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Art, Copyright, and Activism: Could the Intersection of Environmental Art and Copyright Law Provide a New Avenue for Activists to Protest Various Forms of Exploitation?

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ABSTRACT

¶1 *In 2015, a group of activists led by Aviva Rahmani began an artistic venture known as “Blued Trees.” They painted blue sine waves onto trees along a proposed pipeline pathway, and subsequently filed for federal copyright registration. They hoped to use copyright law and the Visual Artists Rights Act as a sword against fossil fuel companies. Although the piece was destroyed later that year as part of the pipeline construction, the “Blued Trees” movement continues. This note will discuss Rahmani’s legal theory and consider this theory’s strengths and weaknesses. This experimental protest brings forth a number of unanswered questions about the nature of copyright law. It is no secret that contemporary art forms, and the mediums involved, are becoming increasingly diverse. Therefore, this note also seeks to address the merits and limitations of current copyright law in terms of environmental and installation art.*

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INTRODUCTION

¶2 The Algonquin Pipeline Project is a development designed to expand the current natural gas infrastructure in the Northeastern United States. The development plan runs through New York, Connecticut, Rhode Island, and Massachusetts, with pipelines, compressors, and metering stations.¹ It will run through private property and thus disrupt various familial homes that have existed on the land for multiple generations.²

¶3 The Federal Energy Regulatory Commission authorized the pipeline several months ago, and construction is underway.³ The development has already been met with serious opposition by families and activist groups.⁴ These groups have attempted to stop this expansion since its original proposal because they believe the development poses a danger not just to families and the environment, but also to public safety in general.

¶4 When completed, the pipeline will transport highly volatile gas and cross near the Indian Point nuclear power plant and other nuclear fuel rods near fault lines.⁵ As explosions often accompany such gas pipelines and compressor stations, the pipeline's operation poses an arguably large risk for nearby communities, particularly those near the Indian Point nuclear power plant.⁶ In addition, the presence of a gas pipeline will also threaten the water and food supply in the immediate area, and also release high levels of radon into the environment. Social activists argue that this will also pose a threat to public health because radon is documented as one of the leading causes of lung cancer.⁷ Similarly, environmental activists point to the dangerous consequences of releasing such toxins into the air and the potentially devastating effects this can have on the surrounding wildlife.⁸

¶5 With these threats in mind, a group of social and environmental activists took a creative and seemingly revolutionary approach to protesting the development of the Algonquin Pipeline Project. Throughout 2015, the activist group worked to create "Blued Trees," a piece of environmental art. This art was placed directly on portions of the private land that will be affected by the proposed pipeline development. The theory behind their approach was simple: intersect activism and art, and thereby use untested theories of copyright law as a protective blanket.

¹ *Algonquin Incremental Market (AIM) Project*, SPECTRA ENERGY (last visited Nov. 14, 2015), <http://www.spectraenergy.com/operations/new-projects-and-our-process/new-projects-in-us/algonquin-incremental-market-aim-project/>.

² Aviva Rahmani, *Pushing Rocks*, <http://pushingrocks.blogspot.com/>.

³ *Algonquin Incremental Market (AIM) Project*, SPECTRA ENERGY (last visited Nov. 14, 2015), <http://www.spectraenergy.com/operations/new-projects-and-our-process/new-projects-in-us/algonquin-incremental-market-aim-project/>.

⁴ Akiko Matsuda, *Algonquin pipeline opponents arrested after blocking construction*, LOHUD, <http://www.lohud.com/story/news/local/westchester/2015/11/09/algonquin-pipeline-opponents-arrested-after-blocking-construction/75454248/>.

⁵ *Stop the Algonquin Pipeline Expansion*, Credo Mobilize, <https://www.credomobilize.com/petitions/stop-the-algonquin-pipeline-expansion> (last visited Nov. 15, 2015); *Stop Algonquin Pipeline Expansion 2016*, <http://sape2016.org/> (last visited Nov. 15, 2015).

⁶ *Id.*

⁷ *Stop the Algonquin Pipeline Expansion*, Credo Mobilize, <https://www.credomobilize.com/petitions/stop-the-algonquin-pipeline-expansion>.

⁸ *Id.*

¶6 This theory was based off a similar venture by Canadian artist, Peter Von Tiesenhausen. When faced with a pipeline development company that aimed to drill into his land, Tiesenhausen copyrighted his entire land, claiming that the various sculptures installed on it and pieces such as his white picket fence, “were integral to that piece of land” and to his art practice as a whole.⁹ Although it was never litigated, Tiesenhausen was able to use the copyright protection to battle the natural gas company until they eventually gave up.¹⁰ In Canada all creative works are automatically afforded copyright for 50 years past the artists’ death. The fact that such copyrights are awarded so easily brings doubt on how strong the protection would have been up against eminent domain law. Nevertheless, the efforts and the artists’ success with it, served as a symbol of hope for the activists involved in the “Blued Trees” project.

