37</sup>

The same is not true of moral rights in Great Britain, which bases its moral rights on more traditional property concepts. British law protects only three kinds of moral rights: the artist's right of paternity, integrity, and privacy.<sup>38</sup> As an additional layer of exclusion to the moral rights entitlement, these three types of moral rights are available only to a limited number of works and authors.

Britain's treatment of moral rights is closely mirrored in the United States, where moral rights are meant to serve a utilitarian function. It can be argued that the real impetus for the inclusion of moral rights in U.S. law was not necessarily for the sake of artist protection, but more in the interest of economic growth and development.

### *C. The Limited Scope of Moral Rights in the U.S.*

Prompted by the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>39</sup>, the United States joined the Berne Convention in 1988.<sup>40</sup> Domestic copyright reform

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34. *Id.* at 15.

35. *Id.*

36. See John Finnis, *NATURAL LAW AND NATURAL RIGHTS* 198 (2d ed. 2011).

37. Irma Sirvinskaite, *Toward Copyright "Europeanification": European Union Moral Rights*, 3 J. INT'L MEDIA & ENT. L. 263 (2010-11).

38. *Id.*

39. Berne membership was a prerequisite to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) at the World Trade Organization.

40. WIPO-ADMINISTERED TREATIES, *available at*

became necessary in order to ensure compliance with the Berne Convention. There were two major inconsistencies between existing U.S. copyright law and the Berne requirements: one was that Berne did not require “formalities,” or the use of registration, in order to assert copyright protection; the other was that the Convention required that its members treat copyright protection as a natural right.<sup>41</sup> Conversely, in the U.S., registration was required to assert copyright protections, and its copyright law was most closely associated with legal property rights. U.S. copyright law was based on a utilitarian need to foster the “progress of the useful sciences and arts.”<sup>42</sup>

The Berne Convention Implementation Act (BCIA) amended the language of the Copyright Act to make copyright registration optional.<sup>43</sup> Although registration may still be obtained by submitting an application and fee to the U.S. Copyright Office, 17 U.S.C. §408(a) makes it clear that “registration is not a condition of copyright protection” for any article of copyrightable work.<sup>44</sup>

Moral rights, on the other hand, have been more difficult to implement. First of all, moral rights are not closely embedded in the copyright statute because they are limited to specific visual art mediums. Second, moral rights over a work of art do not continue after the death of the author. Third, moral rights protect only those works of art that exist in single copies or limited editions. Finally, moral rights cede priority to “the ability of U.S. copyright owners and users to further the constitutional goal of ensuring public access to a broad, diverse array of creative works.”

It has been argued that because moral rights are scattered among competing propositions derived from common law established before and after the passage of the VARA, moral rights are difficult for courts to construe.<sup>45</sup> U.S. courts therefore apply moral rights inconsistently. The issue of “taste,” as discussed in Part II, is a debilitating bar to artists seeking to have the courts recognize their rights under the VARA.

The confusion regarding moral rights is certainly not limited to the courts. For artists, the inability to locate the extent of their entitlement to moral rights is a hurdle, particularly for those without the capital or the know-how to enforce their rights. Artists must engage in a search for the grounds on which to base their entitlement to moral rights. This problem

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[http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15).

41. Mira T. Sundara Rajan, *MORAL RIGHTS: PRINCIPLES, PRACTICE, AND NEW TECHNOLOGY* 140 (Oxford University Press 2011).

42. *Id.*

43. Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong. (1988) (enacted).

44. 17 U.S.C. § 408(a) (2005).

45. Rajan, *supra* note 41, at 141.

is particularly pronounced in the realm of public art, including site-responsive art, because these artists are more likely involved in political and community engagement activities which make issues of authorship more difficult to establish. Public artists do not always benefit from the resources such as a managed career, gallery exhibitions, and sales at auction houses that established gallery artists do. Therefore, they receive less publicity and are less commercially successful than their counterparts in the museum and gallery setting.

