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Alina Ladyzhinskaya  
*Touro Law Center*

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## **PROTEST ART AND COPYRIGHT LAW: WEAPONIZING INTELLECTUAL PROPERTY AGAINST SYSTEMIC INEQUALITY AND SOCIAL INJUSTICE**

*Alina Ladyzhinskaya*<sup>\*</sup>

### **ABSTRACT**

The death of George Floyd ignited a powerful modern-day Civil Rights movement that spread across the globe. While some protesters took to the streets to demand change, creators amplified the message of hope and unity through protest street art. Murals of police brutality victims like George Floyd, Breonna Taylor, and Ahmaud Arbery, among many others, appeared in most large cities in the United States and were widely spread on social media. From cave art to modern protest street art, graffiti continues to be a generational medium of expression of the human experience. However, while a handful of artists like Banksy, Keith Haring, and Basquiat are celebrated, lesser-known graffiti artists face prosecution and fines. The cognitive dissonance at the heart of this debate grows more evident as graffiti art is commercialized, while still considered an act of vandalism.

Copyright law has long protected economic rights of artists, encompassing unauthorized reproduction and distribution of the works. Moral rights of artists against destruction and mutilation were ignored until the passage of Visual Artists Rights Act ("VARA") in 1990. Today, 17 U.S.C. § 106A recognizes moral rights of attribution and integrity for a limited category of visual artworks of "recognized stature." By failing to issue legislative guidance defining the "recognized stature" standard, Congress left this critical element to

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<sup>\*</sup> J.D Candidate 2022, Touro College Jacob D. Fuchsberg Law Center; City College of New York, B.A. in Philosophy, 2016. This Note is dedicated to the most influential person in my life, my grandmother Milya. I am forever grateful for the unconditional love and support. I would like to thank my advisor Professor Rena Sepowitz and editor Jennifer Covais for the continued encouragement and guidance.

subjective judicial interpretation. The outcome creates a fundamentally flawed standard that ignores potential prejudice and dislike of graffiti as an art form.

In *Castillo v. G&M Realty LP*, the United States Court of Appeals for the Second Circuit upheld a judgment against a New York developer for painting over graffiti, thereby violating artists' rights under VARA. Although *Castillo* was a landmark case for graffiti artists, its holding further narrowed the scope of VARA. This Note discusses the potential negative effect of *Castillo* on future graffiti art cases litigated under VARA. It also proposes an amendment to VARA which will help limit judicial bias and ensure a fair and equitable application of the law for graffiti artists.

## I. INTRODUCTION

Graffiti has been historically used by artists to break boundaries, defy societal expectations, and tell personal and cultural narratives.<sup>1</sup> The year 2020 will go down in history as a revival of the Civil Rights movement. On March 13, 2020, Breonna Taylor was fatally shot eight times while sleeping in her bed.<sup>2</sup> On May 25, 2020, the whole world watched police officer Derek Chauvin murder George Floyd in broad daylight in Minneapolis.<sup>3</sup> Viewers witnessed a police officer suffocate a man and ignore him as he called out to his mother and cried “I can’t breathe.”<sup>4</sup> Thousands of protesters poured into the streets and marched to demand an end to police brutality and systemic racism.<sup>5</sup> Art became a powerful form of solidarity with the Black Lives Matter movement during this time. Artists turned boarded up plywood windows and storefronts into murals which portrayed the

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<sup>1</sup> Nicole Chavez, *Tens of thousands march in largest George Floyd protests so far in the US*, CNN (Jun. 6, 2020), <https://www.cnn.com/2020/06/06/us/us-george-floyd-protests-saturday/index.html>.

<sup>2</sup> Helier Cheung, *George Floyd: Why the US protests are so powerful this time*, BBC NEWS (Jun. 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905>.

<sup>3</sup> *Id.*

<sup>4</sup> Elliott 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>.

<sup>5</sup> Chavez, *supra* note 1.

collective raw pain and grief of the community.<sup>6</sup> Graffiti artists value the importance of feeling heard and spreading unfiltered political messages.<sup>7</sup> Images of murals were widely circulated on social media and became a vital part of the movement.<sup>8</sup> Artists create vibrant art that represents every piece of the human experience, fueled by oppression, pain, joy, and finally, celebration of their own identity. However, these murals do not receive the same treatment as other artistic works do under the copyright laws. Without an adequate legal framework that analyzes the social impact and importance of the murals, together with its artistic merit, protest art will be destroyed.

The Constitution's copyright clause rests on an economic incentive, rewarding creative intellectual efforts of artists that benefit the general public.<sup>9</sup> The Supreme Court has supported this utilitarian purpose by holding that the primary objective of copyright law is the benefit conferred by the public, bestowed by the genius of the artist.<sup>10</sup> Lower courts have held that copyright law is preferential to economic, rather than moral interests of artists.<sup>11</sup> It is not surprising that under such a scheme, moral rights of artists have been overlooked for years. By contrast, the theory of moral rights deeply engrained in the copyright law of many countries in Europe.<sup>12</sup> Unlike the economic theory behind U.S. copyright law, *droit moral*, or moral rights, represent the personal, noneconomic relationship between an artist and

<sup>6</sup> The Associated Press, *Artists, activists, rush to save Black Lives Matter Murals*, NBC NEWS (Dec. 14, 2020), <https://www.nbcnews.com/news/nbcblk/artists-activists-rush-save-black-lives-matter-murals-n1251113>.

