

AE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CHAPMAN KELLEY,	§	
Plaintiff,	§	04C 7715
	§	
Vs.	§	Judge Coar
	§	
CHICAGO PARK DISTRICT,	§	Magistrate Mason
Defendant.	§	

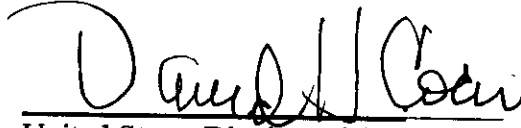
FINAL PRETRIAL ORDER

This matter having come before the court at a pretrial conference held pursuant to Fed. R. Civ. P. 16, and Richard C. Balough, Attorney at Law, 53 W. Jackson Blvd., Ste. 956, Chicago IL 60604, 312.834.0400 having appeared as counsel for plaintiff and Jeanne G. Toft, Deputy General Counsel-Law Department, 541 N. Fairbanks Ct., Chicago IL 60611, 312.742.4604, having appeared as counsel for defendant, the following actions were taken:

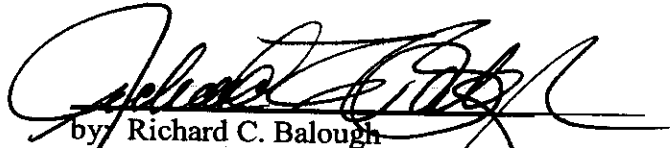
1. Plaintiff alleges (i) a violation of the Visual Artists Rights Act (VARA), 17 U.S.C.A. Sec. 106A under the U.S. Copyright Act, (ii) unlawful taking of plaintiff's property and (iii) breach of contract. The Park District has denied all substantive allegations and has filed affirmative defenses. The jurisdiction of the court is invoked under 17 U.S.C.A. Sec. 106A and the United States Copyright Act. Jurisdiction is not disputed.
2. The following stipulations and statements were submitted and are attached to and made a part of this Order:
 - a. A comprehensive stipulation or statement of all uncontested facts, which will become a part of the evidentiary record in this case, is attached as Schedule A;
 - b. An agreed statement or statements by each party of the contested issues of fact and law and a statement of contested issues of fact or law not agreed to are attached as Schedule B;
 - c. Except for rebuttal exhibits, schedules in the form set out in the attached Schedule C of
 - i. All exhibits.
 - d. a list of names and addresses of the potential witnesses to be called by each party, with a statement of any objections to calling, or to the qualifications of, any witness identified on the list is attached as Schedule D;
 - e. stipulations or statements setting forth the qualifications of each expert witness is attached as Schedule E;
 - f. A list of all depositions or portions thereof, to be read into evidence and statements of any objections thereto is attached as Schedule F;

- g. Proposed Findings of Fact and Conclusions of Law are attached as Schedule G;
 - h. A statement summarizing the history and status of settlement negotiations, indicating whether further negotiations are ongoing and likely to be productive is attached as Schedule H.
 - i. A statement that each party has completed discovery, including the depositions of expert witnesses is attached as Schedule I;
3. Trial of this case is expected to take two to three days. It will be listed on the trial calendar, to be tried when reached.
 4. This is a non-jury trial.
 5. The parties agree that the issues of liability and damages should be bifurcated for trial.
 6. The parties do not consent to this case being reassigned to a magistrate judge for trial.
 7. This Order will control the course of the trial and may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.
 8. Possibility of settlement of this case was considered to be remote by the parties.

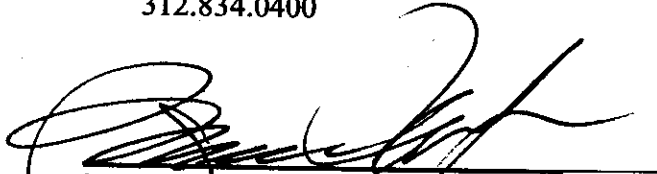
ND!


 United States District Judge

DATE: 9-14-2007


 by: Richard C. Balough
 Attorney for plaintiff, Chapman Kelley
 53 W. Jackson Blvd., Ste. 956
 Chicago, IL 60604
 312.834.0400

DATE: 9 June 2006


 by: Jeanne G. Toft
 Attorney for defendant, Chicago Park District
 541 N. Fairbanks Court, Ste. 3
 Chicago, IL 60611
 312.742.4604

DATE: June 9, 2006

SCHEDULE A

AGREED STIPULATIONS

1. Plaintiff Chapman Kelley is a citizen of the State of Illinois and a resident of the City of Chicago.
2. The Chicago Park District is a duly created public agency organized and existing under the laws of the State of Illinois for the purpose of controlling and supervising the operations of all parks, boulevards and public ways under its jurisdiction. Its place of business is in Cook County, Illinois.
3. Grant Park in Chicago, Illinois, is public land, codified at 70 ILCS 1580, 70 ILCS 1585 and 70 ILCS 1590, and is under the supervision of the Chicago Park District.
4. Chapman Kelley by trade and by training is an artist.
5. Chapman Kelley has painted on various media.
6. Chapman Kelley's paintings are represented in private and public collections.
7. Chapman Kelley has incorporated landscapes and flowers that are surrounded by bold outlines in his paintings.
8. Chapman Kelley closed his art gallery in Dallas, Texas in 1984 and moved to Chicago, Illinois.
9. Bonnie and John Swearingen (former chairman of Amoco) invited Chapman Kelley to come to Chicago in 1983 to do a wildflower garden.
10. In December 1983, Chapman Kelley met with Chicago Park District General Superintendent Edmund L. Kelly to present plans for the creation of a wildflower garden that became known as the Wildflower Works I (Wildflower Works) in Grant Park to be located on the roof of the East Monroe Underground Parking Garage in an area designated as the Daley Bicentennial Plaza.
11. Chapman Kelley submitted his plans for the Wildflower Works to the Chicago Park District in December 1983.
12. In March 1984, the Chicago Park District granted a permit to Chapman Kelley for the Wildflower Works in Grant Park.
13. The Wildflower Works was not commissioned by the Chicago Park District.
14. On June 19, 1984, Edmund L. Kelly sent a letter to Chapman Kelley confirming the authorization by the Chicago Park District for the Wildflower Works.
15. In June 1984, Chapman Kelley began installing the Wildflower Works in Grant Park.
16. The Wildflower Works consists of two elliptical shapes formed by gravel and metal edging surrounding two beds of wildflowers, laid out in accordance to the design of Chapman Kelley.
17. The approximate size of the Wildflower Works was about 1.5 acres.
18. Wildflower Works, Inc. is a not-for-profit corporation that has a board of directors and officers.
19. Jonathan Dedmon is president of Wildflower Works, Inc.