¶7 “Blued Trees” is best described as permanent installation art. It consists of blue sine waves that have been painted with non-toxic paint onto previously existing trees along pipeline pathways, as well as the land beneath these trees. These sine waves represent musical notes and the art piece is meant to serve as a visual depiction of a Greek symphony. “Blued Trees” attempts to encompass music, visual art, and nature into a single artistic entity and stand as an illustrative symbol of environmental destruction.¹¹

¶8 The activist group that created “Blued Trees” is led by Aviva Rahmani, a well-recognized environmental artist who is renowned for using art to bring attention to environmental issues. She has successfully led various landscape restorations, and is now actively involved in the Gulf to Gulf project, an ecological restoration initiative that is sponsored by the New York Foundation for the Arts. This initiative aims to combine art and science in order to re-green the Earth and mitigate the effects of global warming.

¶9 Rahmani has incorporated “Blued Trees” as part of the Gulf to Gulf initiative. Rahmani acquired legal aid from Patrick Reilly, an intellectual property attorney in Santa Cruz who is the founder of the Intellectual Property Society, and filed a federal copyright registration over one completed overture of “Blued Trees.”¹² This was the overture that had been painted directly along the proposed Algonquin Pipeline Project development.

¶10 The federal copyright registration for the completed portion of “Blued Tees,” was known as “Three Sisters.” The copyright was registered with the US Copyright Office with Aviva Rahmani as the author. The creation rights specifically covered a “photograph, 2-D artwork, map, 3-D painting.”¹³ After obtaining this registration, Rahmani also initiated a cease-and-desist notification. This notification was sent to Spectra Energy, the corporation that is building the Algonquin pipeline, for the portion of the proposed pipeline development that is on the artwork.¹⁴ However, the cease and desist notification was ignored and the overture was destroyed as part of the pipeline construction in November 2015.

⁹ Stephen Keefe, *This Canadian Artists Halted Pipeline Development by Copyrighting His Land as a Work of Art*, VICE, <http://www.vice.com/read/this-canadian-artist-halted-pipeline-development-by-copyrighting-his-land-as-a-work-of-art-983> (last visited Nov. 14, 2015).

¹⁰ *Id.*

¹¹ *Gulf to Gulf*, http://www.gulftogulf.org/project_item/blued_trees/ (last visited Nov. 15, 2015).

¹² Jillian Steinhauer, *Using Art to Stop a Pipeline*, HYPERALLERGIC, <http://hyperallergic.com/235429/using-art-to-stop-a-pipeline/> (last visited Nov. 15, 2015).

¹³ Rahmani, *Pushing Rocks*, <http://pushingrocks.blogspot.com/>.

¹⁴ *Id.*

¶11 Regardless of the destruction of this first overture, the “Blued Trees” movement continues. This artwork continues to be developed throughout the United States along the routes of proposed pipeline developments. Rahmani, her legal team, and fellow activists, also remain relentless in their mission. They hope to file suit against Spectra Energy for violating their federal copyright registration on the “Three Sisters” overture, and are also working to obtain federal copyright registrations over the various new “Blued Trees” sites. While the first attempt may have been ignored, the group continues to gain momentum and media attention. In February 2016 Rahmani delivered a progress report in Zurich, Switzerland at the *Models for Diversity* conference and exhibition.¹⁵ It is clear that the activists are holding on to their legal theory of copyright protection as a sword to prevent future pipeline developments.

¶12 Could it really be that simple? Could activists use art to further their cause, when all other forms of activism have failed? While at first glance this appears to be legally impossible, this experimental protest brings forth a number of unanswered questions about the nature of copyright law and how it may or may not intersect with the provisions of real property law.

¶13 This Note will begin by analyzing whether or not the “Blued Trees” art piece is, in fact, copyrightable. While Rahmani and her legal team may have filed for federal copyright protection, courts have been reluctant to afford such rights to site-specific pieces of art. The fact that Aviva Rahmani has a registered copyright over this artwork may not actually hold up during litigation proceedings.

¶14 Irrespective of whether this specific art piece will pass the copyright test or not, the question of whether other works of environmental art or other types of installation art are subject to copyright protection in general, is an extremely important one to determine. Contemporary art forms, and the mediums involved, are becoming increasingly diverse, and this issue may just be the first of many similar ensuing artistic protests. Therefore, this Note also hopes to address what the merits and limitations of current copyright law are in terms of environmental and installation art.

¶15 Next, this Note will aim to determine what specific protections copyright law could actually offer the activists. On a fundamental level, it is unclear whether obtaining copyright protections over all “Blued Trees” overtures will actually aid in protesting any future pipeline developments. The activist group is confident that they will be able to use the Visual Arts Rights Act in order to bring moral rights to the forefront. However, site-specific works of art have not only had trouble gaining copyrightable status in general, they have also very rarely been afforded the rights granted by VARA.

¶16 Lastly, this Note will address the intersection of copyright law and real property law. The activists are confident that this protest will bring eminent domain and takings law into consideration, and thereby serve as a larger protest against fossil fuel companies. It is well documented that fossil fuel companies have utilized eminent domain law on various occasions under the guise of “public good.” This Note will delve into what this public good really consists of, and if the moral rights intertwined with copyright law could serve as a sword against eminent domain provisions.