<sup>7</sup> Rani Boyer, *How Graffiti Artists are Propelling the Vision of the Black Lives Matter Movement*, ARTSY (Jul. 20, 2020), <https://www.artsy.net/article/artsy-editorial-graffiti-artists-propelling-vision-black-lives-matter-movement>. "It was important for me to be a part in it, because it was me being heard, instead of being spoken for by someone else," he explained. "I'm from the streets, I'm not in contract with nobody. And that's why I think that public art is a great form for this type of message—I'm not in a contract to make you feel cute, to make you feel comfortable, to make you feel special. I'm here to speak about the issues and truth of it." *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>10</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932); *Kendall v. Winsor*, 62 U.S. 322, 328 (1858); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

<sup>11</sup> *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976). "American copyright law, as presently written, does not recognize moral rights or provide for cause of action for their violation, since the law seeks to vindicate the economic, rather than personal rights of authors." *Id.*

<sup>12</sup> William Fisher, *Theories of Intellectual Property*, in *New Essays in the Legal and Political Theory of Property*, 168, 173 (Stephen R. Munzer ed., 2001).

her artistic work.<sup>13</sup> Today, two commonly recognized moral rights are the right of attribution and the right of integrity and both are codified on an international level in Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).<sup>14</sup>

Over the past three decades, the United States has been moving away from a solely economic approach towards a system which pays deference towards moral rights of artists.<sup>15</sup> In 1990, Congress passed the Visual Artists Rights Act (“VARA”), recognizing moral rights of attribution and integrity for a category of visual artworks of “recognized stature.”<sup>16</sup> However, Congress drafted exceptions to narrow the scope of the applicability of VARA that do not reflect the spirit of the Berne Convention nor adequately protect artists’ moral rights.<sup>17</sup> Among other exceptions,<sup>18</sup> VARA limits protection to visual works on the basis of quality and aesthetic, rather than creation alone.<sup>19</sup> The statute did not define the “recognized stature” standard and left this subjective inquiry up to judicial interpretation.<sup>20</sup>

Until 2020, street art was not protected under VARA. In *Castillo v. G&M Realty LP*,<sup>21</sup> the United States Court of Appeals for the Second Circuit upheld a judgment against a New York developer and ordered him to pay a \$6.75 million statutory award to twenty-one street artists for violating their rights under VARA.<sup>22</sup> The opinion acknowledged that the legislative history of VARA does not define “recognized stature,”<sup>23</sup> and relied on a two-tiered test from *Carter v.*

<sup>13</sup> 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 16:2. (2017).

<sup>14</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 41 (1978) (GUIDE TO THE BERNE CONVENTION). The rights of attribution and integrity were codified in the 1928 Rome revision of the Berne Convention. *Id.*

<sup>15</sup> Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 798 (2001).

<sup>16</sup> 17 U.S.C. § 106A(a)(3) (2012).

<sup>17</sup> Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 947 n.5 (1990).

<sup>18</sup> *See infra* Part IV.

<sup>19</sup> Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1945-46 (2000).

<sup>20</sup> 17 U.S.C. § 106A(a)(3)(B).

<sup>21</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 164 (2d Cir.), *as amended* (Feb. 21, 2020), *cert. denied sub nom. G & M Realty L.P. v. Castillo*, 141 S. Ct. 363, 208 (2020).

<sup>22</sup> *Id.* at 164.

<sup>23</sup> *Cohen v. G & M Realty.*, 320 F. Supp. 3d 421, 437 (E.D.N.Y. 2018).

*Helmsley-Spear, Inc.*<sup>24</sup> To protect her work from destruction, the plaintiff had a burden of showing that the visual art in question has “stature” and is “recognized” by art experts, other members of the artistic community, or by some cross-section of society.<sup>25</sup> The subjectivity of the “recognized stature” standard ultimately presents more issues than solutions. How does a court decide which experts, or “cross section of the community” *objectively* determine what art is worthy of protection?

Despite its growing popularity in today’s art market, street art, also known as graffiti art, struggles to find protection within the statute.<sup>26</sup> Graffiti art is classified as vandalism by city ordinances across the United States because it is often created without the permission or consent of the property owner.<sup>27</sup> To some, the presence of graffiti art is representative of a high crime, decaying neighborhood. However, not all graffiti art is treated the same in the eyes of the public and the law. Artists like Basquiat, Keith Haring, Banksy, and Steve Powers have gained international recognition for their unsanctioned art while lesser-known artists face the law and remain anonymous to avoid prosecution.<sup>28</sup> As a result, street artists’ works are subject to replication, exhibition, and sale without their knowledge and consent.<sup>29</sup> Finally, unsanctioned graffiti art leads to disputes between artists and property owners.<sup>30</sup>

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<sup>24</sup> *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

<sup>25</sup> *Id.*

<sup>26</sup> Unsanctioned street art is street art applied without the property owner’s consent. Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide between Graffiti Art and Intellectual Property Protection*, 7 *Landslide*, no. 5, May/June 2015, at 1.