20. Chapman Kelley initially provided wildflower plugs for the Wildflower Works.
21. Chapman Kelley has no invoice or other documentation and cannot substantiate the cost of the wildflowers he originally planted in Grant Park.
22. The air vents from the Monroe Street Underground Parking Garages are in the Wildflower Works.
23. There is no sculpture in the Wildflower Works.
24. The Wildflower Works was an on-going project — plants would be added and taken out.
25. Part of Chapman Kelley's plan for the Wildflower Works included an environmental component that would provide a native plant community that would not waste water and that did not require fertilizers and insecticides.
26. Chapman Kelley said that the "environmental thing" and that the public accept an "entirely different looking landscape were both important."
27. In 1998, the Wildflower Works won the mayor's first award for "Naturalized Landscape".
28. On June 29, 1985, the Illinois Senate adopted Senate Resolution No. 420.
29. In 1988, in a letter dated June 3, 1988 from Jesse D. Madison the Chicago Park District notified Chapman Kelley that his permit was to be terminated within ninety days.
30. In 1988, Chapman Kelley filed a lawsuit against the Chicago Park District in the Northern District of Illinois, No. 88 C 6619. The suit alleged, *inter alia* that Chapman Kelley's First Amendment rights were being infringed upon.
31. As part of the settlement of the 1988 lawsuit, the Chicago Park District renewed the temporary permit for the Wildflower Works in Grant Park for two years.
32. After the 1988 lawsuit was settled, the Park District issued a one-year permit jointly to Chapman Kelley and Wildflower Works, Inc. for the Wildflower Works that was conditioned upon the Grant Park Management and Restoration Plan Steering Committee's evaluation whether the existence, size and location of the wildflower display was appropriate based on the needs and demands of the space in Grant Park for other recreational uses.
33. On March 29, 1990, the Chicago Park District renewed the temporary permit jointly to Chapman Kelley and Wildflower Works, Inc. for the Wildflower Works through March 31, 1991.
34. On April 13, 1992, the Chicago Park District renewed the temporary permit jointly to Chapman Kelley and Wildflower Works, Inc. for the Wildflower Works through September 30, 1994.
35. Since September 30, 1994, the Chicago Park District has not renewed the temporary permit for the Wildflower Works to either Chapman Kelley or Wildflower Works, Inc.
36. Since September 30, 1994, Chapman Kelley has not applied for a permit from the Chicago Park District for the Wildflower Works.
37. The last temporary permit issued by the Park District expired September 30, 1994.
38. No permits were subsequently issued by the Park District.

39. All of the permits issued by the Chicago Park District for the Wildflower Works since 1988 were jointly issued to Chapman Kelley and Wildflower Works, Inc. and were designated as "Temporary."
40. Wildflower Works, Inc. is not a party to this lawsuit.
41. From October 1, 1994 through June 9, 2004, Chapman Kelley and his volunteers continued to install plants for the Wildflower Works in Grant Park.
42. In May 2001, Chapman Kelley and the Wildflower Works, Inc. requested that the Chicago Park District make repairs to the metal edging around the Wildflower Works and to disconnect the water supply.
43. In November 2001, the Chicago Park District issued a contract to re-install the edging around the Wildflower Works in the amount of \$13,671.02.
44. Chapman Kelley has obtained a service mark from the U.S. Patent and Trademark Office for the term "Wildflower Works" in international class 42 for "designing artistic renditions of wildflower gardens for public places, in class 42, registered December 10, 2002."
45. On June 10, 2004, Chapman Kelley met with persons from the Chicago Park District who presented plans to reduce the size and to change the shape of the Wildflower Works.
46. During the summer 2004, the Chicago Park District reconfigured the Wildflower Works' shape and design.
47. Chapman Kelley did not approve of either the reconfigured new shape or design.
48. The Chicago Park District did not ask Chapman Kelley to remove any of his wildflower plants from the Wildflower Works.
49. Chapman Kelley did not request that he be given an opportunity to remove any of his wildflower plants from the Wildflower Works.
50. Millennium Park, located in Grant Park, was completed and dedicated in the summer of 2004.
51. A band shell, designed by Frank Gehry is in Millennium Park.
52. Frank Gehry designed a steel bridge that connects the band shell with Daley Bicentennial Plaza.
53. The Frank Gehry bridge, a/k/a the "BP Amoco Bridge spans Columbus Drive and was completed in 2004.
54. V.A.R.A. was enacted December, 1990 and became effective June 1, 1991.
55. There is no express language in the statute stating that it is to be applied retroactively.
56. Chapman Kelley planted the Wildflower Garden in 1984.
57. Plants and flowers are living things that change, mutate and die over time.
58. Chapman Kelley said he was told by the Texas Highway Department that it could save \$26 million per year if it planted wildflowers because the flowers would only have to be mowed once a year instead of four.
59. Chapman Kelley never had an appraisal or valuation done of what the plants were worth in the Wildflower Works.
60. No permanent wildflower installation by Chapman Kelley exists today.
61. Randall Ismay, on of plaintiff's expert witnesses, is on the Wildflower Works, Inc. Board and serves as its chief scientist and horticultural adviser.