The following section describes the difficulties of obtaining moral rights for “emerging mediums” such as photography, public art, and site-responsive art. It is meant to contextualize the difficulties that public artists, including site-responsive artists, must overcome in order to assert moral rights over an artwork.

## II. EMERGING MEDIUMS: PROBLEMS OF FUNCTION AND TASTE

It is not a new phenomenon that artists practicing in emerging mediums receive inadequate copyright protection and a limited ability to enforce moral rights. Photography and public art are historical examples of both the global community and the United States’ failure to proactively address the unique characteristics of emerging mediums. What follows is a brief description of how these mediums have been treated within the moral rights debate. In both of these examples, functionality and traditional “taste” have undermined photographers’ and public artists’ moral rights.

### A. Photography

Berne’s vision that the “most shocking differences in international law will gradually disappear and a new regime will be established, more uniform, and consequently more secure for authors”<sup>46</sup> has not been fully realized. There is a continued distinction between the treatment of moral rights as a natural right and moral rights as a legal right. The way in which these differences manifest themselves is directly tied to the medium of the works to be protected.

Photography is an excellent example of a medium that has been increasingly accepted as a medium worthy of protection. However, the process to include photography in the list of traditionally protected mediums such as painting, drawing, and sculpture has been lengthy. In the late-nineteenth century, the photographer was seen less as an artist and more as the “operator of a machine.”<sup>47</sup> This is perhaps a cause for

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46. Ladas, *supra* note 7, at 76.

47. See Justin Hughes, *The Photographer’s Copyright – Photograph as Art, Photograph*

the exclusion of photography from the initial Berne Convention. Although Berne later added photography as a class of protected work, only those photographs that were deemed “artistic” were protected.<sup>48</sup> The issue of artistic merit and aesthetic taste became a hindrance to the achievement of moral rights protection. Even when photographs eventually became fully included in Berne, the duration of their protection was limited. In 1971, photographs were granted protection for the life of the artist plus 25 years; all other mediums were granted protection for the life of the artist plus 50 years. As of 1996, all photographs are protected for the life of the artist plus 50 years.

The French theorist Pierre Bourdieu described photography as a “middle brow art” situated between “noble” and “vulgar” practices.<sup>49</sup> Bourdieu posited that the practice of photography “condemns its practitioners to create a substitute for the sense of cultural legitimacy which is given to the priests of all the legitimate arts.”<sup>50</sup>

In a similar vein, the Convention required that any nation who wished to protect the moral rights of photographers do so by promulgating national statutes. The Convention’s decision to exclude photography allowed nations to make distinctions between photographic works and other, more established, works of art. The Convention’s decision to leave protection for photography to member nations ultimately failed to grant the hoped-for “universal protection” that the Convention wished to establish.

As will be discussed in Section III, Bourdieu’s ideas of photography as a “middle-brow” art have been re-created in U.S. federal courts’ conceptions of site-specific artwork. The courts’ treatment of site-specific artwork reveals foreseeable problems for the treatment of the emerging practice of site-responsive artwork.

### *B. Public Art*

Contemporary public art is a far cry from the public art of ancient Rome, in which emperors used art as a sign of power and wealth, or the grandiose monuments of the U.S., most notably those that are featured on the National Mall in Washington D.C. as symbols of the country’s history and power. During the twentieth century, public art in the United States was revived and more widely disseminated among the nation’s communities with the start of the Federal Art Project (FAP) arm of the Works Progress Administration. The FAP was part of the New Deal, and

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*as Database*, 25 HARV. J.L. & TECH. 329, 343 (2012).

48. *Id.* at 341.

49. Pierre Bourdieu. *The Market of Symbolic Goods*. THE FIELD OF CULTURAL PRODUCTION: ESSAYS ON ART AND LITERATURE. (1983).

50. *Id.*

funded artists' work between 1935 and 1942. The goals of the FAP were two-fold: (1) to provide artwork for non-federal public buildings such as hospitals, schools, and community centers, and (2) to provide jobs for unemployed artists.

