VARA: Winning the Battle and Losing the War

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Four years ago, Richard Phillips lost when he protested relocation of twenty-seven sculptures in Boston's Eastport Park across from Boston Harbor. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 130 (1st Cir.2006).

Within the past week, Chapman Kelley lost when he protested the Chicago Park District's altering his "wildflower display at the north end of Grant Park, a prominent public space in the heart of downtown Chicago," roughly twenty years after it began to occupy a space equivalent to two football fields. Kelley v. Chicago Park Dist., 2011 WL 501161 at * 1 (7th Cir.). More specifically, Kelley complained that the district "dramatically modified the garden, substantially reducing its size, reconfiguring the oval flower beds into rectangles, and changing some of the planting material." *Id*.

He claimed that the alteration breached a contract, but that is summarily dismissed for lack of authority in an official who supposedly agreed to allowing it to continue. *Id*. at 16-17.

The more interesting claim was based on Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A. The opinion provides a good summary of its scope and of events leading to its passage. *Id*. at *5-7. The opinion also provides considerable analysis of VARA's coverage and its exceptions. In the final analysis, however, most of that proves to be beside the point because "VARA supplements general copyright protection; to qualify for moral rights under VARA, a work must first satisfy basic copyright standards." *Id*. at *8. Indeed VARA protects only a subset of works protected by § 102(a)(5) (pictorial, graphic, and sculptural works).

The Park District did not challenge the district court's finding that the flower garden was a painting and a sculpture, but the court of appeals finds this to be "an astonishing admission." *Id*. at *9. Still, the garden is found not to be copyrightable. "The real impediment to copyright here is… that a living garden lacks the kind of authorship and stable fixation normally required to support copyright." *Id*. at *12.

The court goes on to say, " In the ordinary copyright case, authorship and fixation are not contested; most works presented for copyright are unambiguously authored and unambiguously fixed. But this is not an ordinary case. A living garden like Wildflower Works is neither 'authored' nor 'fixed' in the senses required for copyright." *Id*. at *13. Thus, "[b]ecause Kelley's garden is neither 'authored' nor 'fixed' in the senses required for basic copyright, it cannot qualify for moral-rights protection under VARA." *Id*. at *14.

Despite admitting that it need not reach the question of whether site-specific art is covered by VARA, the opinion is critical of *Phillips*' holding to the contrary, and, by way of dicta, finds the statute to suggest that such art "is not categorically excluded from VARA." *Id*. at 16 (note omitted).

This brings me to the subtitle of this short piece. I cannot help but wonder what Phillips and Kelley expected to accomplish for such art and its artists in the long run. No doubt they were interested only in their own projects, but a win for either seems apt to have accomplished nothing beyond that. On the contrary, a win for either seems more likely than not to poison the well for anyone who wanted to undertake such a project in the future. Only a fool, it seems, would agree to accept such a work, particularly one requiring substantial annual maintenance, on the understanding that it could not be altered during the lifetime of the artist. Although that point is explicit in neither opinion, it is difficult to believe that the courts of appeal were unaware of the long-term implications of contrary findings.