62. Plaintiff first met Randall Ismay in the 1970s when both were speakers for the International Erosion Control Association seminar in Sacramento, CA.
63. Plaintiff photographed and made paintings of the Wildflower Works.
64. Besides the environmental component to the use of native plants in the Wildflowers Works, plaintiff said there is an educational component.
65. Plaintiff received commendations from landscape architects.

SCHEDULE B

CONTESTED ISSUES OF FACT AND LAW

Contested Issues of Fact:

Facts Offered by Plaintiff disputed by Defendant:

1. On average, Chapman Kelley spent about eight months of the year maintaining the Wildflower Works.
2. The Wildflower Works was properly maintained by Chapman Kelley and his volunteers.
3. The Wildflower Works was not unsightly.
4. The Wildflower Works was not a host to weeds, invasive species and rabbits.
5. Chapman Kelley never directly heard any complaints about the condition of the Wildflower Works from either citizens or the Chicago Park District.
6. Dr. Margaret Burroughs was the honorary chairperson of the Wildflower Works, Inc.
7. In March 2004, at a luncheon meeting, Dr. Burroughs was asked about the permit process for the Wildflower Works. Dr. Burroughs told Chapman Kelley that "you are still here, aren't you?" Chapman Kelley interpreted the statement to mean that no further action for a permit was required.
8. Chapman Kelley's oil paintings are offered for sale today ranging in price from \$1,500 to \$40,000.
9. Chapman Kelley prices his paintings on a square inch basis at \$40 per square inch for his smaller paintings and \$12.50 per square inch for his larger paintings.
10. The Wildflower Works was on 66,000 square feet of land, which is 9,504,000 square inches.
11. In 2004, the Chicago Park District sponsored the "Art in the Garden" project.

Opinions Offered by Plaintiff disputed by Defendant:

1. Jane C. H. Jacob's opinion is that Chapman Kelley is a significant name in American art history and his name, reputation and market status is well-known.
2. Jane C. H. Jacob's opinion is that the Wildflower Works is a work of art and a work of recognized stature.
3. Jane C. H. Jacob's opinion is that the Wildflower Works was a work of recognized stature.
4. Randall Ismay is an expert in the area of landscape architecture.
5. Randall Ismay has the background, professional experience and education to offer expert testimony on the value of the plants that comprised the Wildflower Works.
6. Randall Ismay's calculation of the value of the materials that Chapman Kelley was not able to remove from the Wildflower Works is \$1.5 million.

7. Chapman Kelley has the requisite background, professional experience and education to offer an opinion as to the artistic value of his work.
8. Chapman Kelley's opinion is that market price for the Wildflower Works would be \$10 million.

Facts Offered by Defendant disputed by Plaintiff:

1. The Park District considered the wildflower garden to be "experimental".
2. The Park District received numerous complaints about the appearance of the Wildflower Garden which destroyed other plantings and landscape materials in Grant Park.
3. Kelley admitted in his deposition that invasive species were an on-going part of the garden.
4. The Wildflower Garden deteriorated over time and became host to weeds, invasive species and rabbits.
5. The Park District issued temporary permits to Wildflower Works, Inc. and Chapman Kelley.
6. The Grant Park Advisory Council expressed concerns over the maintenance of the Garden.
7. The Park District did not issue Kelley a permit in perpetuity.
8. Commissioner Sylvia Herrera called the wildflower garden "an eyesore and visual disaster."
9. A condition of the permit was that Kelley submit timely planting designs for review by the Park District Landscape Committee.
10. Dallas- Ft. Worth Airport wildflower garden was never completed and was subsequently mowed over.
11. Kelley envisioned the Dallas- Ft. Worth Airport wildflower installation along a run-way as income-producing sale of t-shirts, tote bags and seeds.
12. Wildflower Garden would have savings in terms of water, manpower and machinery according to Kelley.
13. V.A.R.A. does not have a provision stating that it is retroactive.
14. Wildflower Works, Inc. printed Dr. Margaret Burroughs' name as 'honorary president' without her permission.
15. As a commissioner of the Board of the Chicago Park District, Dr. Burroughs has no authority to bind the Chicago Park District or to alter its permit policies.
16. Dr. Margaret Burroughs never agreed to serve as honorary chairman of Wildflowers Works, Inc.
17. Plaintiff does not consider Monet's Water Lily Garden in France to be a work of art.
18. Plaintiff can not name any other garden planted by a painter that he considers a work of art.
19. Plaintiff has no tangible documentation to show that he has sustained any impact or damage to his reputation as a painter.
20. Use of the word "art" is ubiquitous in American marketing and advertising.

21. Illinois Senate Resolution No. 420 adopted by the Illinois Senate on June 29, 1985 is merely an honorary proclamation and does not have the force of law.
22. Kelley was given a copy of the Grant Park Framework Plan before any changes were made to the Wildflowers Works.