The artworks that came out of the FAP were widely varied. Photographers, painters, sculptors, and muralists were represented. Notable artists such as: Berenice Abbott, a photographer who produced many iconic images of New York City's skyline; Jackson Pollock, a painter known for his abstract expressionist "drip-paintings"; and Diego Rivera, a Mexican artist best known for his large scale murals, were included in the group. Because of the explicit goal of the FAP to place art works in the community, public art became embedded in the everyday lives of Americans.

Naturally, production and dissemination of public art following the FAP drastically decreased. Instead, the new public art of the time rested primarily in the propaganda posters produced by the government in hopes of rallying Americans behind the war effort. The New Deal and the WWII era marked a period in which the United States government was the driving force of public art.

The most pronounced, and arguably the most revolutionary, period of public art in the United States began in the 1960s and 1970s. Social unrest prompted artists to engage in their own propaganda, be it against the war in Vietnam or, conversely, to rally support for domestic concerns like the women's rights and civil rights movements. At that time, murals were an ideal solution for public art for several reasons. First, murals were very visible. They could be produced with cheap materials such as house paint, instead of the more traditional (and more expensive) oil and canvas mediums of traditional painters. The production of a mural only required one artist to sketch the design on paper and on the wall or board on which the mural itself would be placed. Upon completion of the initial sketch, a single artist could engage several non-artists to paint within the artist's completed drawing.

One of the most iconic murals of the early 1970s still exists in the United States today. Construction on "The Great Wall of Los Angeles" started in 1974 by Mexican-American artist Judy Baca. Baca has described the mural movement of the 1970's as a way in which ethnic and racial minorities were able to assert their place in American society during a time in which they "lacked representation in public life, with neither voice in elections, or elected representatives."<sup>51</sup>

The public art of the 1970s signaled a pronounced shift from public art as an agent of government authority to public art as a more

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51. Judith F. Baca, BIRTH OF A MOVEMENT: 30 YEARS IN THE MAKING OF A SITE OF PUBLIC MEMORY 3 (UCLA 2001).

participatory medium in which trained artists and non-artists alike could be involved in the creation of public art forms. Following the mural movement of the 1970s, museums and municipal governments took note of the value of public engagement in the creation and exhibition of public art. At the same time public art was flourishing on the ground in a community development context, it was also gaining prominence in more traditional circles. Public art expanded outward from a heavy basis in murals to forms that included large-scale sculptures and installations designed not with a particular social agenda in mind, but with goals of testing social exchanges through the use of art.

Nonetheless, public art still remains outside of the circle of traditional, “legitimate” arts. The benefactors of art production are a testament to the distinction between traditional, gallery-based art forms and public art. There remains a vast difference between, say, an exhibition mounted at the Metropolitan Museum of Art and the recently commissioned sculptures by the Public Art Fund. In a typical experience at the Met, for example, visitors are expected to refrain from touching the artwork, and are not permitted to use flash photography in the galleries. Site-responsive art, on the other hand, offers an implied invitation to not only touch and photograph the work, but also to make adjustments to the work. The participatory nature of the public’s interaction with a site-responsive artwork is a defining feature of the genre.

### III. SITE-RESPONSIVE ART: CURRENT ISSUES IN VARA APPLICATION

Failure to learn from and fully implement the goals of the initial Berne Convention have created global and domestic inconsistencies in copyright and moral rights protection. Thus far the U.S. system has failed to respond to these inconsistencies. However, site-responsive artwork offers an opportunity to address the ongoing issues in moral rights protection for artists working in emerging mediums.

#### A. *An Overview of Site-Responsive Art*

Although both site-specific and site-responsive art emerged from public art practice, the two are not to be confused with one another.<sup>52</sup> Site-specific art “is meant to become part of its locale, and to restructure the viewer’s conceptual and perceptual experience of that locale through the artist’s intervention.”<sup>53</sup> Conversely, site-responsive artists are

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52. See Vogel, *infra* note 57.

