

## THE *TILTED ARC* CONTROVERSY

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I am going to speak about the saga that I went through about fifteen years ago dealing with the commissioning of *Tilted Arc*<sup>1</sup> and the subsequent removal by the government of the same work. The United States Government destroyed *Tilted Arc* on March 15, 1989. Exercising its proprietary rights, authorities at the General Services Administration ("GSA")<sup>2</sup> ordered the destruction of the same public sculpture that their own agency had commissioned ten years earlier.<sup>3</sup>

This final desecration of *Tilted Arc* followed after five years of misrepresentations, false promises, and show trials in the media and in the courtroom.<sup>4</sup> In the end, these deceptions not only al-

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<sup>1</sup> See Grace Glueck, *Serra Work Stirrs Downtown Protest*, N.Y. TIMES, Sept. 25, 1981, at C24 (noting that *Tilted Arc* was a 120 feet long, 12 feet high curving wall sculpture installed at 26 Federal Plaza in New York City, in July 1981).

<sup>2</sup> The General Services Administration ("GSA") is a federal agency granted with broad authority over the acquisition, maintenance and disposal of federal property. Its mission is to "provide policy leadership and expert solutions in services, space, and products, at the best value, to enable Federal employees to accomplish their missions." *GSA Strategic Plan*, available at <http://159.142.162.71/Portal/pub.jsp?OID=113973> (last visited Mar. 21, 2001).

In 1979, the GSA paid Serra \$175,000 for his sculpture, *Tilted Arc*, which was to be displayed at 26 Federal Plaza. See *Serra v. U.S. General Services Admin.*, 664 F.Supp. 798 (S.D.N.Y. 1987) [hereinafter *Serra I*]. After *Tilted Arc* was created and placed at the Plaza, the agency received many complaints requesting its removal. Serra filed a complaint naming as defendants the GSA, the GSA Administrator, the GSA's Commissioner of Public Building Service, William Diamond as the GSA Regional Administrator for the region including New York, and Dwight Ink, another GSA administrator. Serra claimed that he had a contractual right to have *Tilted Arc* remain at the Plaza, that relocation would violate his rights under copyright and trademark laws, and he also claimed violation of his First and Fifth Amendment rights. The Court held it lacked jurisdiction to hear the contract, copyright and trademark claims. The Court dismissed the actions against the defendants in the personal capacities. See also *Serra v. U.S. General Services Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987) [hereinafter *Serra II*]. Defendants filed a motion to dismiss the remaining claims due to sovereign immunity and lack of subject matter jurisdiction. The contract, copyright, trademark, and constitutional claims were dismissed. See *Serra v. U.S. General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988) [hereinafter *Serra III*]. Serra appealed only the rejection of his free expression and due process claims. The Court of Appeals held that Serra, the artist, had relinquished his free speech rights in his sculpture when he sold it to the government. See generally *id.* The Court also held that to the extent that the government's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was permissible, and the relocation decision did not violate due process. See generally *id.*

<sup>3</sup> See *Serra III*, 847 F.2d at 1047. *Tilted Arc* was installed in Federal Plaza under the Art-in-Architecture program of the GSA, pursuant to which "one half of one percent of the construction cost of federal buildings is reserved for the funding of art works by living American artists." *Id.*

<sup>4</sup> See Douglas C. McGill, *Office Workers and Artists Debate Fate of Sculpture*, N.Y. TIMES, Mar. 7, 1985, at B1 (discussing merits of Serra's case); see also Margot Hornblower, *New*

lowed the government to destroy *Tilted Arc*, but also established a precedent for the priority of property rights over free expression and the moral rights of artists. Such a precedent tests the ability of the Berne Convention laws to protect the rights of artists in their works.<sup>5</sup> After an exhaustive analysis of the treaty, my attorneys concluded that the Berne Convention laws, as abridged by the United States Congress,<sup>6</sup> were inadequate to protect my work. In 1988, I was permanently denied by the federal courts, any say in the fate of the sculpture.<sup>7</sup> Thereafter, William Diamond, the original administrator of the GSA and the man most responsible for the campaign against *Tilted Arc*,<sup>8</sup> acted immediately to have the sculpture removed from 26 Federal Plaza in Manhattan.