¶17 Foundationally, the “Blued Trees” overture poses a number of questions about intellectual property and real property law. While the merits of the protest may not hold

¹⁵ *Id.*

up in litigation, this protest could prove significant in terms of challenging the grey areas currently present in the law. In contrast, if it is truly possible for the rights afforded under the different legal theories at play to marry in a way that provides activists with a new avenue for their goals, this could change the future of art, the environment, and activism as a whole.

I. IS “BLUED TREES” COPYRIGHTABLE UNDER CURRENT COPYRIGHT LAW?

¶18 According to the Copyright clause, there are several threshold requirements when determining whether or not something affords copyright protection. The statute states, in relevant part,

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.¹⁶

Thus, to determine the copyright status of “Blued Trees,” we will have to consider originality, authorship, the idea/expression distinction, and fixation.

A. Originality, Authorship, and Idea/Expression Distinction

¶19 Originality, authorship, and the idea/expression distinction are three of the four fundamental requirements to establish copyright protection. “Blued Trees” will satisfy all of these requirements.

¶20 Case law has established that a work will meet the originality requirement as long as “the author make(s) the selection or arrangement independently . . . and that it displays some minimal level of creativity.”¹⁷ Historically, this has not served as a stringent requirement and “Blued Trees” will likely meet this threshold without difficulty.

¶21 Rahmani worked alongside the other activists to incorporate various musical notes into a Greek symphony, which will meet the bar for independent selection and arrangement. Furthermore, this musical symphony is being “performed” visually by the forest, through the painted trees. This performance is an experimental take on environmental art, and should easily pass the threshold for creativity.

¶22 Moreover, the authorship question does not appear to be in dispute. Although there were activists working alongside Aviva Rahmani to implement the “Blued Trees” project, they are not claiming ownership. The first copyright registration was filed under Rahmani’s name. If another activist who worked alongside Rahmani later claimed authorship over the artwork—under the argument that there were multiple authors involved—this may be taken into consideration. However, this question is not relevant to

¹⁶ US Copyright Act 17 U.S.C.A. § 102 (2010).

¹⁷ Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 111 S. Ct. 1282 (1991).

our discussion in this Note, and would not affect the copyrightable status of the work as a whole.

¶23 Lastly, “Blued Trees” is the expression of a particular idea, and does not depend on just an idea in itself. In essence, this threshold requirement states, “copyright law protects tangible, original expressions of ideas, not ideas themselves.”¹⁸ “Blued Trees” meets this bar because the artwork takes the idea of a visual representation of a musical symphony and physically installs, or expresses, the idea onto the land. Therefore, the artistic idea to combine the environment, music, and art has already been executed into expression.

B. Fixation

¶24 This is the aspect of the copyright clause that creates the greatest amount of uncertainty for “Blued Trees.” As a work of art that uses nature as the medium, specifically trees and the land underneath these trees, can we establish “Blued Trees” as sufficiently ‘fixed’? Undoubtedly, trees are alive, growing, and constantly changing. Nature, by its very being, is dynamic. The activists could respond with their claim that they have also installed art within the soil of the land, but how fixed is this, really, in terms of copyright law?

¶25 The threshold requirement is generally explicated as “a period more than transitory duration.”¹⁹ A commonly cited example that also delves into the potential of contemporary art forms, and specifically environmental art, is *Kelley v. Chicago Park District*²⁰. In this case, Chapman Kelley attempted to copyright a garden he designed as a “work for hire” for the Chicago Park District. When faced with litigation, however, the court not only debated the authorship of the garden, but also (importantly) claimed that the garden did not meet the fixation requirement of copyright.²¹ A garden is inseparable and fundamentally intertwined with nature. Therefore, it is a living creature, dynamic and perpetually changing, and fundamentally subject to tests of nature. Although the garden could meet the transitory duration requirement of fixation because it existed for more than a transient period of time, it would never be able to satisfy the entire requirement because it was dynamic in essence.²² Notably, the fact that the garden owed “most of its form and appearance to natural forces” was also cited as a reason why it would not be upheld under copyright law.²³

¶26 As others have argued, the decision in *Kelley* posed a:

Tension between contemporary art and copyright law when it noted that ‘not all conceptual art may be copyrighted’ . . . Under this definition, not only are important strains of contemporary art ‘unfixed’ because they are

¹⁸ *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.2d 527, 533 (5th Cir. 1994); Copyright Act of 1976, 17 U.S.C. § 102(a), (b); see also *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir. 1992).

¹⁹ US Copyright Act 17 U.S.C.A. § 101 (2010).

²⁰ 635 F.3d 290, 300-02 (7th Cir. 2011).

²¹ *Id.*

²² *Id.* at 305.

²³ *Id.*

transitory in nature, but also because they often make a point of incorporating elements of change over time.²⁴

Kelley has been an unpopular decision for a number of reasons, especially because it suggests that many forms of contemporary art would no longer be protected under the Copyright Act. Such works of art include sculptures using natural media, performance art, and sculptures using living materials²⁵ (which is the category “Blued Trees” could potentially fall under).

