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COMMENTS

COPYRIGHT TAKES TO THE STREETS: PROTECTING GRAFFITI UNDER THE VISUAL ARTISTS RIGHTS ACT

INTRODUCTION

Artists who choose the streets as their canvas—whether to beautify neighborhoods, spark political protest, or merely mark their territory—are faced with uncertainties when it comes to questions of copyright protection for their work. Prior to *Castillo v. G&M Realty L.P.*,¹ the rights granted to street artists had generally been uncharted territory. However, a verdict that pitted the rights of street artists against the rights of property owners finally gave street art the credibility many felt it long deserved. In *Castillo*, the United States Court of Appeals for the Second Circuit recognized graffiti as a work of visual art, thus providing it copyright protection under the Visual Artists Rights Act (“VARA”) of 1990.² This decision reflected a broad change in the perception of unconventional art like graffiti, and it demonstrated the federal courts’ intent on catching up with that change.

Castillo presented a chance to shed light on the scope of VARA and its application to street art. VARA grants artists the right to prevent the destruction of their work, an issue of concern among many street artists. It upheld street artists’ rights of ownership over property owners’ rights, implicating a preference for artistic control over physical ownership. Though the right to prevent the destruction of graffiti art was the main concern in *Castillo*, the decision breathes new life into traditional copyright law and reflects an opportunity to provide even greater protection for street artists.

1. 950 F.3d 155 (2d Cir. 2020).

2. *See id.*

Part I of this Comment examines the roots of graffiti and its transformation to becoming an admired art form. Part II details general copyright protection for street art, followed by protection under VARA, notably the right of integrity and its impact on graffiti art. Part III covers *Castillo*, the landmark decision regarding the scope of VARA. Part IV discusses the impact of *Castillo* on VARA and its future implications on graffiti art, as well as the possibility for the decision to shed new light on traditional copyright claims. Finally, Part V of this Comment details the *Castillo* decision as a reflection of the broader change of graffiti art, and it predicts the artistic explosion effect the holding will have.

I. THE EVOLUTION OF STREET ART

For some, graffiti is straightforward; it is no more than aerosol paint scrawled onto a city bridge or subway train. In reality, graffiti has existed as a means of communication for thousands of years.³ The word originates from Greek γράφειν—*graphein*—meaning “to write,” and it became especially popular with the Greeks, who were among the first to express themselves through picture.⁴ Walls have historically been used as a medium of artistic expression, from the paintings in the French Lascaux caves dating back 16,500 years,⁵ to Egyptian hieroglyphs in 1800 B.C.,⁶ to murals left by Pompeii inhabitants just under 2,000 years ago.⁷ For thousands of years, graffiti has been used to communicate and reflect upon what is happening in society.

Graffiti came to America in the early colonial period, with its graphics centered primarily on drinking, defecation, and politics.⁸ In the 1950s, immigrant populations experienced a rise in ethnic

3. See Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 U. MICH. J.L. REFORM 245, 257 (2010); see also Elizabeth J. Himelfarb, *First Alphabet Found in Egypt*, 53 ARCHAEOLOGY (Jan./Feb. 2000), <https://archive.archaeology.org/0001/newsbriefs/egypt.html> [<https://perma.cc/Q2LS-GAD4>]; Kristin Ohlson, *Reading the Writing on Pompeii's Walls*, SMITHSONIAN MAG. (July 26, 2010), <https://www.smithsonianmag.com/history/reading-the-writing-on-pompeii-walls-1969367/> [<https://perma.cc/8CXK-83Y2>].

4. *Graffiti*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/graffiti> [<https://perma.cc/SJ6C-X73X>]; Lisa N. Honworth, *Graffiti*, in HANDBOOK OF AMERICAN POPULAR CULTURE 549, 551 (M. Thomas Inge ed., 2d ed. 1989).

5. David Whitehouse, *Ice Age Star Map Discovered*, BBC NEWS (Aug. 9, 2000, 1:00 PM), <https://news.bbc.co.uk/2/hi/science/nature/871930.stm> [<https://perma.cc/46Q5-HQP5>].

6. Himelfarb, *supra* note 3.

7. Ohlson, *supra* note 3.

8. Honworth, *supra* note 4, at 552.

pride and identity for the first time, and graffiti became a way for different cultures to communicate with each other.⁹ Particularly in cities with strong cultural overlap, newly formed gangs used graffiti as a way to mark their territories.¹⁰

In the late 1960s, “tagging” became popular as graffiti artists’ styles grew increasingly individualistic, with each well-known artist creating their own name and signature.¹¹ Even today, “tagging,” defined as the act of writing your graffiti name with spray paint or markers, is the most common form of graffiti.¹² Tagging differed from gang graffiti not only in that it involved more artistic attributes, but it also “represented a powerful youth subculture which cared little about the values and laws of society, developing a language, aesthetic values, and standards all its own.”¹³ From the beginning, graffiti art was meant to be transgressive and to push back against commercialism and government infrastructure.¹⁴ It was frequently viewed negatively by politicians and upper-class communities because it was often associated with gang culture.¹⁵ But within the graffiti subculture, it was simply a way for disenfranchised groups to communicate their frustrations with society in an artistic, nonviolent manner.¹⁶

As graffiti grew in popularity, techniques were refined, and distinctive styles began to evolve and merge. For example, graffiti styles in Manhattan had long, slim letters; the Bronx was characterized by bubble letters; and Brooklyn artists used a pseudo-Celtic style with flourishes and arrows.¹⁷ In 1972, street artist, Super-Kool 223, began using spray paint instead of markers so that he

9. *Id.*

10. *Id.* at 553.

11. *Id.*

12. Tim Stone, *Graffiti: Art of the Tag*, AUSTL. BROAD. NETWORK (Oct. 3, 2016), <https://www.abc.net.au/news/2016-02-04/the-art-of-graffiti-tagging/6959396> [<https://perma.cc/3ZCW-SX9L>]; Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 DEPAUL J. ART, TECH. & INTELL. PROP. L. 225, 226 (1996).

13. Marisa A. Gómez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J. L. REFORM 633, 637 (1993).

14. *The Evolution of Street Art*, INVALUABLE (Mar. 10, 2017), <https://www.invaluable.com/blog/the-evolution-of-street-art/> [<https://perma.cc/6CQK-KRRW>].

15. *Id.*

16. *Id.*

17. Gómez, *supra* note 13, at 638.

could rapidly create larger works.¹⁸ Artists developed “3D” techniques and styles of shading, highlighting, and overlapping letters.¹⁹ Over time, simple words sprayed on a wall began to morph into abstract and pop-art forms.

Graffiti exploded in New York City in the 1970s, in part due to infrastructural corruption and lack of social programming, which left young people without a creative outlet.²⁰ In unison, bankruptcy and graffiti blanketed the city, causing many people to associate graffiti with the social ills plaguing New York.²¹ Graffiti covered surfaces from bridges, to buses, to walls, but the preferred surface was a subway train, because it guaranteed a larger audience and an effective method of communication with other artists throughout the city.²² Graffiti artists roamed the streets with little concern for private property or public infrastructure. In 1995, in an effort to combat this phenomenon, then Mayor Rudy Giuliani established the Anti-Graffiti Task Force.²³ Its goal was to strengthen laws aimed at graffiti enforcement.²⁴ In 1999, Giuliani led an effort known as Graffiti-Free NYC, which allowed property owners to report street art and give the city consent to “clean” their property.²⁵ Giuliani’s graffiti enforcement policies encouraged police to treat minor property crimes as a gateway to violent crimes and punish accordingly.²⁶ Graffiti enforcement was at its height, and police kept a tight watch on the city’s walls, subway trains, tunnels, and bridges.²⁷ When an artist finally found an unpatrolled canvas, they worked fast. This graffiti became known for its “hurried, look-over-your-shoulder ‘throw ups’” form.²⁸ During this time, use of the word

18. *Id.*

19. *Id.* at 639.

20. Helen Holmes, *Graffiti Is Important to the Tradition of American Dissent*, OBSERVER (June 6, 2020), <https://observer.com/2020/06/graffiti-protests-american-dissent-art/> [<https://perma.cc/3RLJ-G5RE>].

21. Daisy Alioto, *How Graffiti Became Gentrified*, NEW REPUBLIC (June 19, 2019), <https://newrepublic.com/article/154220/graffiti-became-gentrified> [<https://perma.cc/RA85-2NZ4>].