Although permanency is implicit in the commission of any site-specific work, I explicitly raised the issue several times with different representatives of the GSA. Before accepting the commission, I felt it crucial for the issue of permanency to be fully understood. I accepted the commission only after I had been assured repeatedly that my work would be, as stated in the GSA manual, incorporated as an "integral part of the total architectural design."<sup>9</sup> I was told that the GSA did not want to have it any other way. In 1981, as soon as the final location of the sculpture was agreed upon, *Tilted Arc* was installed and anchored into the existing steel and concrete substructure of the Plaza.<sup>10</sup>

In 1985, William Diamond, a new regional administrator of the GSA and a Reagan appointee, appeared on the scene.<sup>11</sup>

*Yonkers, Artists Tilt Over 'Arc'; GSA Hears Whether a Sculpture Should Stay*, WASH. POST, Mar. 7, 1985, at D1 (detailing the hearing, including quotes from Serra's testimony); Alan G. Artner, *Debate Rages: Can Public Art be Recalled*, CHI. TRIBUNE, Mar. 8, 1985, at C1.

<sup>5</sup> The Berne Convention was adopted by the United States Congress in 1988. It was effected by an international committee of nations to protect the rights of authors in their literary and artistic works. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>6</sup> See Berne Convention Implementation Act of 1988, H.R. REP. NO. 609, 100th Cong., 2d Sess., at 40 (1988) [hereinafter Berne Convention Implementation Act]. The Berne Convention for the Protection of Literary and Artistic Works was concluded in 1986. The Convention seeks to protect the rights of authors in their artistic and literary works, including writings, musical arrangements, and scientific designs. The Convention has since been modernized through multiple revisions.

<sup>7</sup> See *Serra III*, 847 F.2d at 1047.

<sup>8</sup> William Diamond, the regional administrator of the GSA, had circulated a petition demanding the removal of *Tilted Arc* in 1984. The petition obtained nearly 4,000 signatures. See Richard Serra, *The Case of Tilted Arc*, available at [http://www.arts.arizona.edu/arc476/files/tilted\\_arc.html](http://www.arts.arizona.edu/arc476/files/tilted_arc.html) (last visited Feb. 19, 2001).

<sup>9</sup> MANUAL FOR THE UNITED STATES GENERAL SERVICES ADMINISTRATION (on file with GSA).

<sup>10</sup> *Tilted Arc* was completed and installed at Federal Plaza in 1981. See *Serra III*, 847 F.2d at 1047.

<sup>11</sup> See *id.*

Through flyers, posters and personal letters of invitation, Diamond announced that a GSA hearing would be held at the Court of International Trade on March 6, 1985.<sup>12</sup> The letters that Diamond sent out stated that the purpose of the hearings was to decide whether or not the artwork known as *Tilted Arc*, located on the East Plaza of the Jacob K. Javits Federal Building in Manhattan, should be relocated to "increase public use of the Plaza."<sup>13</sup>

The announcement elicited a tremendous response, much of which was in favor of *Tilted Arc*, particularly from the art community.<sup>14</sup> Eventually, the hearing had to be extended to three days to accommodate the more than 180 people who petitioned to speak.<sup>15</sup> At the hearing, 122 people spoke in favor of retaining the sculpture, and fifty-eight in favor of relocation.<sup>16</sup> Those facts have subsequently been distorted over and over again not only by the GSA administration, but by pundits from the press as well.<sup>17</sup> This continues to cause me aggravation. However, there is nothing I can do about it.

My sculpture had been approved, commissioned and installed under a Democratic administration. A Republican administration decided that it should be destroyed.<sup>18</sup> The governmental decree to remove, and thereby destroy *Tilted Arc*, was the direct outcome of a cynical Republican cultural policy that supports art only as commodity. Relocation would in fact transform *Tilted Arc* into an exchange commodity in that it would annihilate the site-specific aspect of the work. My sculpture would become exactly what it was not intended to be: a mobile, marketable product.

