

COPYRIGHT CLAIM FOR PARK WILDFLOWER DISPLAY

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In the case of *Kelley v. Chicago Park District* (N.D. Ill. 9/29/2008), plaintiff Chapman Kelley alleged defendant Chicago Park District violated the Visual Artists Rights Act, 17 U.S.C. § 106A, when it removed his wildflower plantings from a long time exhibit in Grant Park.

FACTS

In March 1984, the Park District had granted Kelley a permit to create an exhibit called "Wildflower Works I" in Chicago's Grant Park. The permit was granted subject to several provisions, including one that gave the Park District, upon written notice from the General Superintendent, the option of terminating the installation with 90 days notice to remove the planting.

Under the terms of the permit, Kelley was to install and maintain Wildflower Works at his expense in exchange for the Park District's allowance for the exhibit on its property. Kelley initially financed the project himself and purchased between 200,000 and 380,000 wildflower plugs at a cost of between \$80,000 and \$152,000.

In June 1984, Kelley began installing Wildflower Works in an area of Grant Park designated as the Daley Bicentennial Plaza, which is the roof of the East Monroe Street Parking Garage. The exhibit consisted of two elliptical shapes, formed by gravel and metal edging, that enclosed two beds of wildflowers, laid out in accordance to Kelley's design. Its approximate size was 1.5 acres, or 66,000 square feet. Kelley did maintenance and organized volunteers to work on the exhibit eight months a year for each of the twenty years it was installed.

Wildflower Works attracted the attention of national news outlets, including the New York Times and the Christian Science Monitor, which published articles that commented positively on the exhibit. Kelley was also commended by various state and local officials for the installation. The Illinois Senate recognized Wildflower Works as "a new form of living art . . . [in] the first park district in the United States to display a live wildflower work of art of this scale" and commended Kelley for "his vast artistic contribution to Grant Park."

In 1988, the Park District notified Kelley that his permit for Wildflower Works was to be terminated within ninety days. Kelley responded with a lawsuit alleging that his First Amendment rights were being infringed. As part of the settlement of that lawsuit, the Park District renewed Kelley's temporary permit for one year. The 1988 permit was renewed in 1989, 1990 and 1992. The last permit renewal expired on September 30, 1994. Kelley did not apply for a permit, and the Park District did not renew the temporary permit.

From October 1, 1994 until June 9, 2004, Kelley and his volunteers continued to maintain and install plants in Wildflower Works, and the Park District did not remove the installation.

In May of 2004, as a result of ongoing issues with the maintenance of Wildflower Works and the upcoming opening of a new adjacent park, the Park District determined that changes would have to be made to Wildflower Works.

In a meeting with Kelley, the Park District presented plans to reduce the size and to change the shape and design of Wildflower Works. Kelley did not approve of either the reconfigured new shape or the design and requested an opportunity to remove any of his wildflower plants from Wildflower Works. Despite Kelley's disapproval, the Park District went forward with the reconfiguration plans.

During the summer of 2004, the Park District reduced the wildflower-planted spaces in Daley Bicentennial Plaza from roughly 66,000 square feet to less than 30,000 square feet. The two ellipses in the wildflower beds were also reconfigured into rectilinear shapes edged with new evergreen hedges.

## VARA

As described by the federal district court, the Visual Artists Rights Act ("VARA") provides that "an 'author of a work of visual art' is entitled to certain rights of attribution (the right of the artist to be recognized by name as the author of the work) and integrity (the right of the artist to prevent distortion or mutilation of the work), subject to exceptions and limitations." 17 U.S.C. § 106A(a). However, to be protected by VARA, the court noted that "an object must (1) meet the statutory definition of 'a work of visual art' and (2) be subject to copyright protection." In pertinent part, VARA defined a "work of visual art" as follows:

a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author. 17 U.S.C. § 101.

Kelley contended that the Wildflower Works exhibit could be characterized as a painting or sculpture and, therefore, constituted a "work of visual art" within the context of statutory protection under VARA

As noted by the federal district court, the terms "painting" or "sculpture" were not defined in the Copyright Act. The Park District had argued that VARA only applied to "a narrow range of artwork." The court, however, found the legislative history of VARA indicated a broader view and intent to simply differentiate "visual art from films and other kinds of intellectual property."

While noting that "words are to be given their plain and ordinary meaning" in the absence of a "statutory definition or a clearly expressed legislative intent to the contrary," the court found VARA should not "be read so narrowly as to protect only the most revered work of the Old Masters." On the contrary, in determining "whether the two elliptical gardens of Kelley's creation could be considered a painting or a sculpture under VARA," the court found 'the plain and ordinary' meanings of words describing modern art are still slippery."