22. Gómez, *supra* note 13, at 638.

23. Alioto, *supra* note 21 (detailing the crackdown on graffiti in New York City in the 1970s).

24. *Id.*

25. *Id.*

26. *Id.* “‘They’re trying to make it look like graffiti writers break windows and everything, it ain’t even like that,’ said [one] young artist . . .” *Id.*

27. *Id.*

28. *Id.*

“graffiti” evolved to include any graphics applied to surfaces in a manner that constituted vandalism.²⁹

Over the next two decades, however, graffiti art began to gain credibility as communities embraced it in their neighborhoods.³⁰ It proliferated throughout major urban cities, appearing on both public and private property in lower-, middle-, and upper-class neighborhoods alike.³¹ Los Angeles, in particular, developed its own graffiti subculture.³² In Los Angeles, most street artists are Latino, and their style and the content of their street art reflect their ethnicity.³³ These artists use graffiti as a means to beautify their neighborhoods, stop gang graffiti, educate children of their heritage, and create a sense of community and belonging.³⁴

Street art, a once reprehensible transgression, slowly transformed into an admirable, detailed, and multifaceted art form. Some illustrate scenes or heroes from the community, and it is often used to educate and foster a sense of belonging.³⁵ Although subways and buses are still the preferred surface for most street art, it is no longer confined to just the streets. Graffiti art now appears in galleries, museums, and art exhibits around the world.³⁶ Street artists have been commissioned to create artwork for magazine covers, nightclubs, and billboards; graffiti has influenced clothing and jewelry designs; movies have been made about graffiti; and Disneyworld even has its own New York-style, graffiti-covered subway train.³⁷ Nevertheless, the rise in public appreciation for street art also welcomed legal conflicts with respect to protections for graffiti artists.³⁸

29. *Id.*

30. *See id.*

31. *See* Alan Citron, *Writing Is on the Wall--Graffiti Problem Growing on Westside*, L.A. TIMES (Mar. 31, 1988), <https://www.latimes.com/archives/la-xpm-1988-03-31-me-724-story.html> [<https://perma.cc/VY3P-MV3M>]; Bob Pool, *Woodland Hills Residents Voice Outrage: Graffiti Spreads Amid Cleanup Dispute*, L.A. TIMES (Mar. 6, 1986), <https://www.latimes.com/archives/la-xpm-1986-03-06-me-15832-story.html> [<https://perma.cc/R6BA-N9L7>].

32. Gómez, *supra* note 13, at 639.

33. *Id.*

34. *Id.*

35. *Id.*; *see also* Musetta Durkee, *WYWH: International Perspectives on Street Art*, CTR. FOR ART L. (Mar. 21, 2019), <https://itsartlaw.org/2019/03/21/wywh-international-perspectives-on-street-art/> [<https://perma.cc/5TG8-6UQU>].

36. Gómez, *supra* note 13, at 641.

37. *Id.*

38. *See infra* Part III.

As street art becomes increasingly valuable, new questions have been presented surrounding ownership of graffiti art on buildings and whether artists can retain intellectual property rights to prevent the copying, removal, sale, or destruction of their work. The progression in how graffiti is perceived not only makes intellectual property rights more important for artists, but it influences the change that supported the eventual decision in *Castillo v. G&M Realty L.P.*,³⁹ where a federal court recognized graffiti as work of visual art for the first time.⁴⁰ This recognition granted graffiti art protection under VARA in the same manner that “works of art that are romantically viewed as ‘fine art’”⁴¹ are protected.⁴²

II. COPYRIGHT PROTECTION FOR GRAFFITI ART

Street art is ephemeral in nature. Some pieces last for months, while others do not see the end of day. Even the most famous pieces are not guaranteed perpetuity, and artists learn early on not to get too attached. Regardless, street artists should be authorized the same copyright protection afforded to artists who use more permanent materials.

A. Copyright Protection Under 17 U.S.C. § 102

Insofar as it is an original work, fixed in a tangible medium of expression, graffiti art is suitable for copyright protection. Under 17 U.S.C. § 102, copyright law protects only “original works of authorship fixed in any tangible medium of expression.”⁴³ The statute provides that works of authorship include literary works in addition to pictorial and graphic works.⁴⁴ To qualify as original, a work must be “independently created by the author”⁴⁵ and must possess

39. 950 F.3d 155 (2d Cir. 2020).

40. Ephrat Livni, *A Landmark Court Case Affirms that Street Art is High Art*, QUARTZ (Feb. 15, 2018), <https://qz.com/1206623/a-landmark-5pointz-case-shows-the-legal-reasons-why-graffiti-is-art/> [<https://perma.cc/Y7TM-P2BC>].

41. Dane Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 76 (1997).

42. Before *Castillo*, courts restricted VARA to categories of “fine art,” including paintings, drawings, prints, sculptures, or photographs. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995).

43. 17 U.S.C. § 102(a).

44. *Id.* § 102(a)(1), (5).

45. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

“at least some minimal degree of creativity.”⁴⁶ The creativity standard “is extremely low,” as “even a slight amount” of creative expression will suffice.⁴⁷ “The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁴⁸ “Independently created” simply requires that the author create the work without copying from other works.⁴⁹

Originality does not, moreover, require novelty—a work may be independently created “even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”⁵⁰ Although the originality and authorship standards are low, they are not limitless, and thus not all graffiti qualifies for copyright protection. Graffiti consisting of words and short phrases, familiar symbols and designs, or mere variations of typographic lettering cannot be protected under copyright law.⁵¹ Such graffiti falls within “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”⁵² For example, the phrase “*Tupac is alive*,” written in plain handwriting, in one or two colors, would not be protectable due to lack of originality.

The final requirement, fixation, includes writing or otherwise recording copyrightable expression in some stable form.⁵³ “It makes no difference what the form, manner, or medium of fixation may be.”⁵⁴ Most works are fixed by their very nature—graffiti, for example, is fixed when it is painted onto a wall, bridge, or train. The likelihood that it will be covered up or later destroyed is immaterial; copyright law’s fixation requirement demands only that the work is “sufficiently permanent or stable to permit it to be

46. *Id.* at 345, 358, 362.

47. *Id.* at 345.

48. *Id.* (citing 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08(c)(1) (2021)).

49. *Id.*

50. *Id.*

51. 37 C.F.R. § 202.1(a) (2021) (holding, “Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents” are not subject to copyright).

52. *Feist*, 499 U.S. at 359.

53. 17 U.S.C. § 101 (defining “fixed”). Some works that do not satisfy the fixation requirement include improvisational speech, sketch, dance, or other performance that is not recorded in a tangible medium of expression.

54. H.R. REP. NO. 94-1476, at 52 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵⁵ Thus, even a work that is painted over by another artist, or has faded in the sun, had a temporary existence sufficient to meet copyright’s fixation requirement.

B. *Copyright Protection Under VARA*

In 1990, Congress adopted VARA as an amendment to the U.S. Copyright Act.⁵⁶ VARA grants certain rights to artists who create paintings, drawings, prints, sculptures, or photographs existing in a single copy or in limited editions of 200 or fewer copies.⁵⁷ VARA was the first federal copyright legislation to grant protection to “moral rights.”⁵⁸ Moral rights preserve an artist’s reputation and include two specific rights: the right of attribution and the right of integrity.⁵⁹ The right of attribution establishes rules about identifying authorship of works, while the right of integrity establishes rules related to the modification of works.⁶⁰ For works of visual art that fall under the protection of the Act, VARA grants artists the following rights: (1) the right to claim authorship over a work; (2) the right to prevent the use of one’s name as the author of a work that the author did not create; (3) the right to prevent the use of one’s name as the author of a work that has been distorted, mutilated, or modified in a way that would damage the author’s reputation; and (4) the right to prevent distortion, mutilation, or modification of a work in a way that would be harmful to the author’s reputation.⁶¹ Additionally, and most notable to this Comment, artists may prevent any intentional or grossly negligent destruction of a work that has achieved “recognized stature.”⁶²

55. 17 U.S.C. § 101. Works not sufficiently permanent or stable to warrant copyright protection include “purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television . . . or captured momentarily in the ‘memory’ of a computer.” H.R. REP. NO. 94-1476, at 53 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

56. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 101, 106A, 113, 301 (1991)).

57. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995).

58. 17 U.S.C.S. § 106A (LexisNexis 2021).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Most claims brought by artists under VARA face difficulty in proving their work is of recognized stature, in part because VARA does not actually define what it means to be of recognized stature⁶³ and in part because “courts have difficulty in determining what the law protects.”⁶⁴ However, previous courts have deemed recognized stature to mean “meritorious” work by “art experts, other members of the artistic community, or some other cross-section of society.”⁶⁵ Courts typically rely on expert testimony to determine whether a work is of recognized stature.⁶⁶

VARA has implications on street art in particular because it grants authors additional rights in their work, regardless of any subsequent physical ownership of the work itself. For example, in 1994, the Parks and Recreation Department of Harrisburg bought a stainless steel Holocaust memorial created by sculptor David Ascalon.⁶⁷ Twelve years later, when the Department removed the rusted metal on the sculpture and replaced it with a more durable steel replica, Ascalon sued the Department for violating his moral rights, claiming the replacement changed his intentions of the piece and thereby damaged his reputation.⁶⁸ Hence, VARA’s statutory rights implicate artistic control over physical space owned by others. As a result, an artist may be granted rights to their work, regardless of ownership of the physical space on which it is placed, provided that the work meets the other requirements.

There are important VARA exceptions to note as well. Natural changes that result from the passage of time, such as fading from the sun or the inherent nature of the materials used, are not protectable.⁶⁹ Further, modifications or destruction that result from conservation efforts or the public presentation of the work are not protectable, unless caused by gross negligence.⁷⁰ Additionally,

63. *See id.*; *see also* Drew Thornley, *The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal?*, 67 CLEV. ST. L. REV. 351, 365 (2019).

64. Daniel Grant, *When Creator and Owner Clash*, WALL ST. J. (Aug. 31, 2010), <https://www.wsj.com/articles/SB10001424052748703447004575449793518169052> [<https://perma.cc/ZF5W-78DH>].

65. *Some Artists Paint Buildings*, SHEPPARDMULLIN (Nov. 1, 2010), <https://www.artlawgallery.com/2010/11/articles/intellectual-property-copyright-and-moral-rights/some-artists-paint-buildings/> [<https://perma.cc/Y8J8-CC52>].

66. *Id.*

67. Grant, *supra* note 64.

68. *Id.*

69. 17 U.S.C. § 106A(c)(1).

70. *Id.* § 106A(c)(2).

VARA does not cover advertising, promotional, utilitarian, or other works for hire.⁷¹

Unlike with traditional copyright law, registration with the U.S. Copyright Office is not required to bring claims for violation of VARA.⁷² Nevertheless, the question of VARA's applicability to street art had not been thoroughly analyzed by courts prior to *Castillo v. G&M Realty L.P.*⁷³ In a now landmark ruling, the *Castillo* court recognized street artists' rights to prevent the destruction of their graffiti on a building owned by someone other than the artists.⁷⁴ The court found the building owner liable for the maximum amount of statutory damages under VARA,⁷⁵ and in doing so, the court gave preference to artistic control over physical ownership of the building.

III. STREET ART IN COURT: *CASTILLO V. G&M REALTY L.P.*

In March 2020, the Second Circuit handed down a decision which suggested that graffiti art could be protected by existing copyright law.⁷⁶ It marked the first time a federal court had determined whether the work of an aerosol artist was worthy of protection under the law, and it was the first time graffiti artists had won a lawsuit based on VARA.⁷⁷ *Castillo v. G&M Realty L.P.* represented a lot of firsts in the street art community, and it was considered a substantial victory for artists who were familiar with their work being mistaken for vandalism. In *Castillo*, the court helped to clarify the types of work protectable under VARA, confirming that graffiti art is an art form deserving of protection.⁷⁸

71. *See id.* § 106A(c)(3).

72. Caleb L. Green & Andrea L. Arndt, *Black Lives Matter Murals: Intellectual Property vs. Real Property Rights*, DICKENSON WRIGHT (July 8, 2020), <https://www.dickinson-wright.com/news-alerts/green-black-lives-matter-murals> [<https://perma.cc/AGV5-MA5B>].

73. 950 F.3d 155 (2d Cir. 2020); Brittany M. Elias & Bobby A. Ghajar, *Street Art: Growing Clarity on VARA's Applicability to Unsanctioned Street Art*, LANDSLIDE (Sept./Oct. 2017), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/september-october/street-art-digital-feature/ [<https://perma.cc/JLH7-NEUY>].

74. *Castillo*, 950 F.3d at 162.

75. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 428 (E.D.N.Y. 2018), *aff'd sub nom. Castillo*, 950 F.3d at 162; § 504(c)(1)–(2).

76. *See Cohen*, 320 F. Supp. 3d at 426, *aff'd sub nom. Castillo*, 950 F.3d at 162.

77. Uche Ewelukwa Ofodile, *Do Intellectual Property Rights Extend to Graffiti Art?: The 5Pointz Case*, JURIST (Mar. 30, 2018), <https://www.jurist.org/commentary/2018/03/ofodile-graffiti-art/> [<https://perma.cc/M42J-DXBK>].

78. *Castillo*, 950 F.3d at 166–67.

Considering how little this statute had previously been litigated, this high-profile ruling by an influential court like the Second Circuit is thought to have lasting effects on how similar cases will be litigated in the future.⁷⁹

A. *Facts of the Case*

The debate in *Castillo* began with a five-story, 200,000-square-foot factory warehouse located in the Queens borough of New York.⁸⁰ With the building owner's permission, world renowned artist Jonathan Cohen turned the warehouse into 5Pointz, the largest graffiti art space in the world.⁸¹ Under Cohen's curatorial direction, 5Pointz featured an evolving collection of more than 350 vibrant murals and exhibited tags by thousands of artists.⁸² "Beginners painted alongside masters of the craft, who enthusiastically shared their knowhow and experience," one journalist wrote;⁸³ others referred to it as "the United Nations of graffiti."⁸⁴ It quickly became a famed New York City open-air graffiti museum, attracting thousands of daily visitors.⁸⁵ 5Pointz was featured in a number of movies and music videos, like the 2013 motion picture "Now You See Me."⁸⁶ By 2013, as many as ten tour buses a day were visiting.⁸⁷

For thirteen years, artists flocked to this graffiti mecca to leave their mark, and over time, their art helped transform a once derelict neighborhood into a desirable place to live.⁸⁸ The art at 5Pointz dramatically increased the value of the property, and in 2013, the

79. See Bill Donahue, *2nd Circ. Rules Destruction of Famed NYC Graffiti Broke Law*, LAW360 (Feb. 20, 2020), <https://www.law360.com/articles/1245798> [<https://perma.cc/2DPN-7KGN>]; see also William K. Ford, *Judging Experience in Copyright Law*, 14 J. INTELL. PROP. L. 1, 41 (2006) (discussing the Second Circuit's influence on copyright law, stating that its leading decisions have helped to define copyright law, making it the "clear leader in terms of experience and influence" regarding copyright decisions).

80. See *Castillo*, 950 F.3d at 162; Donahue, *supra* note 79; Alioto, *supra* note 21.

81. Scott Manson, *New York's 'United Nations of Graffiti'*, THE GUARDIAN (Sept. 20, 2011), <https://www.theguardian.com/travel/2011/sep/20/new-york-graffiti-street-art-5-pointz> [<https://perma.cc/8XVH-MKAK>].

82. *Id.*

83. *5Pointz NYC*, GOOGLE ARTS & CULTURE (2013), <https://artsandculture.google.com/exhibit/5-pointz-nyc-street-art-nyc/wRU6hVET> [<https://perma.cc/WCD7-WVZR>].

84. Manson, *supra* note 81.

85. Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 433 (E.D.N.Y. 2018).