Doubtless, to some people, *Tilted Arc* was an eyesore. However, the same may be said about any other work of art. There will always be viewers who will react negatively to any given work. Peo-

<sup>12</sup> See *Serra II*, 667 F. Supp. 1042, 1053 (S.D.N.Y. 1987).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., Michael Brenson, *The Case in Favor of a Controversial Sculpture*, N.Y. TIMES, May 19, 1985, §2 at 1 (stating that "[*Tilted Arc*] gives an incoherent, intractable space a focus and sense of possibility it did not have before.").

<sup>15</sup> See *Serra III*, 847 F.2d at 1047 (giving a brief discussion of the hearing and the result).

<sup>16</sup> See *id.*; see also Richard Serra, *Tilted Arc*, available at <http://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/tiltedarc.html> (last visited Feb. 18, 2001).

<sup>17</sup> See, e.g., Grace Glueck, *Downtown Protest*, *supra* note 1, at C24 (citing a petition circulated by employees of the Department of Housing and Urban Development calling "[*Tilted Arc*] the wrong work of art in the wrong place," and another petition circulated by the Environmental Protection Agency referring to the art as a "graffiti catcher"); see also Susan Heller Anderson and David W. Dunlap, *'Arc' Under Scrutiny*, N.Y. TIMES, Dec. 29, 1984, §1 at 25 (stating that "if letters and petitions are any guide. . . *Tilted Arc* does not have too many fans in the neighborhood.").

<sup>18</sup> The GSA commissioned Serra in 1979, while the Democratic Carter Administration was in power. Whereas, the decision to remove *Tilted Arc* was made while the Republican Reagan Administration was in power.

ple are entitled to their opinions, but prejudice, even if shared by a majority, ought not be a reason to decide the fate of a work of art. In this case, however, a majority of those who spoke at the public hearing favored retaining *Tilted Arc* at its original site.<sup>19</sup>

Lacking majority support for its relocation scheme, the GSA looked for help from the National Endowment for the Arts ("NEA").<sup>20</sup> The GSA completely ignored the outcome of the hearing and asked the NEA to establish a "relocation review panel" to evaluate the suitability of alternative sites for *Tilted Arc*.<sup>21</sup> The NEA assembled a distinguished seven-member panel of artists, architects and legislators to consider the matter.<sup>22</sup> The panel met in New York City on December 15, 1987, and visited the Federal Plaza to see *Tilted Arc in situ*. At that time, I presented the panel with my arguments about the importance of the work's site-specificity, which I asserted, precluded the possibility of relocation.<sup>23</sup> I reiterated my position that to remove the work would be to destroy it.

In its recommendation to the GSA, the NEA panel concurred with my definition of site-specificity and stated:

[W]e have been presented with a statement by the artist about the site-specific nature of his *Tilted Arc* sculpture. Our visit to the Federal Plaza to review the actual relationship of the work to its site led us to conclude that there was merit in the artist's statement that relocation of the work would destroy it.<sup>24</sup>

The panel further recommended that the GSA discontinue its

<sup>19</sup> See Richard Serra, *Tilted Arc* (1981), at <http://www.geocities.com/sotto/square/1371/serra.html> (last visited Feb. 1, 2001) (discussing Serra's career, with particular emphasis on the *Tilted Arc* controversy).

<sup>20</sup> The National Endowment for the Arts ("NEA") was created by Congress, and established in 1965 as an independent agency of the federal government.

The NEA's mission is to serve the public good by nurturing human creativity, supporting community spirit, and fostering appreciation of the excellence and diversity of our nation's artistic accomplishments. [It carries] out that mission through grantmaking; leadership initiatives; partnerships with state arts agencies, regional arts organizations, other federal agencies and the private sector; research; and public information.

Learn About the NEA: Guide to the NEA: Overview, available at <http://arts.endow.gov/learn/NEAGuide/Overview.html> (last visited on Apr. 3, 2001).

<sup>21</sup> See *Serra I*, 664 F.Supp. 798, 801 (S.D.N.Y. 1987) (restating the underlying facts); see also *Serra II*, 667 F. Supp. 1042, 1047 (S.D.N.Y. 1987) (stating that the NEA was selected to "search for a suitable location for the sculpture with the aid of the artist. . .").

<sup>22</sup> See *Serra II*, 667 F. Supp. at 1054 (describing criteria established for composition of relocation panel).