CONTESTED ISSUES OF LAW

1. Whether a garden is copyrightable under U.S. copyright law.
2. Whether protections under U.S. copyright law apply to gardens and landscapes.
3. Whether the Visual Artists Rights Act (VARA), 17 U.S.C. 101 was intended to apply to gardens and landscape or only to traditional works of art such as paintings, sculptures, drawings, photographs, collages and other works of visual art.
4. Whether V.A.R.A., effective June, 1991, was intended to be applied retroactively or only prospectively.
5. Whether V.A.R.A. applies to the Wildflower Works.
6. Whether VARA requires that the Wildflower Works be "copyrightable."
7. Whether Chapman Kelley is the "author" of the Wildflower Works under the U.S. Copyright Act.
8. Whether the Wildflower Works is a "work of visual art" under the U.S. Copyright Act, 17 U.S.C. 101.
9. Whether the Wildflower Works is a "work of recognized stature" under the U.S. Copyright Act.
10. Whether the destruction of the Wildflower Works has prejudiced the honor or reputation of Chapman Kelley under the U.S. Copyright Act, 17 U.S.C. 106A(a)(3)(A).
11. Whether Kelley waived any right to the plant materials when he failed to re-apply for a new temporary permit from the Park District.
12. Whether the re-configuration of the Wildflower Works was an unlawful taking without due process.
13. Whether the course of dealing between Chapman Kelley and the Chicago Park District established an implied contract to allow Chapman Kelley to maintain the Wildflower Works indefinitely on public land.
14. Whether the non-renewal of permits with the Chicago Park District by Chapman Kelley constitutes a waiver of any rights to plant materials he may have had under the prior permits.
15. Whether the Chicago Park District is immune under the Local Governmental and Governmental Tort Immunity Act, 745 ILCS 10/3-103.
16. Whether Kelley's personal interest in retaining the garden trumps a public entity's own land use rights.

Brief

Brief

SCHEDULE C TO PRETRIAL ORDER

Plaintiff's Exhibits:

1. Plaintiff's Exhibit 1. Curriculum Vitae of Chapman Kelley.
2. Plaintiff's Exhibit 2. Photographs of Chapman Kelley's artwork.
3. Plaintiff's Exhibit 3. Photographs of the Wildflower Works.
4. Plaintiff's Exhibit 4. State of Illinois Eighty-Fourth General Assembly Senate Resolution No. 420.
5. Plaintiff's Exhibit 5. Letter from James C. Gamble, President, Illinois Chapter of the American Society of Landscape Architects to Edmund Kelly dated July 11, 1984.
6. Plaintiff's Exhibit 6. Letter from Edmund Kelly to press. 1984.
7. Plaintiff's Exhibit 7. Chicago Park District News Release dated July 13, 1984.
8. Plaintiff's Exhibit 8. Tri-fold description of Wildflower Works.
9. Plaintiff's Exhibit 9. *New York Times* article entitled "Wildflowers as Art For a Chicago Park" dated June 20, 1985.
10. Plaintiff's Exhibit 10. *Christian Science Monitor* article entitled "Artist finds his wildflowers are growing on Chicago" dated June 20, 1985.
11. Plaintiff's Exhibit 11, letter from Mayor Harold Washington dated November 1985.
12. Plaintiff's Exhibit 12. Letter to Chapman Kelley from Edmond L. Kelly of the Chicago Park District dated June 19, 1984.
13. Plaintiff's Exhibit 13. Letter to Chapman Kelley from Jesse D. Madison of the Chicago Park District dated June 3, 1988.
14. Plaintiff's Exhibit 14. Permit for Wildflower Works I-Grant Park dated September 14, 1988.
15. Plaintiff's Exhibit 15. Memorandum from Ronald H. Dodd, Deputy Gen. Supt. of Parks & Recreation dated September 28, 1989 re: Chicago Wildflower Works-Renewal of Permit.
16. Plaintiff's Exhibit 16. Letter from Ted Wolff to Ira Burke dated September 28, 1989.
17. Plaintiff's Exhibit 17. Letter on Extension of Temporary Wildflower Works Display in Grant Park dated March 29, 1990 from James D. Madison.
18. Plaintiff's Exhibit 18. Draft letter on Extension of Permit to Chicago Park District Board from Robert C. Penn, General Superintendent dated February 20, 1992.
19. Plaintiff's Exhibit 19. Letter regarding Extension of Temporary Wildflower Works Display in Grant Park dated April 13, 1992 to Chicago Park District Board from Robert C. Penn, General Superintendent dated February 20, 1992...
20. Plaintiff's Exhibit 20. Journal of the Proceedings of the Chicago Park District Board dated May 9, 1988.
21. Plaintiff's Exhibit 21. Journal of the Proceedings of the Chicago Park District Board dated September 26, 1989.

22. Plaintiff's Exhibit 22. Journal of the Proceedings of the Chicago Park District dated April 24, 1990.
23. Plaintiff's Exhibit 23. Journal of the Proceedings of the Chicago Park District dated May 26, 1992.
24. Plaintiff's Exhibit 24. Chicago Park District Interoffice Memo from Mary VanHaafen to Colleen Rock Mueller dated July 20, 2001.
25. Plaintiff's Exhibit 25. Chicago Park District Request for Proposal and Final Scope of Work regarding metal edging around Wildflower Works.
26. Plaintiff's Exhibit 26. Facsimile from Chicago Park District to Jonathan Dedmon dated June 10, 2004.
27. Plaintiff's Exhibit 27. Chicago Park District Press Release dated March 19, 2004 entitled "Artists Create Art in the Garden in Park District."
28. Plaintiff's Exhibit 28. Chicago Park District's brochure on "Art in the Garden."
29. Plaintiff's Exhibit 29. Registration Certificate for "Wildflower Works" service mark from Patent and Trademark Office.