¶27 One scholar has analyzed Christo and Jeanne-Claude’s artwork in terms of this law.²⁶ These artists employed the environment in their exhibitions, in a manner similar to the way “Blued Trees” is (albeit their exhibitions were displayed for a much more transitory duration). With such examples being only a few of the large number of creative and new mediums present in contemporary art, these scholars claim that it is not up to the law to determine what art is.²⁷ By narrowing the scope of the copyright clause to works that are fixed, and further narrowing this definition of fixed, courts are essentially defining what constitutes as art.

¶28 This also seemingly contradicts what previous courts have stated on the matter of defining what is and is not art. In a Supreme Court case it was stated that:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.²⁸

It often takes time for contemporary forms of art to be accepted and realized as art under the law. This is why courts have typically strayed away from definitively defining what is and is not art for the purposes of the law.

¶29 This potential contradiction could be useful for Rahmani’s legal team. It also could be an important factor to consider, as site-specific artwork becomes an increasingly common form of contemporary art. Although the law may be reluctant to accept it as art now, that may change in time, as has been the case with several forms of art in the past. For instance, when a polished bronze object shaped like a bird was shipped to the United

²⁴ Megan Carpenter, *Function Over Form: Bringing the Fixation Requirement into the Modern Era*, 82 *Fordham L. Rev.* 2221, 2221-2271 (2014); quoting *Kelley*, 635 F.3d 290 at 304.

²⁵ *Id.*

²⁶ Anna Belle Wilder Norton, *Site-Specific Art Gets A Bum Wrap: Illustrating the Limitations of the Visual Artists Rights Act of 1990 Through a Study of Christo and Jeanne-Claude’s Unique Art*, 39 *Cumb. L. Rev.* 749, 749-784 (2009).

²⁷ *Id.*

²⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 *US* 239, 251-52 (1903).

States in 1928, there was a significant amount of debate as to whether or not it constituted as art. A short time later, it became indisputably established that this bronze object was in fact a statute and a significant work of art.²⁹

¶30 The opinion in *Kelley* is also, arguably, contradictory in terms of the cases it cites to.³⁰ For instance, the court discusses a work “entitled *Puppy* . . . [that] is a model of a puppy almost three stories high—and made using a metal frame, soil, geotextile fabric, an internal irrigation system, and live flowering plants.” Despite the fact that this artwork also contained “the same kinds of organic materials as *Wildflower Works* and the same changeable nature, the Seventh Circuit posited—without any explanation—that *Puppy* is likely to be considered ‘fixed’ and thus copyrightable.”³¹

¶31 Given the contradictions in the *Kelley* decision and the massive negative repercussions it poses for contemporary art, the attorney representing “*Blued Trees*” may be able to argue that the nature aspect should not automatically classify this artwork as ‘unfixed.’ However, the fact that the *Kelley* decision has not been officially disputed or negatively treated since the initial holding makes this difficult to assess.

¶32 Given the fact that “*Blued Trees*” specifically relies on nature for its expression, and is thus reliant on an essentially dynamic entity, it is much more likely that a court will not find this artwork to meet the fixation requirement.

C. Overall

¶33 Although “*Blued Trees*” meets most of the threshold requirements for copyright protection, it will face difficulty in terms of the fixation requirement. It will likely meet the first half of the fixation requirement, in that it is fixed for more than a transitory duration. However, due to the treatment of site-specific pieces of art and works dealing specifically with nature in *Kelley*, “*Blued Trees*” will be classified as a work of art that is dynamic and incapable of ever being truly fixed. Unless the legal team for “*Blued Trees*” is able to debunk the merits of *Kelley* or somehow prove that it is distinguished from it, the copyright status of “*Blued Trees*” will not hold.

II. WHAT DOES THIS LAW MEAN FOR ENVIRONMENTAL AND OTHER FORMS OF INTEGRATED ART, IN GENERAL?

¶34 Other works of environmental and installation art may soon, or may already have, found themselves in the same unfavorable position that “*Blued Trees*” potentially faces. The *Kelley* decision is not sympathetic towards contemporary forms of art, and brings forth some major questions about the future implications of such a decision. For instance, in a recent case involving street art, the artists were not able to acquire copyright protection and VARA protection because of the claim that their art was not fixable. Other

²⁹ Dr. Derek Finchman, *How Law Defines Art*, 14 J. Marshall Rev. Intell. Prop. L. 314, (2015).

³⁰ Lily Ericsson, *Creative Quandary: The State of Copyrightability for Organic Works of Art*, 23 SETON HALL J. SPORTS & ENT. L. 359, 359-384 (2013).

³¹ *Id.*

forms of art that use the environment, preexisting property, or organic materials are going to face difficulty with the law.

¶35 Given the amount of dispute over this issue and the possibility that contemporary art may increasingly incorporate unique mediums, it is logical to assume that this decision may be changed. As it stands now, however, environmental art and other forms of installation art that rely on nature—something that is dynamic and inherently changing—will not meet the fixation requirement. Thus, “Blued Trees” will be faced with difficulty in terms of copyright protection as a whole.