<sup>23</sup> See *Serra III*, 847 F.2d 1045, 1048 (2d Cir. 1988) (stating that Serra and his attorney met with Dwight Ink, Acting Administrator of the GSA, to "personally articulate his concern about site-specificity"); see also *Serra II*, 667 F. Supp. at 1045 (stating Serra's general "site-specific" argument that the location of the sculpture was a fundamental part of its nature and that removal would render it devoid of all meaning).

<sup>24</sup> THE DESTRUCTION OF *Tilted Arc*: Documents 189 (Clara Weyergraf-Serra and Martha Buskirk, eds., 1991).

search for alternative sites for *Tilted Arc*.<sup>25</sup> However, the GSA ignored the NEA panel's recommendation, just as it had ignored the outcome of the earlier public hearing.<sup>26</sup> With this repugnant and cynical decision, the government showed a total disregard for any processes and institutions that do not affirm its policies. It became clear to me that the GSA was not willing to respect my assertion of the importance of site-specificity, even though it was endorsed by the NEA panel's report. Thus, I took my case to court.<sup>27</sup>

My case, brought against the United States Government in December 1986, addressed both the terms of my contract with the GSA and what I took to be an abridgement of my constitutional rights.<sup>28</sup> This suit attempted to prevent the government from removing or relocating *Tilted Arc* and sought to recover damages for breach of contract, trademark violations, copyright infringement and violation of my First and Fifth Amendment rights.<sup>29</sup>

In a decision handed down on August 31, 1987, Judge Milton Pollack of the United States District Court, dismissed all claims, disallowing the copyright issues and the contract claim as being outside the Court's jurisdiction, and striking down the constitutional questions for lack of merit.<sup>30</sup> An appeal was filed in the United States Court of Appeals on December 15, 1987, calling for a reversal of the decision regarding the constitutional issues.<sup>31</sup> My attorneys contended that insufficient weight had been given to the fact that *Tilted Arc* was created for one site and one site only, and that to remove the work would destroy it.<sup>32</sup> In addition, they argued that the proposed relocation of *Tilted Arc* would violate my right to free expression.<sup>33</sup> They argued that once a medium of expression, be it writing, film, theater, painting or sculpture, is publicly installed or displayed, First Amendment rights attach, which prohibit the government from removing the expression on the basis of its content.<sup>34</sup>

Cited as a precedent was the case of *Board of Education v. Pico*.<sup>35</sup> In this case, the Board of Education had ordered the removal of nine books from school library shelves that were deemed "anti-

<sup>25</sup> See *id.* at 189-90.

<sup>26</sup> See *id.* at 257-73.

<sup>27</sup> See *Serra I*, 664 F. Supp. at 798.

<sup>28</sup> See *id.* at 801.

<sup>29</sup> See *id.*

<sup>30</sup> See *Serra II*, 667 F. Supp. 1042, 1042 (S.D.N.Y. 1987).

<sup>31</sup> See *Serra III*, 847 F.2d 1045, 1045 (2d Cir. 1988).

<sup>32</sup> See THE DESTRUCTION OF *Tilted Arc*: Documents, *supra* note 24, at 228-30.

<sup>33</sup> See *id.* at 233-34.

<sup>34</sup> See *id.* at 233-36.

<sup>35</sup> 457 U.S. 853 (1982).

American, anti-Christian, anti-Semitic, or just plain filthy."<sup>36</sup> Holding that the books could not be removed simply because the Board disliked their contents, the Supreme Court found for the plaintiff on appeal.<sup>37</sup> Applying this principle to the *Tilted Arc* situation, my attorneys noted that dislike was the only reason cited for removal of the sculpture. Following this logic they concluded:

[I]f the issue here were only removal of *Tilted Arc* the authorities we have cited would preclude this result. . . . [B]ut this result is put beyond question we submit, when we recall that to remove *Tilted Arc* is to destroy it. It is no overstatement to say that we [are dealing] with conduct akin to book burning.<sup>38</sup>

United States District Attorney, Rudolph Giuliani, responded with a brief for the defendants—the GSA.<sup>39</sup> The government argued against the applicability of both the First Amendment free speech clause, and the Fifth Amendment due process clause to this case.<sup>40</sup> And in a remarkable and unabashedly authoritarian rebuttal, the government summarized its opinion as follows:

As a threshold matter, Serra sold his 'speech' to the government. . . . As such, his 'speech' became government property in 1981, when he received full payment for his work. An owner's '[p]roperty rights in a physical thing have been described as the rights "to possess, use and dispose of it".'<sup>41</sup>

This rather incredible statement by the government affirms its commitment to private property rights over the interests of art and free expression. It means that if the government owns a book, it can burn it. If the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right of property supercedes all other rights, including the rights of freedom of speech, freedom of expression, and the protection of one's creative works.