53. *Site-Specific Art/Environmental Art*, GUGGENHEIM, <http://www.guggenheim.org/new-york/collections/collection-online/show-full/movement/?search=Site-specific%20art/Environmental%20art> (last visited Jan. 10, 2012).

“concerned with the experience of being” in certain spaces.<sup>54</sup> Arguably, site-specific art is an artist’s attempt to change a specific place through intervention, while site-responsive art seeks to serve as the artist’s “response” to the existing characteristics of a particular place.

Nonetheless, the line between site-specific and site-responsive art is a thin one. One site-specific artist, Ann Hamilton, described the process of transitioning from what she thought would be a site-specific project to what turned out to be a site-responsive project.<sup>55</sup> As a site-specific project, she planned to serve as an interventionist in an abandoned textile warehouse. The warehouse had been previously occupied by as many as 1200 workers during its heyday. Hamilton hoped to recreate the former life of the space, bringing to light the effect of a dwindling economy on what was previously a flourishing company town. Hamilton experienced a conceptual shift when she realized that there were untracked emotions and memories connected with the space—ideas to which she could not be privy as an outsider to the community.

A primary dividing line between site-specific and site-responsive art may be described as resting in a quantitative/qualitative distinction. The site-specific artist is calculated: he or she has a specific intention in creating a work that will be placed in a particular space. The site-responsive artist is more of a facilitator for the public. While the site-responsive artist will typically use a tangible medium (in Hamilton’s case, she used textile art in the textile warehouse) the results of their intervention are subject to development once placed within the public sphere. They are interested in “the inter-relationship of the past and present, imprints of history and current activity, the physical feel and texture of the space and with bringing those experiences out to the public.” Site-responsive art “has the ability to make the audience think about where they are, to reintegrate the lost fragmented forgotten place back into their consciousness.”

The results of site-responsive art works are incapable of pre-determination. So, although a site-responsive artist can own the tangible work that they placed in a particular space, they cannot own the inherent value, history, or context of the space itself. Regardless, site-responsive artists benefit from the placement of what some may describe as sub-par artwork in a place filled with a rich history and participatory visitors.

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54. *An Introduction to Art as Site-Response*, ART/SITE, <http://www.sitespecificart.org.uk/intro.htm> (last visited Jan. 12, 2012).

55. *Spirituality*, ART21, <http://www.pbs.org/art21/artists/ann-hamilton> (last visited Jan. 10, 2012).

### B. *The Andy Monument*

The New York City Public Art Fund (PAF)<sup>56</sup> recently commissioned site-responsive sculptures that were mounted in three separate locations in Manhattan. At the time of their unveiling, Public Art Fund Director Nicholas Baume explicitly rejected the notion that the sculptures were site-specific. Instead, he described the sculptures as site-responsive, stating that “[T]hey are all linked because they use New York City as a context.”<sup>57</sup>

One of the sculptures commissioned by the PAF was designed and fabricated by Rob Pruitt, a successful New York-based artist. Pruitt created a life-sized bronze sculpture of Andy Warhol entitled *The Andy Monument*.<sup>58</sup> The final product was cast in silver chrome, and was placed in front of the former site of Andy Warhol’s *Factory*. The Factory served both as Andy Warhol’s studio, and as a counterculture meeting ground from 1963 to 1968.<sup>59</sup> It was dubbed “The Silver Factory” after an artist lined the interior of the building with tin foil. Pruitt’s use of silver chrome in his final product of *The Andy Monument* was likely a nod to the tin foil that distinguished the Silver Factory. By placing the sculpture in front of the Factory, Pruitt’s sculpture received the benefit of a cult following of New Yorkers and other visitors, many of whom deposited Campbell’s Soup cans and Brillo Pads at the foot of *The Andy Monument*. Although critics did not find particular inherent value in the quality of the statue, Pruitt still received positive reviews for *The Andy Monument*.