III. WHAT WOULD COPYRIGHT PROTECTION MEAN FOR “BLUED TREES”? WOULD IT SERVE AS A SHIELD AGAINST THE PROPOSED PIPELINE DEVELOPMENT?

A. Background on the Visual Artists Rights Act

¶36 Aviva Rahmani’s experimental protest with “Blued Trees” rests primarily upon the moral rights afforded to copyright holders in the Visual Artists Rights Act (VARA) of 1990. Notably, “[t]he Act protects the rights of attribution and integrity for the author of a visual work of art and prevents one from destroying the work provided that it is one of recognized stature.”³²

¶37 The relevant provision of VARA states that artists:

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right. . . .

(c) Exceptions.--(1) The 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 described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.³³

¶38 The statutory language does not specifically explicate what these works of ‘recognized stature’ may be, and these details have been left up to interpretation by the

³² Anna Belle Wilder Norton, *Site-Specific Art Gets A Bum Wrap: Illustrating the Limitations of the Visual Artists Rights Act of 1990 Through a Study of Christo and Jeanne-Claude’s Unique Art*, 39 *Cumb. L. Rev.* 749, 749-784 (2009).

³³ US Copyright Act, 17 U.S.C.A § 106A (2010).

courts. Scholars have suggested that³⁴ a court should consider “the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or marketing of visual art.”³⁵ Similarly, *Carter v. Helmsley-Spear, Inc.*,³⁶ formulated a test to determine what constituted as recognizable art. The two-part test stated, “(1) [t]he visual art in question has ‘statute,’ 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.”³⁷

Under this standard, the breadth of recognized works of art should be large and dynamic, especially as contemporary art forms continue to evolve and involve unique new mediums. Although Rahmani’s current “Blued Trees” project is new and has so far only been recognized by several activist groups rather than the artistic community as a whole, her previous work has been renowned by environmentalists and artists alike. For instance, her piece “Through a Glass Darkly” was installed and displayed at the Hudson River Museum in New York.³⁸ Considering Rahmani’s reputation and prior successes, it follows that the artistic world may also recognize “Blued Trees” as a legitimate work of recognized stature. Also supporting this theory is the fact that the “Blued Trees” project continues to gain media attention, and is now expanding on an international playing field.

Therefore, at face value the statutory language of the provision and the extendable interpretation offered by the Senate Resolution and relevant case law, certainly suggest that “Blued Trees” (if its copyright is upheld as valid) will be shielded against the sort of destruction or mutilation that would occur from a pipeline development. That sort of destruction would not qualify under any of the ‘right of integrity’ exceptions. It is neither a natural modification of the work, nor would it qualify as a modification aimed at conservation. It would constitute as a grossly negligent destruction of the artwork as a whole, the kind that should be protected under the statute.

B. VARA as Applied to Site-Specific Art

¶39 While VARA appears to be directly applicable to the “Blued Trees” cause, site-specific pieces of art have been treated unfavorably in terms of VARA, which sheds some doubt on the success of this venture. Site-specific art is categorically described as a kind of integrated art, which is “comprised of two or more physical objects that must be presented together as the artist intended for the work to retain its meaning and

³⁴ Senate Resolution 1198 and House Bill 20.

³⁵ Francesca Garson, *Before That Artist Came Alone, It was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POLICY 203, (2001); citing S. 1198, 101st Cong. (1990); H.R. 2690, 101st Cong. (1989).

³⁶ Chris Godinez, *Painting over VARA’s Mess: Protecting Street Artists’ Moral Rights Through Eminent Domain*, 37 T. JEFFERSON L. REV. 191, citing *Carter v. Helmsley-Spear, Inc.* 71 F.3d. 77, 88 (2d Cir. 1995).

³⁷ *Id.*

³⁸ *Aviva Rahmani: Ecological Artists, Past Exhibitions*, http://www.ghostnets.com/past_exhibitions.shtml (last visited Nov. 15, 2015).

integrity.”³⁹ “Blued Trees” will almost certainly fall under this category of art, since the work intends to combine visual art, music, and science, and thereby stand as a symbol to protest environmental destruction. The meaning of the work is thus wholly dependent on its location and site, which are the trees along the proposed pipeline development.

¶40 The negative treatment concerning site-specific work came to a forefront in *Phillips v. Pembroke Real Estate*. The court was concerned with how the extension of VARA to site-specific pieces of art, which they also classified as “art attached to real property” could affect “real property interests and laws.”⁴⁰ Concerned with this intersection, the court conclusively established that “VARA does not apply to site-specific art at all.”⁴¹

¶41 This stark conclusion has since been reversed, in part, by *Kelley*. The *Kelley* court raised questions against the legal conclusion reached in *Phillips*, stating several reasons to doubt this conclusion including the fact that, “the term ‘site-specific art’ appears nowhere in the statute. Nothing in the definition of a ‘work of visual art’ . . . excludes this form of art from moral-rights protection.”⁴² The court also reasoned that *Phillips*’s “all-or-nothing approach to site-specific art may be unwarranted.”⁴³ They based this reasoning on the fact that not all site-specific work is automatically destroyed if it is moved. By this logic, extending VARA to site-specific artwork does not necessarily posit a contradiction between real property and moral integrity principles for artists. Rather, this determination should be reached on a case-by-case basis.