86. *Id.*

87. Alioto, *supra* note 21.

88. *Id.*

owner of the building, Gerald Wolkoff, sought to tear the warehouse down to make way for high-rise luxury condos.⁸⁹ Cohen and twenty other graffiti artists initiated a lawsuit seeking a preliminary injunction under VARA to prevent Wolkoff from demolishing the warehouse and consequently destroying the art covering its walls.⁹⁰

On November 12, 2013, the trial court issued an order denying the preliminary injunction and stated that they would issue a written opinion soon.⁹¹ Rather than wait for the court's opinion, which was issued just eight days later, Wolkoff immediately went into the night and whitewashed the entire warehouse.⁹² As soon as the court denied the application for preliminary injunction, Wolkoff covered virtually all of the artwork on 5Pointz with rollers, spray machines, and buckets of white paint.⁹³ Although the art was destroyed, Cohen continued to seek monetary damages.⁹⁴ The district court ruled that the sudden destruction of 5Pointz was a willful, intentional violation of VARA and thus awarded the maximum amount of statutory damages under the Act.⁹⁵ Wolkoff appealed to the Second Circuit.⁹⁶

B. *Holding of the Case*

The case before the Second Circuit primarily rested on the issue of whether the graffiti art at 5Pointz was “too temporary” to be considered art of “recognized stature,” which is protected under VARA.⁹⁷ Wolkoff argued that the 5Pointz artists' work was too temporary.⁹⁸ However, in his decision for the court, Judge Parker declared that the ephemeral nature of graffiti art does not bar it from being art of recognized stature, holding that “the gradual erosion of outdoor artwork exposed to the elements . . . does not threaten

89. *Id.*; *Cohen*, 320 F. Supp. 3d at 426.

90. *Cohen*, 320 F. Supp. 3d at 426.

91. *Id.*

92. *Id.*

93. *Id.* at 434.

94. *Id.* at 435.

95. *Id.* at 441, 443, 447.

96. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

97. *Id.* at 166–67 (quoting 17 U.S.C. § 106A(a)(3)(B)).

98. *Id.* at 167.

liability.”⁹⁹ The court pointed to famed street artist, Banksy, as an example. The court explained that Banksy’s art, though often painted on building walls where it is subject to overpainting, is acknowledged by the general public as significant nonetheless, and that a Banksy painting at 5Pointz would have undoubtedly possessed recognized stature.¹⁰⁰ Moreover, the temporary quality of Banksy’s art has only added to its recognition.¹⁰¹ Illustrating another example, the court noted that when the 7,503 orange-draped gates installed by Christo Vladimirov Javacheff and Jeanne-Claude Denat in Central Park were removed and replaced after just two weeks, the exhibit still achieved recognized stature and would have been protected under VARA.¹⁰²

“[A] work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”¹⁰³ The Second Circuit held that to establish recognized stature, the test for the type of work protected under VARA requires “expert testimony or substantial evidence of nonexpert recognition”¹⁰⁴ Notably, Judge Parker refrained from making artistic judgements on aesthetics, as courts have historically done.¹⁰⁵ In *Bleistein v. Donaldson Lithographing Co.*, for instance, Justice Holmes explained that

[i]t 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.¹⁰⁶

In *Castillo*, the trial court mirrored Justice Holmes’s judgment written over one hundred years prior. Judge Parker affirmed the decision of the trial court, which considered the fact that only forty-nine of the thousands of works of art at 5Pointz were selected for litigation, the fact that each of the artists in the suit had achieved artistic recognition outside of 5Pointz, and the fact that highly

99. *Id.* at 168.

100. *Id.*

101. *Id.*

102. *Id.* at 167.

103. *Id.* at 166.

104. *Id.*

105. *Id.*; see *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

106. 188 U.S. at 251.

qualified art experts provided findings as to the skill and craftsmanship of the aerosol works.¹⁰⁷ The trial court noted that Cohen was Wolkoff's long-time, hand-picked curator "for good reason," as "[h]e remains one of the most prominent aerosol artists in the world."¹⁰⁸ The court listed excerpts from Cohen's curriculum vitae that observed his prominence, such as having had over 500 press mentions, including mentions from the *New York Times*, *Wall Street Journal*, *Today Show*, and *ESPN*.¹⁰⁹ Further, Cohen has been commissioned to create artwork for Fortune 500 companies like Louis Vuitton, Nikon, and Facebook.¹¹⁰ His work has been featured in art museums and galleries around the world,¹¹¹ as well as in major motion pictures¹¹² and documentaries.¹¹³

Evidence from art experts and other members of the artistic community was presented at trial.¹¹⁴ These experts regarded Cohen and the other graffiti artists involved in the suit as "top artists at the heights of their career."¹¹⁵ Some of the experts and members of the artistic community that testified included: Renee Vara, an art appraiser and director; Lois Stavsky, a graffiti art writer based in New York; and Angelo Madrigale, the Vice President and Director of Contemporary Art at the Doyle, a New York art auction house, and professor at Pennsylvania College of Art and Design.¹¹⁶

In determining whether each work at issue was of recognized stature, Renee Vara relied on online videos, documentary footage, social media coverage, letters from art professors around the country, and letters and e-mails from visitors to 5Pointz.¹¹⁷ She identified roughly 805 e-mails written to 5Pointz or Cohen for requests

107. Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 438–39 (E.D.N.Y. 2018), *aff'd sub nom. Castillo*, 950 F.3d. at 162.

108. Cohen v. G&M Realty L.P., No. 13-CV-05612, 2018 U.S. Dist. LEXIS 99250, at *20 (E.D.N.Y. June 13, 2018).

109. *Id.*

110. *Id.*

111. His work has been featured in the Parish Art Museum, Orlando Art Museum, Rush Arts Gallery, Corridor Gallery, and Gold Coast Arts Center. *Id.* at *20–21.

112. *Id.* at *21; NOW YOU SEE ME (Summit Ent. 2013).

113. *Cohen*, 2018 U.S. Dist. LEXIS 99250, at *21; BANKSY DOES NEW YORK (Home Box Off. 2014).

114. *Cohen*, 2018 U.S. Dist. LEXIS 99250, at *26.

115. *Id.* at *29.

116. *Id.* at *26; Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 431–32 (E.D.N.Y. 2018).

117. *Cohen*, 2018 U.S. Dist. LEXIS 99250, at *26.

to visit inside the building.¹¹⁸ These e-mails represented visitors from seventy countries and included kindergarten teachers through college professors, all either requesting tours of 5Pointz or telling Cohen “how valuable they found the experience” and how much their students had learned after visiting.¹¹⁹ Vara even compared the inside of 5Pointz to “an exhibition in a gallery in Chelsea or the Lower East Side.”¹²⁰ Angelo Madrigale described 5Pointz as “ground zero” of the aerosol art movement and testified that it was “equal to” the Lincoln Center and Apollo Theater in terms of cultural significance.¹²¹ Other evidence in support of the recognized stature argument acknowledged the placement of certain paintings, carefully chosen so as to increase visibility by popular trains or streets with significant foot traffic.¹²² The artists created the pieces with the intention they were to remain long-standing pieces.¹²³

Although vast in this case, the court noted that expert testimony is not the sine qua non for establishing recognized stature.¹²⁴ It chose not to be strictly guided by the appraised value of the works, and in addition to testimony from historians, art critics, curators, and other experts, the court requested opinions from the members of the jury.¹²⁵ Through inclusion of testimony from jury members involved in a different cross-section of society, the court recognized the importance of utilizing perceptions of outside communities independent of the art community. Further, the court noted that widespread sharing of artwork on social media and the internet can also serve as evidence of recognized stature warranting moral rights protection.¹²⁶

At its core, VARA is about perceptions of art. Pieces such as “Clown with Bulbs” and “Eleanor RIP,” for example, were seen by thousands of daily visitors and millions of commuters on the passing train, and they were featured in fourteen documentaries.¹²⁷

118. *Id.* at *24–25.

119. *Id.* at *24–25.

120. *Id.* at *25.

121. *Id.* at *22 n.13.

122. *See, e.g., id.* at *28, *30, *32–34.

123. *See id.* at *20, *25, *28–29, *42.

124. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 438 (E.D.N.Y. 2018).

125. *Id.* at 430–32.

126. *Id.* at 431, 439.

127. *Cohen*, 2018 U.S. Dist. LEXIS 99250, at *31–32.