*The Andy Monument* has been described as “site-responsive” because it is directly connected to the site in which it is placed. Moreover, while the sculpture is cast in bronze, its surface is in chrome, perhaps offering a subtle nod to Warhol’s “Silver Factory.” Baume described the sculpture as “giving tangible form to the intangible presence that Warhol still represents for so many New Yorkers and art lovers around the world. Pruitt’s standing monument stands on the street corner as the artist once did signing copies of *Interview* magazine.”<sup>60</sup>

56. NEW YORK PUBLIC ART FUND, <http://publicartfund.org/pafweb/about/membership.html>. (last visited Mar. 25, 2012).

57. Carol Vogel, *The Public Warhol in a Public Sphere*, N.Y. TIMES, Nov. 26, 2010 at 31.

58. The sculpture was modeled on the body of a Cincinnati art collector.

59. See WARHOL SHOP, *The Factory*, <http://www.thewarholshop.com/thefactory.php>. The Factory was originally located at 231 East 47th Street in Midtown Manhattan. After the original building was condemned in 1968, Warhol moved The Factory to 33 Union Square West. The Union Square Factory remained active until 1984. This is the site at which artist Rob Pruitt installed the sculpture of Andy Warhol.

60. *The Andy Monument Audio Tour, Part I: Introduction to the Exhibition by Curator Nicholas Baume*, PUBLIC ART FUND, [http://publicartfund.org/robrpruit/images/uploads/Nicholas%20Baume\\_The%20Andy%20Mon](http://publicartfund.org/robrpruit/images/uploads/Nicholas%20Baume_The%20Andy%20Mon)

After its unveiling, the art world and the general public reacted favorably to the work, but the positive reception was not based on the tangible sculpture itself. Rather, the sculpture benefited from its placement in Union Square. For example, one notable art critic, Jerry Saltz of *New York Magazine*, stated that he did not “actually love the statue itself. . . . But I love the passion behind it and the idea of putting this sculpture in this place at this time. It beautifully evokes the pathos, perversity, and runaway genius of this great swish-hero-artist.”<sup>61</sup> Without the benefit of New York’s Union Square, without the benefit of Andy Warhol, and without the benefit of the continued cult following of Andy Warhol’s legacy, would *The Andy Monument* be as relevant if it were placed in a closed gallery with white walls surrounding it? Would it even be a work of art, or would it be an unrecognizable chrome sculpture, devoid of any particularly poignant meaning or artistic merit?

### C. “Recognized Stature” and Limits on Emerging Mediums

Left to infuse their own interpretations, courts have applied arbitrary standards to moral rights. Most notably, courts that have addressed moral rights in the context of site-specific art have determined that one must meet a level of artistic merit set forth by the courts or by the legislature. To date there are no published cases of courts addressing the moral rights of site-responsive art in the United States.

To obtain moral rights protection, an artist bears the burden of showing that his or her artwork is one of “recognized stature.”<sup>62</sup> Under the VARA, works of recognized stature are those “that have been ‘recognized’ by members of the artistic community and/or the general public.”<sup>63</sup>

An artist must have a certain level of notoriety in order to obtain moral rights protection. In *Dixon*, an artist designed an outdoor sculpture for an individual client. When the client sold the property at which the sculpture was installed, he moved the sculpture, destroying it in the process. Under the VARA, the artist claimed that he had the right to prevent the sculpture from being modified or destroyed. Most importantly, the artist claimed that the work was part of a larger body of art that he had created, and it therefore had a unique personal meaning to him. The court held that “an artist must show not only the work’s artistic merit but also that it has been recognized as having such a merit.”<sup>64</sup>

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ument%20GBC.mp3.

61. Jerry Saltz, *Jerry Saltz on the Unveiling of the Andy Monument*, VULTURE, NYMAG.COM, [http://nymag.com/daily/entertainment/2011/03/jerry\\_saltz\\_on\\_the\\_unveiling\\_o.html](http://nymag.com/daily/entertainment/2011/03/jerry_saltz_on_the_unveiling_o.html).

62. *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

63. *Id.* (citing *Carter v. Helmsley Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994)).