¶42 Nevertheless, because the court found that they could resolve the case without delving into this conclusion it stated that it “need not decide whether VARA is inapplicable to site-specific art.”⁴⁴ Therefore, while the *Phillips* decision may not necessarily establish that *all* site-specific artworks are excluded from VARA protection, this remains an untested grey area.

¶43 Overall, site-specific art has been treated unfavorably by courts. Even if “Blued Trees” is able to successfully support its copyright status, courts may be unwilling to extend VARA protection to this ecological artwork. The essence of “Blued Trees” is inseparably connected to its location.

¶44 As a counter, the activists may be able to combine the copyrighted status of “Blued Trees” with the real property interest that the private property owners have over this land. This would no longer merit the same sort of threat to real property interests that *Phillips* was initially concerned with. However, tying the two laws and interests together brings forth other concerns and hurdles, such as eminent domain law. Rahmani is aware of the eminent domain concerns. The next section of this Note will turn to analyzing how real property and intellectual property interests can be intertwined, or combined, and what benefits or trials this could induce for the situation.

³⁹ John Bicknell, *Is Graffiti Worthy of Protection? Changes Within the Recognized Stature Requirement of the Visual Artists Rights Act*, 17 TUL. J. TECH. & INTELL. PROP. 337 (2014) citing *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 129 (1st Cir. 2006).

⁴⁰ *Phillips*, 459 F.3d 128 at x.

⁴¹ *Id.*

⁴² *Kelley*, 635 F.3d 290, 300-02 (7th Cir. 2011).

⁴³ *Id.*

⁴⁴ *Id.*

IV. THE INTERSECTION OF COPYRIGHT AND REAL PROPERTY LAW AND WHAT THIS COULD MEAN FOR “BLUED TREES”

A. *Real Property Rights for Copyright Owners?*

¶45 There is an existing theory amongst some legal scholars that real property rights are inseparable from, and in many ways the same as, intellectual property rights. These scholars point to the notable instances in which the theories underlying intellectual property and real property laws coincide.

¶46 The most commonly cited of these is the Lockean Labor Theory idea—which proponents argue applies to both real property law and intellectual property law. Locke’s labor theory suggests that, “by mixing our labor with something, we make that thing our own.”⁴⁵

¶47 Labor is, undoubtedly, required to produce the kind of art that would have intellectual property rights. One scholar states that, “[i]deas and expressions and inventions are all the product of mixing our labor, in this case our mental labor, with the common property of preexisting ideas and information.”⁴⁶ Furthermore, this is supported by the very essence of intellectual property law—considering that most intellectual property rights (and copyright law as a whole) exist primarily to incentivize artists to produce their work.⁴⁷ This is directly comparable to the kind of physical labor that is also required to produce an entity that would merit a real property right. Thus, scholars reason that products created through mental labor and products created through physical labor should be afforded the same kind of real property rights.

¶48 The flip side of this argument focuses on the number of ways in which intellectual property is fundamentally different from real property. For instance, the theory of real property law rests upon the fact that, “property is a scarce resource, and its use and possession is limited. Inherent in tangible things is the fact that two people cannot possess the same thing at the same time.”⁴⁸ This is in contrast to intellectual property, which is not scarce. An intellectual property owner who formulates an idea into expression can “enjoy that idea exclusively” or “communicate that idea to another person, and still retain an identical copy; the original copy.”⁴⁹

¶49 Through this reasoning, intellectual property law cannot coincide with real property law because the two are fundamentally different. Intellectual property is not the same as tangible, real property. Rather, it is simply a “government-granted . . . license to possess, use, and transfer your idea.”⁵⁰

⁴⁵ Ian McClure, *Be Careful What You Wish For: Copyright’s Campaign for Property Rights and an Eminent Consequence of Intellectual Monopoly*, 10 Chap. L. Rev. 789 (2007); citing John Locke, *Two Treatises of Government* 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“The Labour of his Body, and the Work of his Hands, we may say, are properly his.”).

⁴⁶ *Id.*, citing Jim Harper, Director of Information Policy Studies, Cato Institute, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 15.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

B. How Does Eminent Domain Law Fit In?

¶50 If real property law, intellectual property law, and the rights afforded to the properties of each are considered the same, then does Fifth Amendment protection also extend to works protected by intellectual property law?

¶51 Furthermore, if real property and intellectual property are afforded the same private property rights, could copyrighted works become subject to the government's eminent domain power?

¶52 The Fifth Amendment states, "private property [cannot] be taken for public use, without just compensation."⁵¹ In other words, this amendment provides that private property *generally* cannot be taken by the government, but allows a limited exception for takings that would constitute as a public use so long as the owners are provided with adequate compensation. Both the development of property case law and events through history have indicated that private property has become subject to eminent domain per this takings clause.