Therefore, the jury found that both of these pieces achieved recognized stature.¹²⁸ For other pieces selected for litigation, the jury considered the number of social media followers its artist had, as well as the number of likes a picture of it had received on Instagram.¹²⁹

In consensus with the jurors' testimony, is it clear from his opinion that Judge Parker considered graffiti as fine art. He admirably quoted the district court's observation that the destroyed works "reflect[ed] striking technical and artistic mastery and vision worthy of display in prominent museums if not on the walls of 5Pointz."¹³⁰ By allowing jurors to help guide its decision, the court discovered that New Yorkers may also see graffiti as significant works of fine art. In the end, the jurors advised a finding for Cohen and the other artists,¹³¹ a decision which surely reflected the changing understanding of how the larger, general public perceives street art.¹³²

On February 20, 2020, the Second Circuit upheld the decision of the lower court, holding that Wolkoff's whitewashing of 5Pointz was an "act of pure pique and revenge" in violation of VARA.¹³³ The court found Wolkoff liable for \$150,000 for each of the forty-five works of aerosol art he destroyed, totaling \$6.75 million in statutory damages.¹³⁴ "Nothing in the record indicates that it was necessary to whitewash the artwork before beginning construction of the apartments. . . . Wolkoff could have allowed the artwork to remain visible until demolition began, giving the artists time to photograph or to recover their work."¹³⁵ Instead, he banned the artists from entering the site and refused to allow them to recover any artwork that could be removed.¹³⁶ VARA fixes statutory damages between \$750 and \$30,000 per work for a nonwillful violation, but because the destruction in this case was willful, the court ordered Wolkoff to pay the maximum statutory damages of \$150,000 per

128. *Id.* at *31.

129. *E.g., id.* at *50, *52, *62.

130. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 163 (2d Cir. 2020) (quoting *Cohen*, 320 F. Supp. 3d at 431).

131. *See id.* at 170.

132. Livni, *supra* note 40.

133. *Castillo*, 950 F.3d at 171–73 (quoting *Cohen*, 320 F. Supp. 3d at 445).

134. *Id.* at 164; *Cohen*, 320 F. Supp. 3d at 447.

135. *Castillo*, 950 F.3d at 171.

136. *Id.* at 163.

work destroyed.¹³⁷ Wolkoff argued that the artists knew the warehouse would soon be demolished for construction, but the court firmly held that such awareness does not justify his decision to whitewash 5Pointz while the written opinion was still under consideration.¹³⁸ The court acknowledged the damages as steep, but nonetheless justified them because Wolkoff took matters into his own hands.¹³⁹

On October 5, 2020, the Supreme Court of the United States declined a request to reconsider the Second Circuit's ruling.¹⁴⁰ The Supreme Court's refusal marked Wolkoff's last legal option to try and reverse the district court ruling, thus solidifying the artists' rights for copyright protection for graffiti art under VARA.

IV. MODERN DAY VARA

The verdict in *Castillo* will go down as a major symbolic victory for street artists. It marked the first time a federal court had tried and concluded a claim for graffiti art under VARA, and it resulted in new milestones of protection for street artists. It gave legitimacy to street artists' work and granted ownership to artists over property owners. The ruling also welcomed relief for artists who work outside of the mainstream.¹⁴¹ The decision expanded VARA to reach art not typically deemed worthy of protection. The verdict in favor of the artists serves as clear evidence that "street art's time has come."¹⁴²

A. *Castillo Changes the Landscape for Protection of Graffiti Art Under VARA*

Castillo will likely serve as precedent for future issues concerning the unauthorized destruction of works of recognized stature. Artists may now feel more confident bringing suit to protect their artwork, and courts may additionally be more inclined to award

137. *Id.* at 166, 170; 17 U.S.C. § 504(c)(1)–(2).

138. *See Cohen*, 320 F. Supp. 3d at 435.

139. *See id.* at 447.

140. *G&M Realty L.P. v. Castillo*, 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (Oct. 5, 2020) (No. 20-66).

141. Ofodile, *supra* note 77.

142. Livni, *supra* note 40 (quoting Dean Nicyper, a partner at the international law firm, Withers, and former Chair of the New York Art Law Committee).

damages when works of recognized stature are destroyed. As one legal expert explained, artists who cannot afford representation will likely use *Castillo* as a road map to defend themselves,¹⁴³ and an outcome in favor of the artists may actually become reality.

VARA protects works of recognized stature from destruction or alteration.¹⁴⁴ Prior to *Castillo*, “recognized stature” was not defined, and there was very little guidance on what it meant.¹⁴⁵ It was difficult for graffiti artists to file claims under VARA because “recognized stature” was vague and subject to broad interpretation.¹⁴⁶ However, the *Castillo* court proved that the requirement is not impossible to satisfy, holding that a work of recognized stature is “one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”¹⁴⁷ To prove the art work’s high quality, the appellants submitted evidence detailing the time and effort put into each mural, the impact 5Pointz had on the artists’ reputations, and the damage each suffered as a result of the whitewashing.¹⁴⁸ The relevant community in *Castillo* included the artistic community, art historians, art critics, museum curators, gallerists, prominent artists, and members of the jury.¹⁴⁹

The *Castillo* ruling also touched on the question of fixation with regard to street art. The court rejected the appellee’s argument that most of the works at 5Pointz could not meet the recognized stature requirement due to their temporary nature.¹⁵⁰ The court held that nothing in VARA excludes temporary art from attaining recognized stature.¹⁵¹ Even street art made from material as erosive as chalk may be protected, so long as it meets the recognized stature requirements.

143. Elieen Kinsella, *Cementing a \$6.8 Million Win for Artists, the US Supreme Court Declines to Hear the Landmark Case Over the Destruction of Graffiti Mecca 5Pointz*, ARTNET NEWS (Oct. 7, 2020), <https://news.artnet.com/art-world/supreme-court-declines-5pointz-ap-peal-1913903> [<https://perma.cc/J92N-42S3>].

144. 17 U.S.C. § 106A(a)(3)(A)–(B).

145. See Elias & Ghajar, *supra* note 73.

146. See Elizabeth Herbst Schierman, *Moral Rights Under Federal Law*, 51 ADVOCATE 23, 23–24 (2008).

147. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2020).

148. *Id.* at 163.

149. *Id.* at 166.

150. *Id.* at 168–69.

151. *Id.* at 167.

1. Intellectual Property Versus Real Property

Questions regarding the scope of VARA have arisen that were not predicted when Congress enacted the statute in 1990, such as whether artists have the right to stake out where their artwork will be permanently placed.¹⁵² With respect to protectable graffiti art, the Court in *Castillo* may have answered that question. For graffiti art that qualifies for protection under VARA, property owners now have a responsibility to preserve it on their buildings. As discussed, VARA grants protection against distortion, mutilation, modification, and destruction of visual art, including the destruction of artwork incorporated onto a building that is owned by someone other than the artist.¹⁵³ A building owner cannot modify or destroy a work of visual art that possesses recognized stature, because they do not own the work's copyright, even if they own the building on which the art is located. In certain situations, even, they cannot destroy the building either. Thus, so long as an artist can show that a work is of recognized stature, VARA will provide legal protection against the destruction of said art.

Though whitewashing was the issue at hand in *Castillo*, street artists should similarly expect the opportunity to bring claims under VARA when their work has been covered by the work of another artist or covered up with an advertisement. In essence, covering one piece of art with another is no different than painting over it with white paint. The original piece of art is still mutilated or destroyed in violation of the statute.¹⁵⁴ In reality, most disputes surrounding murals covered by advertisements settle before reaching court.¹⁵⁵ In many instances, however, artists avoid bringing a lawsuit against a giant conglomerate altogether and chalk it up as a loss.¹⁵⁶

This is what happened with muralist Robert Wyland.¹⁵⁷ In 1997, Wyland painted "Whale Tower" on the back side of the thirty-four-

152. Grant, *supra* note 64.

153. See *supra* section II.B; 17 U.S.C. § 106A(a)(3)(a).

154. See § 106A(a)(3)(a).

155. Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. ONLINE 54, 60–61 (2017).

156. See *id.* at 60–61, 69.

157. Paige Pflieger, *What Right Do Muralists Have to the Buildings They Paint On?*, NPR (June 27, 2015), <https://www.npr.org/2015/06/27/417204222/what-right-do-muralists-have-to-the-buildings-they-paint-on> [https://perma.cc/4445-BV2S].

story Broderick Tower in Detroit, and it quickly became “a hot commodity for advertisers.”¹⁵⁸ In 2006, Chrysler put up a giant advertisement over the entire mural, followed by Verizon Wireless soon after.¹⁵⁹ Wyland told NPR that if he sued under VARA, he knew it would only be a “drop in the bucket” for these companies—best case scenario, they would pay him off and keep his mural covered.¹⁶⁰ However, with *Castillo* paving the way today, muralists like Wyland may feel more confident bringing suit against large companies.