<sup>27</sup> *Id.*

<sup>28</sup> See *infra* Section II and accompanying text for information about prosecution of street art.

<sup>29</sup> “The list of retailers who have found themselves in disputes with recognized street artists over unconsented-to uses of graffiti includes American Eagle Outfitters, Coach, Fiat, General Motors, H&M, Epic Records, McDonald’s, Mercedes Benz, Moschino, Roberto Cavali and Starbucks.” Katten Muchin Rosenman LLP, *Gambling With Graffiti: Using Street Art on Goods or in Advertising Comes With Significant Risks*, THE NAT’L L. REV. (Aug. 4, 2020), <https://www.natlawreview.com/article/gambling-graffiti-using-street-art-goods-or-advertising-comes-significant-risks>.

<sup>30</sup> Richard A. Herman, *Art Versus Commerce: A Look at the Visual Artists Rights Act*, 97 MICH. BAR J. 26, 29 (2018).

This Note will be divided into seven sections. Section II will discuss the history of graffiti and the distinction between graffiti vandalism and street art. Section III will analyze the development of the European moral right theory that influenced the Berne Convention of 1886. It will also discuss the Berne Convention and the minimalist approach taken by the United States to adhere to and join the Convention. Section V will analyze VARA, its elements and applicability to graffiti art. Section VI will examine the seminal case for graffiti artists, litigated under VARA, *Castillo v. G&M Realty L.P.*, and its potential negative implications. Section VII will propose an amendment to VARA, requiring the courts to consider the cultural and social value of protest street art, with the help of the community, art experts with knowledge about graffiti art, and the use of mandatory advisory juries. Additionally, this section will discuss a balancing test that would weigh the moral rights of the graffiti artist and traditional property rights of the building owner. The recommendations will take into consideration the importance of the art to the community to which it belongs. Finally, Section VII will conclude the Note.

## II. STREET ART: ARTISTIC EXPRESSION OR VANDALISM?

### A. The History of Graffiti

Graffiti, defined as an inscription or drawing made on a public structure, dates back to prehistoric times.<sup>31</sup> A lot of what we know about ancient civilizations has been studied from drawings and hieroglyphics carved into cave walls.<sup>32</sup> One of the earliest known forms of art dates back 10,000 years ago to cave art in Argentina, *Las Cueva de las Manos*.<sup>33</sup> In Italy, epigraphologists learned about the city life of Pompeii by studying graffiti preserved on the walls.<sup>34</sup> An early

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<sup>31</sup> *Graffito*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/graffito> (last visited on Mar. 9, 2021).

<sup>32</sup> *Id.*

<sup>33</sup> *La Cueva de las Manos* stenciled handprints and wall paintings are believed to be a created by different hunter-gatherers who lived in the caves at different time periods. *La Cueva de las Manos*, ATLAS OBSCURA, <https://www.atlasobscura.com/places/la-cueva-de-las-manos-cave-of-hands> (last visited Mar. 9, 2021).

<sup>34</sup> ERNEST L. ABEL & BARBARA E. BUCKLEY, *THE HANDWRITING ON THE WALL: TOWARD A SOCIOLOGY AND PSYCHOLOGY OF GRAFFITI* 139 (1977).

form of graffiti by a Viking mercenary in the Hagia Sophia reads “Halvdan was here.”<sup>35</sup>

In the United States, soldiers used graffiti to bolster spirits and stand in solidarity with one another.<sup>36</sup> During World War II, a depiction of a little bald-headed man with a caption “Kilroy was Here” was seen on battlefields and military bases all over the world.<sup>37</sup> Aerosol artists in Philadelphia and New York led the contemporary street art movement in the late 1960s to celebrate ethnic pride and defy societal laws and expectations.<sup>38</sup> In Los Angeles, Latino street artists created murals to beautify neighborhoods, celebrate Latino culture, as well as educate and inspire children of the *barrio* to self-express and work hard.<sup>39</sup>

Today, graffiti has proliferated in major urban areas all over the world and is no longer confined to the streets.<sup>40</sup> Artists such as Jean Michel Basquiat, Keith Haring and Banksy gained recognition by exhibiting and selling their work in galleries as well as being commissioned to create works that have been on covers of magazines, billboards, store walls, and nightclubs.<sup>41</sup> Street art and graffiti have become a lucrative business in the artworld, with some pieces selling as high as \$1.3 million.<sup>42</sup> Mainly, the motivation behind graffiti has not changed. Kilroy and Halydan wanted to make an impact and have their voice heard by anyone who would see their message on the wall, similar to artists today. From cave art to sixteenth century Italian street

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<sup>35</sup> Goran Blazeski, *The history of graffiti from ancient times to modern days*, THE VINTAGE NEWS (Nov. 17, 2016), <https://www.thevintagenews.com/2016/11/17/the-history-of-graffiti-from-ancient-times-to-modern-days/>.