Defendant's Exhibits:

1. Defendant's Exhibit 1. Grant Park Framework Plan.
2. Defendant's Exhibit 2. Grant Park Garden Overlay.
3. Defendant's Exhibit 3. Wildflower Photo Book.
4. Defendant's Exhibit 4. Grant Park Framework Map.
5. Defendant's Exhibit 5. Affidavit of Dr. Margaret Burroughs.
6. Defendant's Exhibit 6. Permit for Wildflower Works 1 - Grant Park dated 09.14.88.
7. Defendant's Exhibit 7. Extension of Temporary Permit: Wildflower Works Display - Grant Park dated 03.29.90.
8. Defendant's Exhibit 8. Extension of Temporary Permit: Wildflower Works Display - Grant Park dated 04.13.92.
9. Defendant's Group Exhibit 9. Journal of Proceedings.
10. Defendant's Exhibit 10. Grant Park Advisory Council Letter dated 07.14.04.
11. Defendant's Group Exhibit 11. Group of Color Xerox Photos.
12. Defendant's Exhibit 12. Daley Bicentennial Plaza (showing Wildflower Garden reconfiguration).
13. Defendant's Exhibit 13. Site Plan (small)
14. Defendant's Exhibit 14. Affidavit of Walter Netsch from 1988 case (*Kelley v. CPD 88 C 6619*).
15. Defendant's Exhibit 15. Legislative History of V.A.R.A. - House of Representatives.
16. Defendant's Exhibit 16. Legislative History of V.A.R.A. - United States Senate.

SCHEDULE D

List of Witnesses:

Plaintiff:

1. Chapman Kelley
301 W. Wisconsin
Chicago IL 60614
2. Jonathan Dedman
70 W. Madison St.
Chicago IL 60602
3. Jane C. H. Jacob
214 N. Taylor Ave.
Oak Park IL 60302
4. J. Randall Ismay
24002 Estacia Avenue
Laguna Niguel CA 92677
5. Maurine Slavin
405 N. Wabash Apt. 3509
Chicago IL 60611
6. Gus Trujillo
400 E. Randolph Apt. 2018
Chicago IL 60601

Defendant:

1. Arnold Randall
541 N. Fairbanks Ct.
Chicago, IL 60611
2. Chris Gent
541 N. Fairbanks Ct.
Chicago, IL 60611
3. Dr. Margaret Burroughs
541 N. Fairbanks Ct.
Chicago, IL 60611
4. Chapman Kelley (as adverse witness)
301 W. Wisconsin

Chicago, IL 60614

5. Jonathan Dedmon (as adverse witness)
70 W. Madison St.
Chicago IL 60602

Rebuttal Witnesses (if needed)

SCHEDULE E

Expert Witnesses:

1. Jane C.H. Jacob's curriculum vita is attached as Exhibit A to this schedule.
2. J. Randall Ismay's curriculum vita is attached as Exhibit B to this schedule.

JANE C.H. JACOB FINE ART
advisory and appraisal
214 No. Taylor Avenue Oak Park, Illinois 60302
telephone 708 445 8791 fax 708 445 8731

**Jane C.H. Jacob, MA, AAA
CURRICULUM VITAE**

Principal	Jane C.H. Jacob Fine Art
Appraisal Specialization	Fine Art, including paintings, sculpture, works on paper, photography, original prints and objets d'art
Certification in Appraisal Studies Certified Member (through examination)	New York University Appraisers Association of America, NY, NY
Professional Museum Experience	Terra Museum of American Art, Chicago, IL Frank Lloyd Wright Preservation Trust, Oak Park, IL Worcester Art Museum, Worcester, MA Dallas Museum of Art, Dallas, TX
Publications	<i>Stolen Art: The Case for Registration</i> <i>Stolen Art—How to Keep it Out of Your Collection</i> http://www.chubbcollectors.com/Vacnews/index.jsp?form=2&ArticleId=85
Education	MA, Arts Administration, Columbia College, Chicago BFA, Fine Arts, University of North Texas
Further Education	New York University 2005 Uniform Standards of Professional Appraisal Practice Damage and Loss The Law and the Business of Art American Works on Paper & Conservation Canons in American Art Encounters with the Land: American Depictions The Art Institute of Chicago Conservators Looking at Paintings Collecting African American Art African American Paintings & Literature Archibald Motley, Jr. Loyola University Law School, Chicago Case Studies in Stolen Art
Boards of Directors	Appraisers Association of America, NY, NY, current Lawyers for the Creative Arts, Chicago, IL, current Oak Park Area Arts Council, past Chicago Public Art Group, past
Committees	Co-chair, AAA National Conference Committee AAA Long Range Planning Committee Illinois Arts Council Grant Review Committee
Adjunct Faculty	Northwestern University, School of Continuing Education, Evanston, IL

JANE C.H. JACOB, AAA

JANE C.H. JACOB FINE ART
advisory and appraisal
214 no. taylor avenue oak park, illinois 60302
telephone 708 445 8791 fax 708 445 8731

PROVIDING KNOWLEDGE TO THE FINE ARTS COMMUNITY

ADVISORY SERVICES FOR COLLECTIONS

Specializing in 19th and 20th century American and European paintings, works on paper, photographs and sculpture, JANE C.H. JACOB FINE ART works from a non-public space to offer a discreet and confidential environment for private collectors, estates and institutions to locate, purchase and advise clients in selling or donating works of art. We provide expert advice in selecting, researching and appraising property, and we can recommend the most appropriate venue and pricing of property to be sold or donated. Depending on the requirements of the seller and the type and value of the property, works may be placed on consignment through us, purchased outright, consigned to traditional auction houses or donated to public institutions. Whether contemplating the purchase of a single painting or an extensive collection, we offer expert advice that will provide informed decision-making.