While most graffiti artists celebrated the *Castillo* verdict, some developed new concerns. Dean Nicyper, an art lawyer who represents artists and building owners in possession of street art, stated that the ruling could have “a chilling effect on building owners.”¹⁶¹ A property owner may now be more hesitant to allow an artist to paint on their walls if it could hinder their ability to sell or redevelop the property later on, should the artist uphold their copyright protection.¹⁶² RJ Rushmore, editor of the street art blog, Vandalog, expressed his apprehension to the ruling as well, stating, “If I’m asking a property owner to let an artist paint their building, I don’t want her worried that she’s suddenly handing over control of her property to someone who might turn around and sue her.”¹⁶³

While it is true that property owners should take caution before destroying or altering street art, there are still legal options for those wishing to do so. The *Castillo* court provided guidance for property owners on how to remove unwanted works without violating VARA.¹⁶⁴ It noted that appellant Wolkoff had two options to mitigate VARA liability: either by (1) entering into a written agreement with the artists before they began painting, or (2) providing a ninety-day notice, giving the artists an opportunity to preserve their work before he destroyed it.¹⁶⁵ Wolkoff was held liable because he did not meet, nor attempt to meet, either requirement.¹⁶⁶ So, given these alternate options, property owners are not completely handing over control of their property when they allow an

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* Livni, *supra* note 40.

162. *Id.*

163. *Id.*

164. *See* *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 168–69 (2d Cir. 2020).

165. *Id.* at 165–66.

166. *Id.*

artist to paint on their walls. So long as they enter into an agreement with the artist before the artist begins work or give ninety-day notice to the artist before destruction of the work, the property owner will not risk facing liability.

2. The Limits of VARA

VARA protects against the destruction of graffiti that has achieved recognized stature, but there are limits on VARA's reach of protection within the graffiti culture, as a result of the culture itself. For instance, when graffiti artists destroy a fellow graffiti artist's work, VARA may be an ineffective mechanism for protection. Many artists follow graffiti rules and customs that have evolved into a normative framework that street artists take very seriously.¹⁶⁷ In fact, these rules are regarded as the reason graffiti is confined to trains and walls and spared from cars and houses.¹⁶⁸ In general, these rules allow artists to cover others' work only if what is being placed on top is bigger and more intricate.¹⁶⁹ In one interview, street art blogger, Dean Sunshine, stated, "Go over, go better."¹⁷⁰ Street artists who break this etiquette face consequences within their subculture.¹⁷¹

The issue with this intersection of graffiti customs and VARA is that the etiquette is not always reflected in the statute. Under VARA, an artist who tags or paints over another's protected work would give rise to a cause of action for mutilation.¹⁷² Further, VARA requires written permission or notice to mutilate protected work.¹⁷³ These graffiti customs may, in turn, undermine the law by allowing an artist to go over another's work if the artist considers it an improvement to the original work. The original artist may disagree, and though the artist may be granted protection over their work under VARA, that protection may not be extended

167. See Olivia Allen-Price, *Why Don't Murals Get Covered by Graffiti in the Mission?*, KQED (May 19, 2015), <https://www.kqed.org/news/10530644/why-dont-murals-get-covered-by-graffiti-in-the-mission> [<https://perma.cc/2MMM-B7J9>].

168. Cathay Y. N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's "Negative Space" Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259, 277 (2014).

169. *Id.*

170. Raymond Gill, *The Unwritten Rules of Street Art*, DAILY REV. (Jan. 31, 2014), <https://dailyreview.com.au/the-unwritten-rules-of-street-art/> [<https://perma.cc/9WHR-RPAK>].

171. See Olivia Allen-Price, *supra* note 167.

172. 17 U.S.C. § 106A.

173. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 168–69 (2020); § 113(d).

within the graffiti culture. As a result, these customs allow artists who cover another's work to escape liability within the community and provide less protection to the original artist than as provided under VARA.

B. *Castillo's Influence on Traditional Copyright Law*

Beyond VARA, the ruling in *Castillo* breathes new life into traditional copyright law.

In coming to a ruling which qualified graffiti art as a protectable work of recognized stature, the Second Circuit demonstrated the flexibility of copyright infringement cases. As a result, it provided a framework with which to lay out relevant considerations in similar copyright infringement cases. For example, there has still been very little litigation concerning graffiti artists' rights against misappropriation by third parties. However, this is not for lack of cases,¹⁷⁴ and the decision in *Castillo* will likely influence these types of traditional copyright infringement cases in the future.

Graffiti art blossomed in the consumer marketplace with its rise in popularity as an art form.¹⁷⁵ Most graffiti artists welcomed this newly found interest in their artwork, especially when compensated and properly acknowledged. The waters got muddy, however, when corporations started to get caught appropriating street art for commercial gain without the artists' consent. Corporations are increasingly incorporating street art into their advertisements in an attempt to appeal to the younger demographic and give their company or product an "edge."¹⁷⁶ Notably, copyright law carries fair use exceptions, such as a work's incidental appearance in the background of an advertisement or use that is so fleeting it is considered trivial.¹⁷⁷ Yet, when corporations use graffiti art to imply

174. See Katie Scholz, *Graffiti: Copyrightable Art, Illegal Activity, or Both?*, IP WATCHDOG (June 15, 2018), <https://www.ipwatchdog.com/2018/06/15/graffiti-copyrightable-art-illegal-activity-or-both/id=98390/> [<https://perma.cc/52VE-LMD3>].

175. See *supra* Part I.

176. Heitor Alvelos, *A Set of Premises for the Scrutiny and Interpretation of Graffiti and Street Art*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 15, 24 (Enrico Bonadio ed., 2019).

177. Gabe Friedman, *Can Graffiti Be Copyrighted?*, THE ATLANTIC (Sept. 21, 2014), <https://www.theatlantic.com/business/archive/2014/09/can-graffiti-be-copyrighted/380323/> [<https://perma.cc/KVM5-TKMH>].

they are affiliated with an artist, they have gone beyond the fair use exceptions and used the work for their own commercial gain.¹⁷⁸

Even with appropriate compensation, some artists are hesitant to allow corporations to profit off their graffiti art, claiming that their reputation as a street artist “rests on the idea that [they] won’t sell out to corporate interests.”¹⁷⁹ Some believe that permitting corporations to gain highly sought after “street credibility” through their work will harm their “street credibility” in return.¹⁸⁰ When General Motors used graffiti artist Smash 137’s mural in a 2016 Cadillac ad campaign, for example, Smash 137 claimed that it “damage[d] his reputation, especially because he has carefully and selectively approached any association with corporate culture and mass-market consumerism.”¹⁸¹

On the other hand, other artists are celebrating the chance to have greater control over their work. Those who celebrate *Castillo* have long desired this kind of control. For instance, the 1983 documentary, “Style Wars,” features graffiti artists wishing they could use New York City subways as canvases without fear of their work being covered up or erased.¹⁸² Additionally, Banksy has protested people taking his art off the streets and selling it.¹⁸³

Very few graffiti artists have taken action against those who copy their work. For some, it is in effort to protect their reputation; for others, it is because it would require them to step out from behind their veil of anonymity and possibly face prosecution for their illegal acts.¹⁸⁴ When artists do bring misappropriation lawsuits, most end in settlement.¹⁸⁵ For example, in 2014, popular Miami street artist, David Anasagasti, became one of the first graffiti artists to attempt to enforce his rights.¹⁸⁶ He sued American Eagle for

178. *Id.*

179. *Id.*

180. *Id.*

181. Sarah Cascone, *Who Owns Graffiti? A Judge Allows a Street Artist’s Lawsuit Against General Motors to Move Forward*, ARTNET (Sept. 21, 2018), <https://news.artnet.com/art-world/judge-greenlights-street-artists-copyright-lawsuit-against-gm-1352788> [https://perma.cc/2HJJ-AP2C].

182. Friedman, *supra* note 177.

183. *Id.*

184. Brain Downey, *The Writing is On the Wall—Who Owns Rights in Graffiti?*, METROPRENEUR (Dec. 15, 2016), <https://themetropreneur.com/columbus/the-writing-is-on-the-wall-who-owns-rights-in-graffiti/> [https://perma.cc/4WJF-VRMJ].