<sup>36</sup> Owen Edwards, *Kilroy Was Here*, SMITHSONIAN MAG. (Oct. 22, 2020), <https://www.smithsonianmag.com/history/kilroy-was-here-180861140/>.

<sup>37</sup> *Id.*

<sup>38</sup> Marisa A. Gomez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 637 (1993).

<sup>39</sup> *Id.* at 639.

<sup>40</sup> *Id.* at 639-40.

<sup>41</sup> Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAG. (Feb. 13, 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/>.

<sup>42</sup> Elisa Shoenberger, *Despite Graffiti's Global Popularity, Cities Still Criminalize It*, ARTSY (Feb. 14, 2021), <https://www.artsy.net/article/artsy-editorial-despite-graffitis-global-popularity-cities-criminalize>.



art, to modern day murals, graffiti art has been a generational medium of expression of the human experience.<sup>43</sup>

### B. The Fight Against Graffiti

While some believe that graffiti is an important contribution to the contemporary art movement, city ordinances deem it to be vandalism.<sup>44</sup> Graffiti vandalism and street art are commonly confused with one another because of their illegal nature and public display.<sup>45</sup> Opponents do not believe in preserving graffiti because it is a sign of decay and loss of control over the cities in which it appears.<sup>46</sup> The appearance of graffiti invites other “offenders” to congregate and paint more graffiti in that area.<sup>47</sup> Once it appears on private or public property, graffiti clean-up costs are expensive and burdensome on owners and municipalities.<sup>48</sup> Most importantly, graffiti vandalism is commonly done without permission of the property owner. Lack of consent of the property owner is what makes graffiti art illegal at its core.<sup>49</sup>

In 1983, New York City transit police killed artist Michael Stewart after he allegedly tagged a subway station.<sup>50</sup> Graffiti artists

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<sup>43</sup> Blazeski, *supra* note 35.

<sup>44</sup> Adam Nagourney, *Graffiti show renews art-or-atrocity debate*, N.Y. TIMES (Apr. 24, 2011), <https://www.nwaonline.com/news/2011/apr/24/graffiti-show-renews-art-or-atrocity-deba-20110424/>.

<sup>45</sup> Jill C. Weisberg, *The Difference Between Street Art and Graffiti*, SCHRIFT & FARBE DESIGN GRP. (May 16, 2012), <http://schriftfarbe.com/the-difference-between-street-art-and-graffiti>.

<sup>46</sup> Mara Gay, *Bloomberg No Fan of Banksy; Says Graffiti Is a Sign of ‘Decay And Loss of Control’*, N.Y. DAILY NEWS (Oct. 16, 2013), <https://www.nydailynews.com/blogs/dailypolitics/bloomberg-no-fan-banksy-graffiti-sign-decay-loss-control-blog-entry-1.1696757>.

<sup>47</sup> *Broken Window Theory and the Problem of Graffiti*, J. RADFORD GRP. (Mar. 21, 2019), <http://www.jradfordgroup.com/news/broken-window-theory-and-the-problem-of-graffiti/>.

<sup>48</sup> Cathy Ives, *Taxpayer and Environmental Cost of Graffiti in Los Angeles*, GREEN ECO SERV’S. (Jul. 13, 2010) <https://www.greenecoservices.com/taxpayer-and-environmental-cost-of-graffiti-in-los-angeles/>

<sup>49</sup> Heather MacDonald, *Graffiti Is Always Vandalism*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/roomfordebate/2014/07/11/when-does-graffiti-become-art/graffiti-is-always-vandalism>.

<sup>50</sup> Isabel Wilkerson, *Jury Acquits All Transit Officers In 1983 Death of Michael Stewart*, N.Y. TIMES (Nov. 25, 1985), <https://www.nytimes.com/1985/11/25/nyregion/jury-acquits-all-transit-officers-in->

still face grave consequences as they are subjected to fines and jail time for their work.<sup>51</sup> Some cities like Los Angeles, Portland and New York try to halt graffiti art by restricting the sale of spray paint.<sup>52</sup> In Portland, stores selling “graffiti materials” are required to keep a log of purchasers which is subject to search by the police department.<sup>53</sup> In Chicago, the sale of spray paint is entirely prohibited.<sup>54</sup> Artists in Portland or Detroit can be arrested for not receiving a permit from the city, even if they have acquired the permission of the property owner.<sup>55</sup> In addition to these harsh penalties and restrictions, law enforcement agencies and politicians across the country are involving the community in graffiti clean-up initiatives.<sup>56</sup> New York City Police Commissioner Dermot Shea announced a Graffiti Cleanup campaign encouraging members of the community to share locations of graffiti covered areas and assist in clean-up efforts.<sup>57</sup> NYPD will prioritize removal of hate graffiti with offensive slogans or symbols and gang graffiti but will also analyze other forms of street graffiti pieces.<sup>58</sup>

Yet, these efforts against graffiti are challenged by its growing popularity as an artform. Although street art has long secured its place in popular culture, artists are still treated like criminals.<sup>59</sup> Commercialism of graffiti exposes the cognitive dissonance present at

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1983-death-of-michael-stewart.html. Police officers allegedly saw Michael Stewart tag a subway wall, arrested, and beat him. *Id.* He arrived at Bellevue Hospital unconscious, in a coma, and subsequently passed away thirteen days after his arrest. *Id.* Tagging graffiti is a repeated use of a single symbol or series of symbols to mark a territory. *Tagging*, Britannica <https://www.britannica.com/topic/tagging> (last visited on Aug. 9, 2021).