The Court of Appeals upheld the government's position.<sup>42</sup> Judge Jon O. Newman dismissed my appeal on May 27, 1988.<sup>43</sup> He upheld the decision of the lower courts on both the questions of free expression and due process. Judge Newman held that:

<sup>36</sup> *Id.* at 857.

<sup>37</sup> *See id.* at 872.

<sup>38</sup> Reply Brief for Defendants (on file with the GSA).

<sup>39</sup> *See THE DESTRUCTION OF Tilted Arc: Documents*, *supra* note 24 at 239-45.

<sup>40</sup> *See Serra II*, 667 F. Supp. at 1056; *see also Serra III*, 847 F.2d at 1049.

<sup>41</sup> *THE DESTRUCTION OF Tilted Arc: Documents*, *supra* note 24, at 240.

<sup>42</sup> *See Serra III*, 847 F.2d at 1045.

<sup>43</sup> *See id.*

[T]he First Amendment has only limited application in a case like the present one where the artistic expression belongs to the government rather than a private individual. In this case, the speaker is the United States Government. *Tilted Arc* is entirely owned by the government and is displayed on government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA. . . .<sup>44</sup>

If I had known that the government would claim *Tilted Arc* as its own speech and destroy it, I would never have accepted the commission in the first place. *Tilted Arc* was never intended to, nor did it speak for, the United States Government.

A key issue in this case, as in all First Amendment cases, was the right of the defendant to curtail free speech on the basis of dislike of the content. The Court stated that aesthetic dislike is sufficient reason to destroy a work of art.

To the extent that the GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible. . . . [The] GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations.<sup>45</sup>

Yet on this very issue, Supreme Court Justice Oliver Wendell Holmes cautioned over eighty years ago, that:

It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works. . . would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their authors spoke.<sup>46</sup>

Justice Holmes's warning should extend to all government officials, whether they are judges or administrators of governmental agencies.

Regarding the Fifth Amendment issue of the denial of my right to due process in the *Tilted Arc* hearing, the Court dismissed my claim.<sup>47</sup> The Court ruled that:

Accepting Serra's factual allegations as true for the pur-

<sup>44</sup> *Id.* at 1048-49.

<sup>45</sup> *Id.* at 1051.

<sup>46</sup> *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 251 (1903) (holding that judges should not use their own opinion of aesthetic value to determine copyrightability).

<sup>47</sup> *See Serra III*, 847 F.2d at 1052.

poses of this appeal, we conclude that his due process claim fails as a matter of law. . . . Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due.<sup>48</sup>

This legal ruling continues the cynicism and farce of this kangaroo court.

In the end, I was left with a decision by the United States Court of Appeals that protected a federal agency, the GSA, and exonerated a federal official, Diamond, even if he was, "not entirely impartial."<sup>49</sup> The Court's decision merely rubberstamped the official's duplicity and conduct. In the same sentence the Court dismissed my due process claim, saying that I had received, "more process than what was due."<sup>50</sup> This cynical decision by the appeals court needs to be challenged—not only by my own denunciation—but by others. I had no further protection under the law.

In a sense, Judge Newman was correct when he said that my lawsuit was, "[a]n invitation for the courts to announce a new rule. . . . that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency."<sup>51</sup> The new rule that I am asking for is for moral rights legislation. Such coverage now exists in virtually every other civilized country in the world.<sup>52</sup> In the United States, this new rule would acknowledge a relationship between an artist and his or her work even after the work has been sold, and no matter to whom.

In the United States, property rights are afforded protection, but moral rights are not.<sup>53</sup> Until 1988, the United States adamantly refused to join the Berne Copyright Convention of 1986.<sup>54</sup> It was the first multilateral copyright treaty, now ratified by seventy-eight countries.<sup>55</sup> The United States's refusal was based on the fact that

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1051.