185. Cloon, *supra* note 155, at 61.

186. Bill Donahue, *American Eagle, Street Artist Settle Copyright Suit*, LAW360 (Dec. 2,

copyright infringement, alleging the unauthorized use of his signature “droopy eyes” in its advertisements, website, social media, and store displays.¹⁸⁷ Albeit a strong case for traditional copyright infringement, the case ended in settlement.¹⁸⁸ In 2017, six street artists accused the fast food company, McDonald’s, of copyright infringement after McDonald’s used the artists’ works in a promotional video titled “McDonald’s Presents the Vibe of Bushwick NY,” without the artists’ consent.¹⁸⁹ The artists sued the company for damages, claiming McDonald’s used their street art to try and enhance its brand image.¹⁹⁰

At minimum, *Castillo* will increase the likelihood that companies will require additional due diligence to clear the use of graffiti in their products and advertisements.¹⁹¹ Due diligence may simply involve finding the artist who curated the work and clearing the use of said work. H&M, for example, contacted the New York City Parks and Recreation Department for permission of its use of graffiti art as a backdrop in one of its campaigns, but because it failed to find the artist, it had not done enough to protect against an infringement allegation.¹⁹²

At issue in each of these misappropriation cases was whether the artists could enforce their copyright for graffiti art. Prior to *Castillo*, copyright protection for graffiti was a novel concept. For those wishing to enforce copyright infringement, it was unclear whether the legal protection extended to art on public walls, even if the art was created legally. Now, a federal court has determined that graffiti art may qualify for copyright protection if it has achieved recognized stature. To avoid potential lawsuits, commercial users should first obtain permission before featuring another artist’s work in any commercial use fashion. Companies should be exceedingly wary before using street art in advertisements or

2014), <https://www.law360.com/articles/600542/american-eagle-street-artist-settle-copyright-suit> [<https://perma.cc/5G7W-NW95>].

187. *Id.*

188. *Id.*

189. Anna Louie Sussman, *Six Street Artists Threaten McDonald’s with Copyright Infringement Lawsuit*, ARTSY (Apr. 19, 2017), <https://www.artsy.net/article/artsy-editorial-six-street-artists-threaten-mcdonalds-copyright-infringement-lawsuit> [<https://perma.cc/MR5D-DT8A>].

190. *Id.*

191. Scholz, *supra* note 174.

192. Jeanna Amatulli, *People Are Boycotting H&M Over Alleged Infringement of an Artist’s Graffiti*, HUFFPOST (Mar. 15, 2018), https://www.huffpost.com/entry/hm-boycott-graffiti-copyright-infringement_n_5aaa835ce4b045cd0a6f5083 [<https://perma.cc/A6WS-JWJ3>].

products, as *Castillo* has opened the door to the idea that graffiti is a protectable art form.

V. *CASTILLO'S* REFLECTION ON THE CHANGING LANDSCAPE OF GRAFFITI ART

The *Castillo* court's recognition of graffiti as a work of recognized stature demonstrates just how far graffiti has come, and the potential for more claims brought forth by graffiti artists may result in courts providing artists even more control over their work. The prospect of control over one's work may encourage creativity in return, incentivizing artists to create and innovate.¹⁹³

Throughout the past decade, street art has continued to gain credibility among artists, those in the artistic community, and the public in general. As a genre of art once considered only in the context of crime and vandalism, street art now holds a prominent role in the modern market of consumerism. Street artist, Merlot, claims that Instagram may have had a hand in this.¹⁹⁴ Even if a piece of graffiti in Detroit gets covered up overnight, it can live on through the internet forever. Another artist, Graves, attributes it to maturation.¹⁹⁵ Generations raised with an appreciation for street art are growing up. They are becoming business owners and public officials and influencing what buildings and streets should look like.¹⁹⁶

Street art is now being recognized as a catalyst in gentrifying New York and other major cities.¹⁹⁷ Antigraffiti enforcement tactics like New York City's Graffiti-Free NYC were developed on the notion that graffiti brings property values down, but many cities have in fact experienced the contrary.¹⁹⁸ 5Pointz, for instance, was credited with transforming a crime-infested neighborhood in Queens to the largest and most popular aerosol art space in the

193. See Lior Zemer, *On the Value of Copyright Theory* (Aug. 12, 2006), <https://ssrn.com/abstract=1657855> [<https://perma.cc/2ZX6-6TSS8>].

194. Brendan Kiley, *COVID and Black Lives Matter Brought an Explosion of Street Art to Seattle. But Graffiti Was Already Having a Moment*, SEATTLE TIMES (Aug. 22, 2020), <https://www.seattletimes.com/entertainment/visual-arts/covid-and-black-lives-matter-brought-an-explosion-of-street-painting-to-seattle-but-graffiti-was-already-having-a-moment/> [<https://perma.cc/URZ2-8697>].

195. *Id.*

196. *Id.*

197. See Alioto, *supra* note 21.

198. See *id.* (describing an increase in rent in Long Island City following the rise in popularity of graffiti mecca 5Pointz).

world.¹⁹⁹ As hundreds of tourists flocked the area daily, rent in the surrounding neighborhoods increased.²⁰⁰

Additionally, a 2016 Warwick Business School study analyzed the relationship between photos of street art and London property values.²⁰¹ Their research revealed that neighborhoods with a higher proportion of street art experience increase in property prices.²⁰² In America, as crime rates dropped in the 1990s, college graduates began moving away from the suburbs and into the cities.²⁰³ They sought an “authentic” urban culture, and graffiti was that culture’s poster child.²⁰⁴ This migration into the city brought with it a rise in real estate prices.²⁰⁵

Even more significantly, graffiti now appears and sells in museums, art exhibits, and galleries worldwide.²⁰⁶ In fact, some museums in New York and Paris *only* exhibit graffiti.²⁰⁷ Arguments in favor of placing street art into museums have mixed reviews within the artistic community.²⁰⁸ Artists in support of the movement claim that some pieces are so “awe-inspiring” they merit preservation.²⁰⁹ “The museum is something to glorify, . . . not a graveyard,” argued Camillo Tarozzi, an expert in the restoration of historical art.²¹⁰ Despite some pushback, Tarozzi insists it is imperative that street art be protected from its “eventual destruction.”²¹¹

199. *Id.*

200. *Id.*

201. *Does More Art Mean Higher Property Prices?*, WARWICK BUS. SCH. (May 20, 2016), <https://www.wbs.ac.uk/news/does-more-art-mean-higher-property-prices/> [<https://perma.cc/9Z99-4FX5>].

202. *Id.*

203. Alioto, *supra* note 21.

204. *Id.*

205. *Id.*

206. See Lisa N. Howorth, *Graffiti*, in HANDBOOK OF AMERICAN POPULAR CULTURE, 555 (M. Thomas Inge ed. 1989) (noting that in 1985, a graffiti painting by Jean-Michel Basquiat sold for \$20,900 at a gallery auction).

207. Gómez, *supra* note 13, at 641.

208. Compare Sade Ford, Emily Liu & Samantha Jeannot, *Does Street Art Belong in a Museum?*, KAIROS (Fall 2017), <https://kairosmagazine.rutgers.edu/does-street-art-belong-in-a-museum/> [<https://perma.cc/5KA7-7JFD>], with Shaul Setter, *Everything That's Wrong With Putting Graffiti in a Museum*, HAARETZ (Jan. 29, 2019), <https://www.haaretz.com/israel-news/premium/MAGAZINE-everything-that-s-wrong-with-putting-graffiti-in-a-museum-1.6891010> [<https://perma.cc/E3P8-WLP8>].