<sup>51</sup> Shoenberger, *supra* note 42.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Art Crime: Graffiti Wars*, THE CRIME REP. (Feb. 22, 2010), <https://thecrimereport.org/2010/02/22/art-crime-graffiti-wars/>.

<sup>57</sup> Dean Moses, *Spring cleaning: Police plan to scrub the graffiti off New York City streets in a big way*, A.M.N.Y. (Mar. 3, 2021), <https://www.amny.com/news/spring-cleaning-commissioner-shea-announced-plan-to-scrub-the-streets-of-graffiti/>.

<sup>58</sup> Reuven Fenton and Amanda Woods, *NYPD launches new graffiti clean-up initiative*, N.Y. POST (Mar. 3, 2021), <https://nypost.com/2021/03/03/nypd-launches-new-graffiti-clean-up-initiative/>.

<sup>59</sup> Shoenberger, *supra* note 42.

the core of this debate.<sup>60</sup> Society cannot continue to celebrate illegally created works of a handful of mainstream artists, while punishing and rejecting most creators.<sup>61</sup>

Street art is monetized by major corporations and businesses to market to a younger audience. In 2018, a prominent street artist Revok and the retailer H&M reached a settlement agreement after the company aired an ad featuring his mural without his permission.<sup>62</sup> However, before agreeing to settle, H&M filed a countersuit alleging that illegally painted work is not subject to copyright protection.<sup>63</sup> H&M subsequently withdrew its complaint and issued a formal statement but not until its brand faced major backlash from the creative community, musicians, and fans.<sup>64</sup> Although this settlement is hardly a win for artists because it was likely a business move, it furthers the point that street art has solidified its place in popular culture and needs to be protected.

Love it or hate it, graffiti has become a well-respected and lucrative artform. However, when it comes to its preservation, it is in the hands of law enforcement. Therefore, what standard is applied when choosing what works are painted over and which ones are not? It appears to be a flexible standard which allows law enforcement to remove graffiti based on their subjective belief of its worth.

### C. Art or Graffiti Vandalism?

To better understand street art, it is important to distinguish between its different styles and the purpose it serves to the artist and his community. “Bombing” and “burning” are two distinct types of graffiti used by artists to convey their own individualized purpose.<sup>65</sup> Although graffiti vandalism and graffiti art are not distinguished by

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<sup>60</sup> Jareen Imam, *From graffiti to galleries: Street vs. public art*, CNN (Aug. 5, 2012), <https://www.cnn.com/2012/08/03/living/ireport-street-art-public-art/index.html>.

<sup>61</sup> *Id.*

<sup>62</sup> Henri Neuendorf, *Street Artist Revok and H&M Settle Dispute Over an Ad That Featured His Work Without Permission*, ARTNET (Sep. 7, 2018), <https://news.artnet.com/art-world/revok-hm-ad-campaign-1345127>.

<sup>63</sup> H&M Hennes & Mauritz GBC AB v. Williams, No. 1:18-cv-01490 (E.D.N.Y. Mar. 9, 2018).

<sup>64</sup> Neuendorf, *supra*, note 62.

<sup>65</sup> Eric Felisbret, *Legal Venues Celebrate Graffiti as an Art Form*, N.Y. TIMES (Jul. 16, 2014), <http://www.nytimes.com/roomfordebate/2014/07/11/when-does-graffiti-become-art/legal-venues-celebrate-graffiti-as-an-art-form>.

law, understanding the motivation behind the works demonstrates that not all artists create with the intention to vandalize.

“Bombing” is accomplished by quickly writing names, usually pseudonyms, and short messages.<sup>66</sup> This style is attributed to gangs and graffiti “taggers.”<sup>67</sup> Gangs create graffiti to claim their territory and send messages to their rivals.<sup>68</sup> Gang members are motivated by fear and intimidation of their rival gangs and society at large.<sup>69</sup> Gang graffiti constitutes less than ten percent of street graffiti, despite the negative connotation it has in the public eye.<sup>70</sup> On the contrary, taggers work alone or in a team and create graffiti to achieve fame and recognition by tagging as many locations as possible.<sup>71</sup> These artists are not violent and do not mean to threaten anyone, but their work may be confused with gang graffiti because of its sporadic nature.