<sup>52</sup> See Berne Convention, *supra* note 5; see also Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH 71, 93 (1988) (noting that while many European States have adopted moral rights into their copyright laws pursuant to Article 6bis of the Berne Convention, the United States has not).

<sup>53</sup> For example, Title 17 of the United States Code does not provide for the protection of Moral Rights. See generally 17 U.S.C. (2000).

<sup>54</sup> The United States ratified the Berne Convention with the exception of Article 6bis in the Berne Implementation Act. See Berne Convention Implementation Act, *supra* note 6.

<sup>55</sup> See, e.g., *Surge in Treaty Adherence Shows Growing Importance of Intellectual Property*, Jan. 31, 2000, at <http://www.wipo.int/pressroom/en/updates/2000/upd82.htm> (last visited

the Berne Convention grants moral rights to authors.<sup>56</sup> Such a policy was, and still is, incompatible with United States copyright law, which recognizes only economic rights. Massachusetts,<sup>57</sup> California,<sup>58</sup> and New York<sup>59</sup> have enacted moral rights statutes on the state level, but federal copyright laws, which are wholly economic in their motivation, tend to prevail.

Indeed, the recent pressure on the United States to agree, at least in part, to the terms of the Berne Convention came only as a result of a dramatic increase in the international piracy of American records and films. In September 1986, Senator Edward Kennedy introduced a bill called the Visual Artists Rights Amendment.<sup>60</sup> This bill attempted to amend federal copyright laws to incorporate some aspects of the international moral rights protection. Kennedy's bill would prohibit the intentional distort-

Feb. 2, 2001) (noting that "the number of contracting parties to the Berne Convention went from 50 in 1970 to 84 in 1990 and to 142 on Dec. 31, 1999").

<sup>56</sup> See Request for Comments on the Waiver of Moral Rights in Visual Artworks, 60 Fed. Reg. 27329 (May 23, 1994) (noting that in this request for speakers, the copyright office sought to solicit comments on the United States's decision not to adopt Article 6bis of the Berne Convention that requires countries to provide protection of the moral rights of artists). "Federal and State, statutory and common, [laws] were sufficient to meet the requirements of the Berne Convention. . . [and that] Congress. . . therefore did not include any substantive moral rights provisions in the Berne Convention Implementation Act." H.R. REP. NO. 514, 101st Cong., 2d Sess., at 7-8 (1990), *reprinted in* 1990 U.S.C.A.N. 6915, 6918.

<sup>57</sup> See generally MASS. GEN. LAWS ANN. Ch. 231 §85S (West 2000) (declaring visual artists interest in protecting their work against "intentional physical defacement, mutilation, alteration or destruction." However, the rights under this section are deemed waived in situations where works are removed from a building. Rights of artists in such a case must be expressly reserved in writing).

<sup>58</sup> See generally CAL. CIV. CODE §987 (West 1999). California's statute declares that: [t]he physical alteration or destruction of fine art which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine arts against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

*Id.*

<sup>59</sup> See generally N.Y. ARTS & CULT. AFF. LAW §14.03 (McKinney 2000). New York's statute forbids any person other than:

[t]he artist or a person acting with the artist's consent. . . [to] knowingly display in a place accessible to the public. . . an altered, defaced, mutilated or modified form if the work is displayed. . . as being the work of the artist, or under circumstances which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.

*Id.*

<sup>60</sup> See *The Visual Artists Rights Amendment of 1986: Hearing on S. 2796 Before the Senate Subcomm. on Patents, Copyright & Trademarks of the Comm. on the Judiciary*, 99th Cong. 12-13 (1986) (amending the copyright law to secure rights of artists of sculptured works in preventing the mutilation of such works) [hereinafter VARA Amendment]; see also Visual Artists Rights Amendment of 1990, 17 U.S.C. 106A (2000) [hereinafter VARA]. Section 106A(a)(3)(A) specifically provides that authors have the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation." *Id.*

tion, mutilation or destruction of works of art after they had been sold.<sup>61</sup> The Amendment would also empower artists to claim authorship, to receive royalties on subsequent sales, and to disclaim their authorship if the work is distorted. This legislation would allow an artist (or his heirs) to sue in order to reverse or to redress the alterations of any artwork.<sup>62</sup>