As described by the court, the Wildflower Works exhibit consisted of arrangements of living plants within two elliptical spaces circumscribed by three feet of gravel and a band of steel edging. Kelley claimed the gravel and metal band in Wildflower Works were analogous to the "banded elliptical forms enclosing colorful wildflowers" depicted in many of Kelley's paintings. In response, the Park District contended that "an artifact that changes over time, requires ongoing maintenance, or contains living matter cannot be considered a work of visual art protected by VARA."

Since the Wildflower Works "required Kelley and his volunteers to plant, cultivate and prune the wildflowers in the gardens," the court acknowledged that such activities were "typically associated with landscaping, not art." On the other hand, the court took note of testimony from Kelley's expert witness that "the manipulation of the flowers, metal, and gravel into an elliptical shape fits within the broadest of the definitions of sculpture." According to Kelley's expert, "since the 1960s in particular, sculpture has been defined as any non-two dimensional art form, including environmental art and some conceptual art." In the alternative, the court found "[a]n exhibit that corrals the variegation of wildflowers in bloom into pleasing oval swatches, as Wildflower Works did, could certainly fit within some of the above definitions of a painting." In light of such testimony, the court found that "Wildflower Works could be considered either a painting or a sculpture under VARA."

#### ORIGINAL TANGIBLE WORK

Since Wildflower Works could be regarded as a work of art, the federal district court then considered whether Wildflower Works was "copyrightable." As cited by the court, "[a]n object is subject to copyright protection if it is an original work of authorship fixed in any tangible medium of expression, now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102. Within this context, works of authorship included "pictorial, graphic, and sculptural works." As a result, the court found Wildflower Works qualified as a "pictorial, graphic, and sculptural work" for the "same reasons that it can be considered a painting or a sculpture under the definition of 'work of visual art' under [VARA] 17 U.S.C. § 101."

The Park District, however, had challenged the copyrightability of Wildflower Works because it contained "living elements" and, therefore, could not be "fixed in a tangible medium of expression" as required under federal copyright law. The court agreed with the Park District. In so doing, the court noted that Kelley himself had described Wildflower Works as a "vegetative management system." Moreover, in the opinion of the court, it was "not clear what about the exhibit is original."

According to the court, Wildflower Works would be excluded from copyright protection under 17 U.S.C. § 102(b) if "the only original element of Kelley's exhibit was this 'vegetative management system'." The court, therefore, held that Wildflower Works was excluded from copyright protection under 17 U.S.C. § 102(b) because it was not an "original work of authorship."

In the opinion of the court found Kelley had presented no evidence or argument to the contrary. Instead, the court found Kelley had only offered an unsupported conclusory statement that "Wildflower Works is copyrightable under the Copyright Act because the arrangement, coordination or selection displayed by Plaintiff is copyrightable." Absent "any evidence differentiating Kelley's work from, for example, the oval wildflower beds of Monticello," the court found "Wildflower Works is not subject to copyright protection" and, therefore, not protected under VARA.

#### SITE-SPECIFIC

In the alternative, even if Wildflower Works was copyrightable, the court found Wildlife Works "would still not be protected under VARA because it is site-specific." In the opinion of the court, VARA "does not protect 'site-specific' art." Within this context, site-specific art is artwork in which "one of the component physical objects is the location of the art." According to the court, site-specific art "usually takes into consideration the natural environment in which a work of art is installed." In this particular instance, the court found "Wildflower Works is clearly a site-specific artwork." Moreover, the court found Kelley himself had "admitted at his deposition that it was site-specific." Similarly, Kelley's expert had "stated unequivocally that Wildflower Works was site-specific."

According to the court, the site specific nature of Wildlife Works gardens in Grant Park was evident in its being "set against a backdrop of Chicago's skyscrapers and grid system." Specifically, the court found the "theoretical concepts that motivated Kelley's design and placement of Wildflower Works required that it be placed in Grant Park."

Kelley wanted a location that would create a contrast between the linearity of the urban grid, the *rondure* [i.e., gracefully rounded curvature] of the elliptical gardens, and the entropy of the wildflower beds... Wildflower Works incorporated pre-existing elements of the environment into its display situated on the roof of the East Monroe Street Parking Garage. Air vents from the garage were incorporated into the artwork: each ellipse had three large square vents spaced evenly along its major axis.

Further, the court noted that the Park District and Kelley discussed relocating the exhibit, but Kelley rejected all other locales as incompatible with his artistic vision for the exhibit. In light of such evidence, the court found "Wildflower Works was site-specific and not protected under VARA." The federal district court, therefore, entered judgment in favor of defendant Chicago Park District on Kelley's VARA and copyright claims.