The simple and individualistic nature of “bombing” is easily distinguishable from “burning.” Burner murals are well respected in the graffiti community because of their complex and sophisticated nature.<sup>72</sup> Street artists use their art as self-expression and communication with other artists and the public.<sup>73</sup> They speak out against social and political issues which affect marginalized communities which they are a part of. Street artists work with communities to create murals to give that community a voice and shine a light on their identity.<sup>74</sup> Most protest art consist of burner murals and deliver messages of hope, peace, and strength.

Burning and bombing are two different styles of graffiti, and neither is inherently motivated by the same factors. Distinguishing among the two styles is the first step in differentiating vandalism from

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<sup>66</sup> *Id.*

<sup>67</sup> Gomez, *supra* note 38, at 644-45.

<sup>68</sup> *Id.* at 644.

<sup>69</sup> Laura Neitzel, *Uncover the hidden messages in graffiti*, POLICE1 (Nov. 5, 2018), <https://www.police1.com/police-products/intelligence-led-policing/articles/uncover-the-hidden-messages-in-graffiti-lnDPf0rss30Lp4LQ/>.

<sup>70</sup> *Why do Graffiti Taggers Tag?*, GOODBYE GRAFFITI, <https://goodbyegraffitiusa.com/why-do-graffiti-taggers-tag/> (last visited Mar. 10, 2021).

<sup>71</sup> *Id.*

<sup>72</sup> *Street Art and Graffiti Words, The Ultimate Glossary*, BERLIN STREET ART (Mar. 4, 2018), <https://berlinstreetart.com/graffiti-words/>.

<sup>73</sup> Gomez, *supra* note 38, at 650.

<sup>74</sup> Caryn Carver, *How street art can transform communities*, GLOB. CITIZEN (Jan. 10, 2016), <https://www.globalcitizen.org/en/content/how-street-art-can-transform-communities/>.

street art. Additionally, this distinction will facilitate our society's eventual appreciation and understanding of street art. This is particularly crucial when analyzing protest art pieces, which are worthy of protection and preservation under our existing copyright laws.

#### D. Protest Art Should Be Protected

Cities over the world have responded to the changing attitudes towards graffiti. In Lisbon, graffiti is legal as long as an artist officially submits a proposal requesting an authorization from the city council.<sup>75</sup> In 2008, Lisbon's city council established the Department of Cultural Heritage with a mission to promote graffiti and street art "in an official and authorized scope, in opposition with the illegal acts of vandalism."<sup>76</sup> Since its conception, the project succeeded in encouraging urban art collaborations with both the private and the public sector.<sup>77</sup> Urban Art Gallery has partnered with Google Art Project and contributes to it newly created urban art section.<sup>78</sup> In Bogota, the police killing of a 16-year-old street artist Diego Felipe Becerra profoundly shaped street art policing reform.<sup>79</sup> In 2013, Gustavo Petro, the mayor of at the time, issued a Decree 75 to regulate graffiti, regardless of artistic merit and quality.<sup>80</sup> This decree granted multiple sizeable public walls in Bogotá to be used as a canvas for

<sup>75</sup> Anna, *A local's guide to Lisbon Street Art*, DISCOVER WALKS BLOG (Nov. 11, 2018), <https://www.discoverwalks.com/blog/a-locals-guide-to-lisbon-street-art/>.

<sup>76</sup> Galeria De Arte Urbana, *Urban Art Galery (GAU)*, <http://gau.cm-lisboa.pt/en/gau.html> (last visited Sept. 17, 2021).

<sup>77</sup> *Id.* The city of Lisbon utilizes structured spaces for authorized graffiti to combat vandalism. *Id.*

<sup>78</sup> World Cities Culture Forum, *Revitalizing The Urban Landscape With Striking Large-Scale Street Art*, [http://www.worldcitiescultureforum.com/case\\_studies/urban-art-gallery](http://www.worldcitiescultureforum.com/case_studies/urban-art-gallery) (last visited Sept. 12, 2021).

<sup>79</sup> Sibylla Brodzinsky, *Artist's shooting sparks graffiti revolution in Colombia*, THE GUARDIAN (Dec. 30, 2013), <https://www.theguardian.com/world/2013/dec/30/bogota-graffiti-artists-mayor-colombia-justin-bieber>.

<sup>80</sup> Germán Gomez, *Grffiti-the arbitrariness of "beautiful"*, THE NATURE OF CITIES, <https://www.thenatureofcities.com/2016/03/23/graffiti-and-street-art-can-be-controversial-but-can-also-be-a-medium-for-voices-of-social-change-protest-or-expressions-of-community-desire-what-how-and-where-are-examples-of-graffiti-as-a-posi/> (last visited Sept. 12, 2021).

political and cultural expression.<sup>81</sup> At the same time, the decree clearly defined spaces which are off-limits to graffiti artists, such as public buildings and monuments.<sup>82</sup> This decree allowed graffiti artists to rely on a level of security and a legally protected space to create their art work.<sup>83</sup> Several Italian regional governments have also allocated designated spaces for artists.<sup>84</sup> Italy is the first country to direct funds in support of street artists with a purpose of promoting creativity and reducing lawsuits and fines associated with graffiti.<sup>85</sup>