¶53 Interestingly, and relevant to "Blued Trees," eminent domain has extended to apply to more than just the taking of private property. For instance, in one technology case, states assumed the rights to a privately held patent under the argument that they were "immune from patent infringement."⁵² This suggests that intellectual property rights, like real property rights, are not absolute rights in any way. They are still subject to the same sort of backdoor takings as real property. In addition, the government's use of copyrighted work is already fairly common. For instance, "[t]hirteen of twenty-eight federal agencies surveyed from 1987 to 1989 reported that they were using copyrighted property on a regular basis."⁵³

¶54 Not only is government use of copyrighted work already extremely prevalent, it is also easily justified through eminent domain law. A scholar states, "because governmental uses of copyrighted property almost always entail public benefits, policy considerations suggest the desirability of assuring the ability of governments to use copyrighted material whenever their uses serve public purposes."⁵⁴ It is not difficult for an employee of the federal government to excuse some use of intellectual property as a "public use," especially if the use of the work was something within the scope of their employment.⁵⁵

¶55 Although these statistics are concerned with the use and not necessarily the taking of copyrighted property, the logic follows to render another virtually limitless possibility. The government may take and appropriate copyright property under the excuse of public use. Copyright law is unlikely to stand as a shield against the takings clause, because,

⁵¹ *Id.*, citing U.S. Const. amend. V.

⁵² Ian McClure, *Be Careful What You Wish For: Copyright's Campaign for Property Rights and an Eminent Consequence of Intellectual Monopoly*, 10 CHAP. L. REV. 789 (2007), citing *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.

⁵³ Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685, (1989).

⁵⁴ *Id.*

⁵⁵ Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, (1998).

[i]f a government entity wants to exercise its transcendent right to use copyrighted property but is unable to negotiate successfully with the copyright owner for such use, the government can essentially force a sale of some or all of the rights to the copyrighted property by invoking its power of eminent domain.⁵⁶

¶56 With this sort of limitless and demonstrable power, Rahmani is likely to face a giant hurdle with eminent domain law (this logic, of course, assumes that Rahmani is first able to overcome the previously discussed obstacles, namely establishing a legally permissible copyright and VARA protection). This may be an area of the law that is untested, but analogous situations and similar occurrences make the likelihood of success questionable.

C. Are There Any Potential Defenses?

¶57 Despite the dubious likelihood of success against the government, there is an available argument to combat the takings of copyrighted work. The practice itself appears to directly contradict the Copyright statute. In relevant part, the statute states, “no action by any government body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright or any of the exclusive rights under a copyright, shall be given effect under this title.”⁵⁷ In theory, this statutory provision should protect copyrighted works from eminent domain law. However, the more we attempt to combine intellectual property and real property laws together, the more uncertain this argument becomes.

¶58 Rahmani is walking a fine line in this case between trying to garnish the protections of VARA into real property, while also trying to garnish the specific protections afforded to copyrighted works. This fine line, in itself, may prove weak. In addition, because eminent domain law has historically overcome most property provisions and protests, it becomes even more unlikely that copyright will be able to win where tangible property could not.

D. On the flip side, could Eminent Domain law help?

¶59 An interesting theory that was proposed in response to *Cohen v. G & M Realty L.P.*, a case that disallowed street artists from gaining copyright and VARA protection over their street artwork, is utilizing eminent domain in favor of the artists.⁵⁸

¶60 The case itself was highly unpopular in its holding. It narrowed in on the potential VARA protection over 5Pointz, a street art exhibition that had been created by many well-known artists. The exhibition was located on a complex of previously unused buildings in New York, which had been utilized by artists since 2002 to showcase art

⁵⁶ *Supra* note 53 at 692.

⁵⁷ *Id.*, citing 17 U.S.C. § 201(e)

⁵⁸ Chris Godinez, *Painting over VARA's Mess: Protecting Street Artists' Moral Rights Through Eminent Domain*, 37 T. JEFFERSON L. REV. 191.

pieces. It became a significant public attraction and had a notable interest in the artistic community as a whole. Eventually, the court found that VARA did not protect 5Pointz from being protected as a tourist site. It did note, however, that because the location had become such an attraction, the city probably could have saved the building had it chosen to exercise eminent domain.⁵⁹ This is the statement that Chris Godinez relies on to posit his theory about the beneficial use of eminent domain.

¶61 The theory, as a whole, borrows from landmark law to suppose that eminent domain can actually be used to protect art. It analogizes the situation with 5Pointz to cases where eminent domain was actually used for protection. For instance, eminent domain was used to protect “the site of the Battle of Gettysburg as a historical monument.”⁶⁰ The park near the Hudson River was also preserved “as a location of ‘scenic beauty’ to be used by the public.”⁶¹ The theory that this kind of landmark preservation is allowed under eminent domain law, and can fit under the “public purpose” definition can, arguably, also extend itself to “Blued Trees.”⁶²

¶62 If the “Blued Trees” artists, or artists who have completed similar works of environmental or installation art, can show that their work is culturally significant in the same way that one of these historical landmarks was, then the government could protect the artwork with eminent domain law.