- **Selling**
We welcome your inquiry concerning works of art that you might wish to sell or donate. We have placed works of art in prominent public and private collections.
- **Buying**
We work with private resources and the art trade to obtain paintings, drawings, and works of art for museums, institutions, and private collectors when they prefer not to go into the marketplace themselves.

ESTATE PLANNING AND SALES

JANE C.H. JACOB FINE ART consults with private collectors, museums, bankers, and lawyers throughout the United States to appraise and catalogue art collections for estate purposes, recommend appropriate venues for sale, donations to museums and charities, and estate distribution.

FINE ART COLLECTOINS MANAGEMENT

JANE C.H. JACOB FINE ART is a seasoned professional practice with comprehensive knowledge of how the art market operates and how individual and corporate art collections are built and documented. Whether you are a new or experienced collector, we can assist you in building and protecting your collection.

- **Curatorial Service**
We provide private clients with museum-quality consultation about art and the market in which it appears. We are able to assess the many factors that affect value, such as attribution, condition, issues of provenance, exhibition history, dating, subject matter, historical significance and market trends, and advise accordingly. We advise on sales and purchases to focus the collection.
- **Collection Management**
We provide detailed documentation of works of art for collectors and institutions in a cost-effective manner. We shape each project to meet the needs of the individual collection - from simple inventories to published catalogues. This may include the use of computerized collection management systems, appraisals, photographic documentation,

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advisory and appraisal

conservation surveys, and research and display concerns, such as framing, mounting, lighting, etc.

- **Research**
We can perform all aspects of research relating to works of art - provenance issues, attribution questions, iconography, sales and exhibition history and authentication. We maintain an extensive reference library; utilize the wealth of research resources available in Chicago and New York City, and consult with appropriate specialists to provide clients with accurate information.
- **Legal Support**
We are available for consultation, litigation support, and expert witness work in matters relating to our field of expertise.

OUR CLIENTS

While we do not divulge the names of our private clients, we have listed some of the types of clients for whom we have worked directly.

- **Private and corporate collectors**
- **Museums**
- **Educational Institutions**
- **Galleries**
- **Auction Houses**
- **Attorneys**
- **Banks and Trusts**
- **Insurance Businesses**
- **Private Foundations**

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JANE C.H. JACOB FINE ART provides articles, public speaking, lectures and symposia on many topics relating to art collectors and their collections. Among the topics presented:

- **Protecting Your Collection from Theft**
- **Collecting African American Art**
- **The American Artists in Paris**
- **How Works of Art Increase in Value**
- **Issues of the Stolen Art Industry**
- **Identifying Paintings without Signatures**
- **Trends in Sculpture**
- **How to Build a Collection**
- **Why Your Collection Should be Documented**
- **Collecting Artists of the Midwest**

We provide slides or PowerPoint presentation formats at your request.

CURRICULUM VITAE

J RANDALL ISMAY

DEGREES

Bachelor of Arts, Environmental Biology, 1972
University of California, Santa Barbara

Bachelor of Science, Ornamental Horticulture, 1976
California Polytechnic State University, San Luis Obispo

Master of Science, Agriculture, 1977
California Polytechnic State University, San Luis Obispo

EXPERIENCE

Over 20 years of environmental horticultural, arboricultural, limnological and irrigation consulting in addition to:

Wholesale nursery management

Building and grounds management

Over 10 years self-employed in gardening and landscape contracting

LICENSES

AND

CERTIFICATES California Pest Control Adviser License # AA 06711

California Qualified Applicator License # QL 33792

Certified Consulting Arborist ISA # WC-0461A

California Landscape Contractor License # 352305

Certified Landscape Irrigation Auditor IA

over→

PROFESSIONAL ORGANIZATIONS

Past Member Board of Directors of California Xeriscape Foundation
Member California State Department of Water Resources, Water Conservation Advisory Committee
Instructor at University of California and California State University
Guest lecturer at Community colleges and professional organizations throughout the United States
Assistance to many professional and technical organizations:
American Society of Landscape Architects, California Landscape Contractors Association, California Association of Nurserymen, American Society of Irrigation Consultants, Southern California Turfgrass Council, California Agricultural Production Consultants Association, American Water Works Association, International Society of Arboriculture, North American Lake Management Association, Community Association Institute, Association of Environmental Professionals, California Parks and Recreation Society, California Native Plant Society, National Xeriscape Council, Inc., National Fire Protection Association

Randall Ismay has over 35 years of education, training, research and experience in horticulture, arboriculture and related fields. He is probably best known for his work with the community development firm of Mission Viejo Company in south Orange County. During his years with that firm, he was responsible for development and implementation of a community-wide landscape and water management program. His responsibilities included horticultural, arboricultural, limnological (fresh water biology) and irrigation consulting to homeowner and lake associations, the developer, recreation associations, equestrian associations, golf courses, and government agencies.

During the course of his career, Randall Ismay has consulted with many homeowner and commercial associations, architects, engineers, property managers, developers, government agencies, contractors, golf courses, and public and private utilities. His past clients have included individuals, companies and agencies around the world.

Mr. Ismay has had a number of technical and informative articles published in horticulture, irrigation, erosion control, fire safety and related fields. These articles have appeared in magazines, trade journals and newspapers. He has authored the book, *FIREWISE, HOW WE LIVE, WHERE WE LIVE*. In addition, he has given expert legal testimony in his various fields. J Randall Ismay is an experienced, practical and highly respected consultant.