The year of 2020 is no different from other times of tragedy and injustice in the United States.<sup>86</sup> American artists have creatively responded to World War II, the Vietnam War, and the Civil Rights movement of 1950s and 1960s through protest art.<sup>87</sup> Protest art demonstrates the goals and demands of the movement through public art pieces.<sup>88</sup> The murder of George Floyd brought a powerful revival of a civil rights movement to protest systemic racial injustice against African Americans in the United States. Within this movement, street artists create works to provide an empathetic narrative and focus the national attention on the civil rights crisis.<sup>89</sup> Other street artists amplify the message of the Black Lives Matter movement — a call for acknowledgement and accountability for dehumanization of Black lives at the hands of law enforcement.<sup>90</sup> Protest art invites the viewer to participate in the movement through its compelling imagery, without marching in a protest or being otherwise active. Floyd's last words, "I Can't Breathe" spray painted in a public space forces the

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<sup>81</sup> Brodzinsky, *supra* note 79.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Visala Alagappan, *Italian Street Art Law and the Crime of Expression*, CENTER FOR ART LAW (Jul. 20, 2021), <https://itsartlaw.org/2021/07/20/italian-street-art-law-and-the-crime-of-expression/>.

<sup>85</sup> *Id.*

<sup>86</sup> Nora McGreevy, *How Artists are Responding to the Killing of George Floyd*, SMITHSONIAN MAG. (Feb. 26, 2021) <https://www.smithsonianmag.com/smart-news/heres-how-artists-are-responding-killing-george-floyd-180975036/>.

<sup>87</sup> *Id.*

<sup>88</sup> Susan A. Phillips, *Op-Ed: 'Say Their Names': How graffiti is cutting to the heart of the protests*, L.A. TIMES (Jun. 14, 2020, 3:05 AM), <https://www.latimes.com/opinion/story/2020-06-14/graffiti-protests-los-angeles>.

<sup>89</sup> *Id.*

<sup>90</sup> *#DefundThePolice*, BLACK LIVES MATTER (May 30, 2020), <https://blacklivesmatter.com/defundthepolice/>.

viewer to bear witness to his murder.<sup>91</sup> The words “Am I Next” are a visual reminder that if no systemic change or reform is to take place, law enforcement will take another life.<sup>92</sup>

Additionally, street art allows graffiti artists to participate in an otherwise elitist art world without wealth, connections or approval of curators and art critics.<sup>93</sup> It is difficult for minorities and people of color to break through the barrier when their art is still illegal.<sup>94</sup> The meaning behind their works is overlooked because their narratives and struggles are not likely to be understood by someone outside of their community.<sup>95</sup> However, street artists are not driven to create for fame or recognition and do not seek approval. They demand systemic change and equality, using the streets as their canvas.

Today, graffiti art is undoubtedly an important part of popular culture. Street art has been a catalyst for gentrification in New York City, driving up real estate prices by bringing in suburban college graduates who want to experience the “authentic” urban culture.<sup>96</sup> Property owners hire street artists to create murals and art pieces to attract young renters and visitors.<sup>97</sup> Social media helps spread the word about specific locations of street art and people come from all over to take a photo of themselves next to it.<sup>98</sup> Additionally, business

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<sup>91</sup> Phillips, *supra* note 88.

<sup>92</sup> *Id.*

<sup>93</sup> Evan Beard, *The Four Social Classes of the Art World*, ARTSY (Nov. 23, 2018), <https://www.artsy.net/article/artsy-editorial-four-social-classes-art>.

<sup>94</sup> Caroline Choi, *Street Art Activism: What White People Call Vandalism*, HARVARD POL. REV. (Oct. 21, 2020), <https://harvardpolitics.com/street-art-activism/>.

<sup>95</sup> *Archivists, Curators and Museum Technicians*, DATA USA, <https://datausa.io/profile/soc/archivists-curators-museum-technicians#:~:text=Race%20%26%20Ethnicity&text=85.4%25%20of%20Archivists%2C%20curators%2C,or%20ethnicity%20in%20the%20occupation> (last visited Feb. 26, 2021). “85.4% of Archivists, curators, & museum technicians are White (Non-Hispanic), making that the most common race or ethnicity in the occupation. Representing 4.99% of Archivists, curators and museum technicians, White (Hispanic) is the second most common race or ethnicity in this occupation.” *Id.*

<sup>96</sup> Daisy Alioto, *How Graffiti Became Gentrified*, THE NEW REPUBLIC (Jun. 19, 2019), <https://newrepublic.com/article/154220/graffiti-became-gentrified>.

<sup>97</sup> Sara Goodyear, *The Art of Encouraging Graffiti*, BLOOMBERG CITY LAB (Nov. 5, 2015), <https://www.bloomberg.com/news/articles/2015-11-05/to-fight-unwanted-tagging-some-new-york-building-owners-are-turning-to-graffiti-murals>.