Such moral rights legislation would have prevented Clement Greenberg and the executors of the Estate of David Smith from authorizing the stripping of paint from several of Smith's later sculptures so that they would resemble his earlier—and more marketable—unpainted sculptures.<sup>63</sup> Such moral rights legislation would have prevented a Japanese bank in New York from removing and destroying a marvelous Isamu Noguchi simply because the bank president did not like it.<sup>64</sup> And such moral rights legislation would have prevented the United States Government from destroying *Tilted Arc*.

If Senator Kennedy's moral rights bill was enacted, it would be legal acknowledgement that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by United States copyright law is insufficient.<sup>65</sup> The bill recognizes that moral rights are independent from the work as property and that they supersede—or at least coincide with—any pecuniary interest in the work.<sup>66</sup> Moreover, the bill acknowledges that granting moral rights protection serves society's interest in maintaining the integrity of its artworks and in promoting accurate information about authorship and art. And most importantly, under the proposed bill, the destruction or mutilation of a work of art would be a federal crime.<sup>67</sup>

On March 1, 1989, the Berne Convention Implementation Act was signed into law by President Reagan.<sup>68</sup> When I learned on

<sup>61</sup> See generally VARA Amendment, *supra* note 60.

<sup>62</sup> See *id.*

<sup>63</sup> "In 1965, as an executor of [sculptor] David Smith's estate, [Clement Greenberg] took it upon himself both to remove layers of primer from Smith's huge steel sculptures and to allow the fierce winters of Smith's upstate New York home to strip paint from finished pieces. Greenberg has always thought Smith's work looked better unpainted." Christine Temin, *The Life of America's Art Dictator*, BOSTON GLOBE, Apr. 3, 1998, at D14.

<sup>64</sup> A 1,600 pound metal sculpture entitled *Shinto*, created by Isamu Noguchi; was removed by the Bank of Tokyo Trust Company from its offices in New York in 1990. The artist was never notified of its removal and mutilation before being placed in storage. See William Grimes, *Is It Art or Merely a Safety Hazard?*, N.Y. TIMES, May 11, 1994, at C13.

<sup>65</sup> See Visual Rights Amendment of 1986, S. 2796, 99th Cong. 2nd Sess. (1986) (Edward Kennedy) (stating that this bill "incorporates the moral rights of artists to complement the basic economic rights already provided by the copyright statutes").

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> Berne Convention Implementation Act, *supra* note 6.

March 13, 1989, that the government had started to dismantle *Tilted Arc*, I went before the United States District Court seeking a stay of the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case.

I expected, as would be the case in any other country that became signatories of the treaty, to be protected by the moral rights clause. This clause gives an artist the right, even after a work has been sold, to object to "any distortion, mutilation or other modification. . . prejudicial to his honor or reputation."<sup>69</sup> I learned, however, that for my case (and other cases like it), the treaty ratified by Congress is a virtually meaningless piece of paper because it excludes the key moral rights clause.<sup>70</sup> Those responsible for the censorship of the treaty are the powerful lobbies of magazines, newspapers, art book publishers, and probable political hacks.

Fearful of losing economic control over authors, and faced with the probability of numerous copyright suits, these lobbies pressured Congress into stating that the moral rights clause must not be enforced in the United States. The result of this omission is that publishers can continue to crop photographs; magazine and book publishers can continue to mutilate manuscripts; and black and white films will continue to be colorized. It also means that the federal government can continue to destroy art.

Subsequent to arguing my case, the Visual Artists Rights Act ("VARA"), a version of the Kennedy bill was passed in 1990.<sup>71</sup> The GSA, once again in its repugnant notion of the law, immediately amended their contracts with artists so that the protection guaranteed by federal moral rights legislation would not apply.

<sup>69</sup> Berne Convention, *supra* note 5, at Article 6bis.

<sup>70</sup> See Berne Convention Implementation Act, *supra* note 6 (omitting to add any section comparable to Article 6bis of the Berne Convention Treaty).

<sup>71</sup> VARA, *supra* note 60.