SCHEDULE F

Portions of Depositions:

(None)

SCHEDULE G

Plaintiff's Proposed Findings of Fact disputed by Defendant:

1. Chapman Kelley initially purchased over 200,000 wildflower plugs at a cost of \$80,000 for the Wildflower Works.
2. In July 1984, the Illinois Chapter of the American Society of Landscape Architects endorsed the Wildflower Works in a letter written by James C. Gamble, president. The letter states in part that Chapman Kelley "is an artist utilizing the form and color of the living landscape as a medium for expressing his art."
3. The Chicago Park District General Superintendent in July 1984 in an invitation to the press for a preview of the Wildflower Works stated that Chapman Kelley is "an internationally renowned artist, is a pioneer in the use of natural materials for 'living' art and has achieved national prominence for his efforts to incorporate landscape in artistic creation." The invitation also states that the "Chicago Park District will be the first park in the U.S. to display flower arrangements on this scale as a cost-effective and low maintenance form of art."
4. In a tri-fold brochure on the Wildflower Works created by the Chicago Park District, the Chicago Park District stated: "Here in the Chicago Park District, Chapman Kelley has been given the best place in the world to do his artwork. Week by week the painting changes as new flowers come into bloom."
5. The Wildflower Works was the subject of articles in national publications such as the *New York Times* and the *Christian Science Monitor*.
6. On June 29, 1985, the Illinois Senate adopted Senate Resolution No. 420.
7. Senate Resolution No. 420 states that the Wildflower Works is a "new form of living art." The resolution also states that "Chapman Kelley is a pioneer in the use of natural materials, and Grant Park will be the first park district in the United States to display a live wildflower work of art of this scale."
8. In November 1985, Chicago Mayor Harold Washington in a letter of introduction stated that Chapman Kelley "artist and philosopher, has given to the City of Chicago, a magnificent piece of art, Wildflower Works I, the 'living landscape'—two giant ovals spanning more than 66,000 square feet of perennial wildflower plants arranged according to the artist's design in the center of the city."
9. The Chicago Park District appointed an advisory committee to observe the Wildflower Works. In its report to Ira M. Berke, Director of Landscape for the Chicago Park District, the committee said on September 28, 1989, among other things, that the "Wildflower Garden is beautiful when the flowers are blooming," that the Wildflower Works "is an attractive contrast to other types of gardens," that it is "unique in Chicago, and perhaps in the country and the world," and that criticisms leveled at the Wildflower works "are more misunderstandings than they are substantial criticisms." The report said the committee "is unanimous in its finding that the Wildflower Garden is an attractive and appropriate use in its present location, and recommends both to the Park District staff and the Board of Commissioners that its permit be renewed, that it remain in its present location,

and that it receive in the future the fullest cooperation and support of the Park District.”

10. On March 29, 1990, the Chicago Park District extended the permit for the Wildflower Works through March 31, 1991.
11. On April 13, 1992, the Chicago Park District extended the permit for the Wildflower Works through September 30, 1994.
12. Since September 30, 1994, the Chicago Park District has not issued a new permit for the Wildflower Works.
13. Since September 30, 1994, Chapman Kelley has not applied to the Chicago Park District for a permit for the Wildflower Works.
14. From October 1, 1994 through June 9, 2004, Chapman Kelley continued to plant and to maintain the Wildflower Works in Grant Park.
15. On average, Chapman Kelley spent about eight months of the year maintaining the Wildflower Works.
16. In May 2001, Chapman Kelley and the Wildflower Works, Inc. requested that the Chicago Park District make repairs to the metal edging around the Wildflower Works and to disconnect the water supply.
17. In November 2001, the Chicago Park District issued a contract to re-install the edging around the Wildflower Works in the amount of \$13,671.02.
18. From the expiration of the Chicago Park District on September 30, 1994, Chapman Kelley acted in reliance upon the actions of the Chicago Park District by maintaining the Wildflower Works.
19. Dr. Margaret Burroughs was the honorary chairperson of the Wildflower Works, Inc.
20. In March 2004, at a luncheon meeting, Dr. Burroughs was asked about the permit process for the Wildflower Works. Dr. Burroughs told Chapman Kelley that “you are still here, aren’t you?” Chapman Kelley interpreted the statement to mean that no further action for a permit was required.
21. The Court finds that the Chicago Park District’s actions in regards to the Wildflower Works since September 30, 1994, created an implied license for Chapman Kelley to continue to use the land in Grant Park for the Wildflower Works.
22. The implied license between the Chicago Park District and Chapman Kelley provided that Chapman Kelley retained the right to remove the materials for the Wildflower Works at the time the implied license was revoked by the Chicago Park District.
23. On June 10, 2004, Chapman Kelley met with persons from the Chicago Park District who presented plans to reduce the size and to change the shape of the Wildflower Works.
24. During the summer 2004, the Chicago Park District removed without Chapman Kelley’s permission various wildflowers from the Wildflower Works and changed the shape and design of the Wildflower Works.
25. The actions by the Chicago Park District destroyed the Wildflower Works as it had been created by Chapman Kelley.
26. Chapman Kelley testified that currently his paintings are offered for sale in the range of \$1,500 to \$40,000. He testified that the price is based upon a square inch