64. See 17 U.S.C.A. § 106(a)(3)(B) (West 2002).

Because the artist had only achieved local fame, the artist could not establish that the sculpture was a work of art of recognized stature within the meaning of VARA.<sup>65</sup>

The issue of taste is not only considered in light fame and notoriety, but also with respect to subject matter and placement of art works. In *Kelly v. Chicago Park District*, an artist planted a wildflower garden in a Chicago City Park.<sup>66</sup> Unlike *Dixon*, the artist in this case funded his own work and installed it with the permission of Chicago officials. Without the artist's permission, the Chicago Parks and Recreation department destroyed the garden. The artist asserted moral rights over the garden, as it was a site-specific work. At trial, the court rejected the artist's moral rights claim, stating that although it could obtain copyrightability as a painting or sculpture, it was not sufficiently original to obtain protection. Although the Court of Appeals conceded that, "nothing in the definition of a "work of visual art" either explicitly or by implication excludes this [site-specific] form of art from moral rights protection," it still held against the artist, stating that the garden "lacked the kind of authorship and stable fixation normally required to support copyright."

Under existing copyright law, the courts are free to interpret the VARA in a manner based on economic principles. The phrase, "recognized stature" was not defined by the VARA, though one court said that a work would have stature if:

it is viewed as meritorious, and (2) its stature is recognized by art experts, other members of the artistic community, or by some cross-section of society. Generally the court will determine whether a work of art has 'stature' based on expert testimony.<sup>67</sup>

Limiting moral rights only to those artists of "recognized stature" limits protection to those artists who have achieved a certain level of fame. In the existing structure of the visual art world, fame is inevitably tied to economic success. The purposes of moral rights in the U.S., therefore, more closely mimic traditional intellectual property rights, as opposed to protecting artistic integrity. Moreover, moral rights, because they are meant to protect the individual artist, should not attempt to be reconciled with the intellectual property's interest in economic utility. Instead, moral rights should be more broadly construed than the current practice of limiting an artist's moral rights based on their notoriety and their recognition by critics and experts.

#### *D. A Proposed Solution for VARA Application to Emerging*

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65. *Dixon*, 309 F. Supp. 2d at 400.

66. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 291 (7th Cir. 2011).

67. *See Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 97 (D. Mass. 2003).

### *Mediums*

As a way to tackle the problems of site-responsive artwork, the threshold question should be: where does the work find its point of completion? In the example of *The Andy Monument*, the work could have been complete when Pruitt finished the sculpture in his studio. It could have also been complete when the sculpture was placed in Union Square, in front of the site of the Factory. Or perhaps it could have been complete when visitors placed iconic symbols of consumption that Warhol both abhorred and embraced: Brillo pads and Campbell's soup cans.

Another question may be raised regarding whether a whole new work was created when visitors to the *Andy Monument* added Brillo pads and Campbell's soup cans. At that stage, it could be argued that by adding elements to the sculpture, visitors created a derivative work. In that case, Pruitt would only be able to claim ownership and moral rights over the *Andy Monument* itself. With the addition of new objects, it may be that infinite derivative works are created. But are derivative works the only way in which untraditional authors can be recognized?

Another question is whether the work, and potentially, subsequent derivative works, benefited from joint authors. Public art, and by default, site-responsive work is meant to be participatory and inclusive. Of course there would be a problem with joint authorship because in the case of *The Andy Monument*, Pruitt would not have consented to joint authors. Moreover, Pruitt, in assuming his moral rights, could potentially block visitors from altering the sculpture by making their own additions to the sculpture. However, as has been noted, Pruitt's sculpture has benefited from the additions that visitors have offered.

These queries bring to light a key distinction between the interests of the commercial artist and the interests of the public. Copyright law and moral rights have been established under the guise of the U.S. interest in useful arts and sciences and in property rights. But the general public, and some practicing artists for that matter, are not always interested in financial returns.

There is no benefit to society in limiting the right to make alterations to the sculpture, particularly in light of our interest in promoting creativity. Copyright law should first recognize that there can be multiple tiers at which fixation is achieved. In the existing structure, the only way in which individual visitors to *The Andy Monument* could achieve some form of authorship rights or copyright protection would be to claim their work as a derivative work. Even then, though, individual visitors would have to agree upon a finished form, otherwise there may be a limit over further derivative works as new amendments are made to the sculpture.