209. Ford et al., *supra* note 208.

210. *Id.*

211. *Id.*

Not all graffiti artists are pleased, though, and many object to removing graffiti from city walls to be placed into museums and galleries. “Street art is meaningless if it’s not where it was made originally. . . . The artist was inspired by its original place,” said street art enthusiast, Letizia Caroscio.²¹² Artists like Caroscio argue that street art loses its validity once it is installed in a museum or sold at a gallery—that once it is removed from the social setting in which it was made, it no longer holds the same meaning.²¹³ Banksy famously made a statement to this notion when he destroyed one of his most famous paintings, just moments after it was sold for \$1.4 million.²¹⁴ He secretly installed a shredder into the frame of his painting “Girl with Balloon,” and seconds after it was sold at Sotheby’s auction house, the painting self-destructed, shredding itself as onlookers watched.²¹⁵

Many credit the rise in the marketability of graffiti art to Banksy, whose true identity has never been made public.²¹⁶ Banksy’s art often encompasses political and social commentary and has been used to speak to what is happening in society.²¹⁷ People pay attention to Banksy because he is one of the most well-known street artists in the world, but street art has been used as a political tool for decades. Political statements within graffiti gained popularity around the late 1960s.²¹⁸ In May 1968, the walls of Paris illustrated the words “[s]ous les pavés, la plage,” which translates to ‘under the paving stones, the beach,’ reflecting the freedom to be found under the French society.²¹⁹ In their attempt to overthrow the French government, protestors used graffiti as a tactic to reach a large audience and encourage solidarity.²²⁰

212. *Id.*

213. Setter, *supra* note 208.

214. Andrew Liptak, *One of Banksy’s Paintings Self-Destructed Just After It Was Auctioned*, VERGE (Oct. 7, 2018, 10:04 AM), <https://www.theverge.com/2018/10/7/17947744/banksy-balloon-girl-artwork-self-destructed-sothbys> [[https://perma.cc/ RP33-Y54K](https://perma.cc/RP33-Y54K)].

215. *Id.*

216. Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 48, 48–49 (2015).

217. *Id.* at 48.

218. Emily Colucci, *Occupying the Walls: Graffiti as Political Protest*, HYPERALLERGIC (Oct. 25, 2011), <https://hyperallergic.com/38778/occupying-the-walls-graffiti-as-political-protest/> [<https://perma.cc/RB5Z-MVZC>].

219. *Id.*

220. *See id.*

It was around this time tags began popping up in the streets of Philadelphia, New York, and other major American cities.²²¹ To some, graffiti was no more than vandalism and property damage. But to others, it became a way to communicate, a political tool within reach that had the potential to lead to tangible change. Artists used city walls to tell stories of social movements and create a sense of belonging within their community. In Los Angeles, Latino graffiti artists were known for creating murals that told stories of their ethnicity to educate the community children of their heritage.²²² In 1986, Keith Haring painted a mural with the words “Crack is Wack!” on an abandoned basketball court in East Harlem in response to the citywide crack epidemic.²²³ It quickly rose to fame, drawing nationwide recognition of graffiti as an art form and as a method of reaching the public in nontraditional ways.²²⁴

Today, street art is still often created for the purpose of sparking political protest—it is “an important part of the grand tradition of American dissent.”²²⁵ Even political graffiti will feel the impact of *Castillo*, because granting more protection to artist’s street art will likely fuel the creation of more street art as a result. Just as the graffiti phenomenon of New York City came about following political corruption in the 1970s, similar conditions have given rise to the explosion of graffiti unfolding around the nation just half a century later. In 2020, over forty million Americans were left unemployed following the onset of the COVID-19 pandemic.²²⁶ On top of that, cases of black citizens dying at the hands of police appeared to multiply by the day.²²⁷ On May 25, 2020, a police officer killed

221. *Id.*

222. Michelle Bougdanos, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y. L. SCH. J. HUM. RTS. 549, 560 (2002) (citing Gómez, *supra* note 13, at 650; and then citing MELBA A. LEVICK & STANLEY YOUNG, *THE BIG PICTURE: MURALS OF LOS ANGELES* (1988)).

223. Katherine McGreath, *Keith Haring’s Crack is Wack Mural in New York City Gets a Second Life*, ARCHITECTURAL DIGEST (Aug. 19, 2019), <https://www.architecturaldigest.com/story/crack-is-wack-keith-haring-mural-in-new-york-city-gets-second-life> [<https://perma.cc/A7DL-497V>] (noting that this mural was refurbished and repainted in 2019 so that it could continue to “instruct and inspire”).

224. *Id.*

225. Holmes, *supra* note 20.

226. *U.S. Jobless Claims Pass 40 Million: Live Business Updates*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/unemployment-stock-market-coronavirus.html> [<https://perma.cc/6FKG-JKZJ>].

227. *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/MS63-MNUA>].

forty-six year old George Floyd by kneeling on his neck after arresting him for allegedly using a counterfeit bill.²²⁸ His death was just a drop in the bucket of police brutality against minorities in the foregoing years, but it ignited worldwide protests against systemic racism in the United States.²²⁹ In response to the killings of George Floyd, Breonna Taylor, Ahmaud Arbery, Tony McDade, and many others, artists worldwide took to the streets to express their outrage.²³⁰ Driven by the desire to reform the political system, graffiti artists covered city walls, using their art to educate communities in hopes of sparking activism and solidarity. Syrian artists, Aziz Asmar and Anis Hamdoun, painted “I can’t breathe,” George Floyd’s famous last words, across a wall in Idlib; Italian artist, Jorit Agoch, created a mural of George Floyd alongside revolutionaries like Angela Davis, Martin Luther King Jr., Malcom X, and Vladimir Lenin in Naples; and Eme Freethinker drew a portrait of George Floyd on the Berlin Wall.²³¹

Some of the political street art was commissioned as well. In Washington, D.C., Mayor Muriel Bowser commissioned a street mural with letters fifty feet long spelling out “BLACK LIVES MATTER” across two city blocks leading to the White House.²³² Following suit, artists across the nation joined in the Black Lives Matter movement to use street art as a primary form of activism.²³³ In Raleigh, North Carolina, artists and protestors painted “END RACISM NOW” in big letters on a public street.²³⁴ In Richmond, Virginia, one graffiti artist engaged the local community, including

228. *George Floyd is Killed by a Police Officer, Igniting Historic Protests*, HIST. (May 24, 2021), <https://www.history.com/this-day-in-history/george-floyd-killed-by-police-officer> [<https://perma.cc/Y5X6-3P6X>]; see also Dickinson Wright, *Black Lives Matter Murals: Intellectual Property vs. Real Property Rights*, JD SUPRA (July 9, 2020), https://www.jdsupra.com/legalnews/black-lives-matter-murals-intellectual-83384/#_ftn1 [<https://perma.cc/7KAH-RCJK>].

229. Eliot C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/NX48-5G3T>]; see also Dickinson Wright, *supra* note 228.

230. McLaughlin, *supra* note 229; Rani Boyer, *How Graffiti Artists Are Propelling the Vision of the Black Lives Matter Movement*, ARTSY (July 20, 2020), <https://www.artsy.net/article/artsy-editorial-graffiti-artists-propelling-vision-black-lives-matter-movement> [<https://perma.cc/BU4X-83N6>].

231. Boyer, *supra* note 230.

232. Dickinson Wright, *supra* note 228.

233. *Id.* (including cities like Brooklyn, New York; San Francisco, California; Austin, Texas; Cincinnati, Ohio; and Charlotte, North Carolina).

234. *Id.*

artists and children, to paint words and phrases like “unity,” “our street,” and “BLM” on the barriers surrounding the controversial (now removed) Robert E. Lee statue.²³⁵

Graffiti quickly gained momentum as a method to propel the Black Lives Matter vision, with its inherent storytelling powers used as a method to raise awareness within communities. However, despite the growing recognition of Black Lives Matter-inspired street art, artwork illegally placed will likely still be subject to property owners’ desires. Even if a piece of graffiti art would achieve protection under VARA, courts will likely deny the artist relief if the graffiti has been installed without the property owner’s permission. Nonetheless, the *Castillo* decision will provide greater protection for these street artists and will likely stimulate more artwork as a result.

CONCLUSION

Street art’s reputation has certainly transformed throughout the decades. At its height in the 1990s, it was regarded as criminal and illegitimate. But as neighborhoods began to embrace it and corporate America sought after it, questions on whether the copyright protections set forth in VARA extended to graffiti grew in importance. *Castillo v. G&M Realty L.P.* became the first federal court to analyze street art under VARA, and its decision provided greater clarity in the previously grey area of law. Following, other courts now have the opportunity to weigh in on the issue and provide more transparency on graffiti artists’ rights that are still left unanswered. The *Castillo* holding suggests that more cases will soon come forward that will inevitably shed light on the scope of street artists’ rights under VARA. As the nation and the world come together in recognition of graffiti art as a tool to lead to real political change, the *Castillo* ruling will light the way for a broader scope of control for graffiti artists overall.

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235. Boyer, *supra* note 230.

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