- calculation with \$40 per square inch for his smaller paintings and \$12.50 per square inch for his larger paintings.
27. The Wildflower Works was on 66,000 square feet of land, which is 9,504,000 square inches.
 28. The Chicago Park District did not give Chapman Kelley any opportunity to remove the Wildflower Works or any wildflowers from the Wildflower Works.
 29. The Court finds that the Chicago Park District violated its implied license with Chapman Kelley by not giving him time to remove his materials from the Wildflower Works.
 30. Chapman Kelley was injured in an amount that represents the fair market value of the materials that he could have removed if the Chicago Park District had allowed Chapman Kelley to remove the materials.
 31. In 2004, the Chicago Park District sponsored the "Art in the Garden" project.
 32. The Chicago Park District admits that plants arranged in a specified order can be a work of art in the "Art in the Garden" project.
 33. Jane C. H. Jacob is an expert art appraiser.
 34. Jane C. H. Jacob has the background, professional experience and education to provide expert testimony in the area of art work.
 35. Jane C. H. Jacob testified that Chapman Kelley is a significant name in American art history and his name, reputation and market status is well-known.
 36. Jane C. H. Jacob testified that in her opinion the Wildflower Works is a work of art and a work of recognized stature.
 37. Jane C. H. Jacob testified that in her opinion the Wildflower Works was a work of recognized stature.
 38. The court finds the testimony of Jane C. H. Jacob credible on the issue of whether the Wildflower Works is a work of art and a work of recognized stature.
 39. The court further finds that over the years through various publications in major media that the Wildflower Works gained a reputation as a work of art.
 40. Randall Ismay is an expert in the area of landscape architecture.
 41. Randall Ismay has the background, professional experience and education to offer expert testimony on the value of the plants that comprised the Wildflower Works.
 42. The Court finds that Randall Ismay's calculation of the value of the materials that Chapman Kelley was not able to remove from the Wildflower Works is a reasonable approximation of their market value. The court finds the market value of the materials as determined by Randall Ismay to be \$1.5 million.
 43. Chapman Kelley is a professional artist. He has the requisite background, professional experience and education to offer an opinion as to the artistic value of his work.
 44. Chapman Kelley's artwork on canvas is a valid starting point for determining the artistic value of the Wildflower Works.
 45. The Court finds that Chapman Kelley's estimation of the "selling price" for the Wildflower Works of \$10 million to be reasonable.
 46. The actions by the Chicago Park District in removing the Wildflower Works from Grant Park were willful.
 47. The removal of the Wildflower Works from Grant Park injured the reputation of Chapman Kelley as an artist.

Plaintiff's Proposed Conclusions of Law Disputed by Defendant:

1. The Visual Artists Rights Act (VARA), 17 U.S.C.A. Sec. 106A grants protection to authors of works of visual art.
2. A work of visual art is a "painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer . . ." 17 U.S.C.A. Sec. 101.
3. The Wildflower Works is a single copy.
4. The Wildflower Works is a work of visual art.
5. The Wildflower Works is a work of recognized stature.
6. The actions by the Chicago Park District destroyed the Wildflower Works.
7. The destruction of the Wildflower Works by the Chicago Park District is a violation of VARA.
8. The reputation of Chapman Kelley as an artist was injured as a result of the action of the Chicago Park District.
9. Chapman Kelley had a vested property right in the Wildflower Works.
10. The Chicago Park District through its actions granted Chapman Kelley an implied license for the Wildflower Works in Grant Park.
11. The Chicago Park District did not give Chapman Kelley notice concerning the revocation of the implied license for the Wildflower Works.
12. Chapman Kelley was prejudiced by the Chicago Park District's action and was prevented from removing his property from Grant Park.
13. The Chicago Park District's action was an unlawful taking of Chapman Kelley's property.

Defendant's Proposed Findings of Fact and Conclusions of Law Disputed by Plaintiff:

1. Protection under U.S. copyright law does not extend to gardens and landscapes.
2. The express statutory language of V.A.R.A. does not apply to gardens.
3. The legislative history of V.A.R.A., as evidenced by the Senate and House debates, do not support plaintiff's contention that the garden is subject to protection under U.S. copyright law.
4. A garden is not copyrightable.
5. Wildflower Works I is not copyrightable.
6. Kelley did not copyright Wildflower Works I.

7. A garden is applied art.
8. Applied art is not a work of visual art.
9. Applied art is excluded from protection under V.A.R.A.
10. Wildflower Works I is not a work of visual art within the meaning of the statute. U.S.C.A. 17 § 106A.
11. Wildflower Works I is not entitled to protection under V.A.R.A. U.S.C.A. 17 § 106A.
12. V.A.R.A. became effective June 1, 1991 and is not to be applied retroactively.

13. Wildflower Works I was planted in 1984.
14. Grant Park is public municipal land held in trust by the Chicago Park District.
15. There is no cause of action for a private citizen to claim an ownership interest in public municipal land.
16. Kelley waived any right to the wildflower plant material when he failed to apply for an extension of the temporary permit.
17. Kelley abandoned any right to retrieve plant materials when he failed to ask permission of the Chicago Park District to do so after the June 2004 meeting to present the reconfiguration plans for Daley Bicentennial.
18. There was no implied contract between Kelley and the Park District for Kelly to have a wildflower garden on public land in perpetuity.
19. Each of the permits issued by the Park District was temporary in duration and was issued jointly to Wildflower Works, Inc. and Chapman Kelley.
20. Unless extended or renewed by the Park District, any rights granted by a temporary permit were extinguished when the permit expired.
21. The Court finds that this case involves only issues of law under U.S. copyright law.
22. The Court excludes the opinions of plaintiff's experts, Jane Jacob and Randall Ismay as their opinions do not assist the trier of fact and are not the product of reliable principles and methods. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993); *Kumho Tire Co., v. Carmichael*, 119 S. Ct. 1167 (1999).

SCHEDULE H

Settlement Negotiations

There have been no meaningful settlement negotiations.

SCHEDULE I

The parties to this case have completed discovery. Expert witnesses have been scheduled, but not yet deposed.