The idea of multiple levels of fixation requires not only an

adjustment to copyright law, but also an adjustment in the U.S. conception of moral rights. Untraditional authors do not always have a chief interest in the economic or property benefits connected with the work. Therefore, ways in which moral rights are manifest in the current form of the VARA bestows undue favor upon visual artists in the site-responsive context, and robs contributing artist-visitors of their ideas without affording them credit for their contributions. Visual artists should not receive a unilateral benefit in which they can place a work of art in a particular context and reap the rewards of that context either by way of the physical setting, or by the media attention stemming from alterations made by visitors. Instead, moral rights should take on more of the meaning with which “moral” is typically associated: they should recognize that contributions to works of visual art may come from several sources, and when an artist’s work receives enrichment from outside sources, those sources should be appropriately credited.

The tension between traditional, recognized artists and non-traditional artists is not limited to the visual arts. Olufunmilayo B. Arewa has recognized the limits of copyright protection for emerging musicians, particularly those using improvisational mediums. Arewa argues that “[m]usic compositional practices have varied both over time and among genres in ways that should be more explicitly recognized in copyright considerations of music.”<sup>68</sup> A visual-textual bias, Arewa argues, “constrains copyright . . . in ways that prevent copyright frameworks from encompassing musical creativity in its fullest.”

Parallels can be drawn between improvisational music and site-responsive art. In both, there are no written or tangible accompaniments that will guide precisely where the works will reach their completion. As such, similar issues of fixation are present in both mediums. Arewa’s notion that there is a bias toward the visual-textual is grounded in the idea that there is a bias toward that which can be tangibly perceived. The same is certainly true of visual art, in which copyright protection is geared only toward a certain limited category of tangible artworks, which, as the limited case law dealing with site responsive artwork confirms, must meet a certain “stature” as defined by experts.

Building on Arewa’s idea, Mark P. McKenna has stated that copyright fails because it “fixates on threats to ownership and compensation for creators . . . ignoring the risk to unwritten creative practices . . .”<sup>69</sup> Again, copyright law in its current form not only negates the rights of authorship to individuals that contribute to the development

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68. Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1831.

69. Mark P. McKenna, *Introduction: Creativity and the Law*, 86 NOTRE DAME L. REV. 1819, 1820 (2011).

of a work through means beyond defined mediums of a certain stature, but it deprives potential artists of the right to contribute to or fully develop a work due to potential shields by the VARA, which prevent modifications to the work. The VARA should acknowledge the multiple levels of fixation and contribution to works of art in order to adequately distribute moral rights protection to those who deserve it.

## CONCLUSION

U.S. Copyright Law has long been criticized for failing to anticipate the complexities of creative practices in both performance and in the visual arts. Like the inclusion of Victor Hugo's *L'Association Littéraire et Artistique Internationale*, which drafted the propositions that provided the foundation for the Berne Convention, policymakers should acknowledge emerging art forms by listening to artists. Discussing the public's enthrallment with remixes, Girl Talk artist Gregg Gillis has stated, "[i]deas impact data, manipulated and treated and passed along. I think it's just great on a creative level that everyone is so involved with the music that they like . . . [y]ou don't even have to be a traditional musician . . . I just think it's great for music."<sup>70</sup>

Site-responsive artwork presents a timely challenge for Congress to address the failures of copyright law in its current form. Creativity must be viewed not only as a way to ensure the nation's economic health and prosperity by way of training enough scientists and engineers, but it must also be viewed as a way to foster a creative society in general. Addressing the failures of copyright law—and moral rights in particular—is one way in which Congress must acknowledge that creativity in its truest form is unplanned, experimental, and responsive, but nonetheless deserving of the same rights and protections as creativity that is planned, traditional, and reactionary.

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70. Lawrence Lessig, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 14 (2008).