¶63 However, this is a very difficult argument to make. The pipeline companies will be promoting their own public good. The fact that the Algonquin Pipeline Development has already been approved by the FERC, and presumably the taking of the private property was already authorized, suggests that this reverse theory of eminent domain law will be difficult to implement. Rahmani and the remainder of the activist group would need to show that the public good and public significance of their art piece is so great that it should be protected by the government despite the proposed pipeline.

¶64 As the “Blued Trees” movement continues to gain momentum and media attention, and more members of the public become involved, this theory may gain more weight. Nevertheless, it remains difficult to prove that a piece of art (and the cultural significance behind it) is a greater public good than a pipeline development could be. There is little precedent to show that eminent domain has favored potential cultural benefits over long term economic ones.

V. WHAT ARE SOME OTHER POTENTIAL FUTURE IMPLICATIONS?

¶65 The claims made by Aviva Rahmani and the group of activists are creative, but perhaps legally weak. Even if litigation ends up ensuing on these matters, it is unlikely that the copyright claim will be successful on its merits alone. Nevertheless, this experiment could still have some future implications because it will delve deeper into the

⁵⁹ Timothy Marks, *The Saga of 5Pointz: VARA’s Deficiency in Protecting Notable Collections of Street Art*, 35 LOY. L.A. ENT. L. REV. 281 (2015).

⁶⁰ Godinez, citing *U.S. v. Gettysburg Elec. Ry. Co.* and *Bunyan v. Comm’rs of Palisades Interstate Park*.

⁶¹ *Id.*

⁶² *Id.*

issue of whether site-specific pieces of art are afforded copyright protection. Furthermore, this will pave the way for discussions regarding the intersection of real property and intellectual property law. It will also potentially bring to light the contradictions between VARA and eminent domain law.

¶66 Perhaps the most significant part of this entire issue is simply the fact that the publicity involved will vilify eminent domain law, and this pipeline development in particular. Even if the protest is unsuccessful as a whole and construction continues nationwide without any hitches (as it did over the first overture) public opinion and outrage by other non-traditional artists could change the standards regarding site-specific art and what constitutes a “public good.”

¶67 One of Rahmani’s latest initiatives includes an attempt to speak with New York State policymakers on the matter of the destroyed “Blued Trees” overture. In a letter she drafted to a policy maker, Rahmani pointed to the “Blued Trees’ public art project that has now spread throughout the United States. In the movement’s defense she stated:

The grounds of this legal-art work, are that the public good is not being served, as we face a catastrophe of climate change, alarming data on fugitive methane emissions, the probability of a fracked gas explosion close to a nuclear facility thirty miles from NYC, and impacts on watersheds and the small farming communities of upper New York State.⁶³

It follows that this defense will resonate with many social and environmental activists and artists throughout the country and world.

¶68 While the legal merits of the “Blued Trees” movement fall on shaky grounds, public involvement and movement may implicate these proposed pipeline developments.

CONCLUSION

¶69 Aviva Rahmani and the involved activists have proposed an interesting prospect for the future of activism. However, under the strains of current copyright law it is unlikely that their protest will amount to the desired result.

¶70 An analysis of the “Blued Trees” artwork under the lens of the copyright statute’s threshold requirements comes out uncertainly. Rahmani will be faced with difficulty when she attempts to prove that the “Blued Trees” piece is sufficiently “fixed,” as is required by copyright law. Although this work will likely stand for more than a period of transitory duration (if it is untouched by the pipeline developers), it has incorporated nature, an essentially dynamic entity. Artworks using nature have not been treated favorably by copyright case law.

¶71 Furthermore, if Rahmani is able to argue that her copyright registration is legally valid, she will once again meet difficulty when she attempts to garnish VARA protections. “Blued Trees” is site-specific art, a kind of integrated art that has also been

⁶³ Aviva Rahmani, *Pushing Rocks*, <http://pushingrocks.blogspot.com/>.

treated unfavorably by courts. Courts are concerned that if they extend VARA protections to site-specific art, this will coincide with real property interests. However, there is no directly analogous or conclusive case law on this issue. Therefore, Rahmani can argue that her art does not coincide with any real property interests. Without this collision of intellectual property and real property provisions, the courts may be more willing to afford “Blued Trees” VARA protections.

¶72 If Rahmani is able to combine the VARA protections offered by copyright into real property interests, she will still be faced with eminent domain law. Through eminent domain law, the government can still take private property, so long as it intends to deploy the use of it for the “public good,” even if that occurs by transferring ownership and usage rights to a different private party.⁶⁴

¶73 There are many documented instances through which the government has used copyrighted works. Its logic can easily extend to takings, as the federal government can merit a “public use” argument. Therefore, Rahmani will have a difficult time combatting eminent domain law with a property interest that is even less tangible than the real property interests that have failed in light of eminent domain law.

¶74 There is a potential argument to make directly from the copyright statute that appears to suggest that copyrighted works cannot be interfered with by the government. However, this is yet another untested development in that area, and may prove unsuccessful, considering the wider public use the pipeline development offers.

¶75 Overall, although this experimental protest may prove to be an important publicized symbol and form of activism against fossil fuel companies, there are many hurdles before its attainment and very little case law or precedent to suggest its success.

⁶⁴ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