<sup>98</sup> Alex Leonard, *8 Ways How Murals Can Help Businesses To Grow*, LINKEDIN (May 29, 2019), <https://www.linkedin.com/pulse/8-ways-how-murals-can-help-businesses-grow-alexander-leonard/>.

owners use graffiti art to connect to the community which they serve.<sup>99</sup> Because of its commercialization and growing acceptance graffiti art should be entitled to protection under the copyright laws.

After years of systemic inequality and police brutality, protests demanding justice for black Americans erupted throughout major cities in the United States.<sup>100</sup> The video of Floyd's vicious death sparked international outrage and activists took to the streets to demand change.<sup>101</sup> Police officers nationwide were not properly trained to handle such large-scale demonstrations.<sup>102</sup> Instead, they were heavily armed and employed the use of teargas, rubber bullets, pepper spray grenades, and foam marker rounds for de-escalation.<sup>103</sup> Despite the protests being largely peaceful, many believe that demonstrators were not responding appropriately to Floyd's murder and are trying to incite violence and destroy property.<sup>104</sup> These negative and false narratives are largely due to the mainstream media outlets, such as CNN and FOX News, focusing on looting and vandalism within the movement.<sup>105</sup> Additionally, President Trump made numerous divisive comments by labeling all protesters violent "thugs" and tweeting "when looting starts, the shooting starts."<sup>106</sup> Trump has also vilified protest muralists by labeling their art as a

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<sup>99</sup> *Id.*

<sup>100</sup> Jason Silverstein, *The global impact of George Floyd: How Black Lives Matter protests shaped movements around the world*, CBS NEWS (Jun. 4, 2021), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/>.

<sup>101</sup> *Id.*

<sup>102</sup> Kim Barker et al., *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES, <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html> (last updated Jun. 28, 2021).

<sup>103</sup> Tobi Thomas, et al., *Nearly 1,000 instances of police brutality recorded in US anti-racism protests*, THE GUARDIAN (Oct. 29, 2020), <https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest>.

<sup>104</sup> The Armed Conflict Location & Event Data Project, *Demonstrations & Political Violence in America: New Data For Summer 2020*, ACLED (Sept. 2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>. In more than 93% of all demonstrations connected to the movement, demonstrators have not engaged in violence or destructive activity.

*Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Tommy Beer, *Trump Called BLM Protesters 'Thugs' But Capitol-Storming Supporters 'Very Special'*, FORBES (Jan. 6, 2021), <https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/?sh=3177d6043465>.



“symbol of hate,” which led to their subsequent defacement and destruction.<sup>107</sup>

America was founded on a belief that “all men were created equal” and afforded fundamental natural rights such as “Life, Liberty, and the pursuit of Happiness.”<sup>108</sup> The Declaration of Independence supports the right of the people “to alter or to abolish” a government that threatens these fundamental rights.<sup>109</sup> In the light of the “long train of abuses and usurpations” against Black Americans and minority groups, protesting “is their right ... to throw off such Government, and to provide new Guards for their future security.”<sup>110</sup> Like traditional forms of protest such as marches and rallies, protest art calls out for social justice and reform using aesthetic approaches. The following section analyzes the emergence and development of copyright law in Europe from the theory of natural rights and its subsequent adoption in part in American copyright law.

### III. PHILOSOPHICAL DEVELOPMENT OF COPYRIGHT LAW IN EUROPE AND THE BERNE CONVENTION

Modern copyright law emerged from early sixteenth century printing monopolies.<sup>111</sup> In England, the Crown played an influential role in publishing by granting royal licenses to control printed works as a means of suppressing dissidence.<sup>112</sup> Books published during the Protestant Reformation criticizing the Catholic Church and the monarchy were illegal and punishable by law.<sup>113</sup> In 1557, the Catholic Queen Mary and King Philip decreed a royal charter to the Worshipful

<sup>107</sup> Victor Luckerson, *The Defacement of Destruction Of Black Lives Matter Murals*, THE NEW YORKER (Nov. 19, 2020), <https://www.newyorker.com/news/us-journal/the-defacement-and-destruction-of-black-lives-matter-murals>.

<sup>108</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S 1776).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Jane C. Ginsburg, *Overview of Copyright Law*, OXFORD HANDBOOK OF INTELL. PROP. LAW, ROCHELLE DREYFUSS & JUSTINE PILA, EDS., OXFORD UNIV. PRESS, 2018; COLUMBIA PUB. LAW RSCH. PAPER NO. 14-518 (2016).

<sup>112</sup> PATRY, *supra* note 13.

<sup>113</sup> PATRY, *supra* note 13. In 1485, Henry VI appointed the Savoyard Peter Actors as the King's Stationer. Actors were given the license “to import, so often as he likes, from parts beyond the seas, books printed and not printed into the port city of London, and other places within the kingdom of England.” *Id.* In 1504, in the Tudor dynasty, Henry VII appointed William Facques, a Norman, as the first royal printer, granting him the exclusive right to print official documents. *Id.*

Company of Stationers of London, a group of leading publishers at the time.<sup>114</sup> Even though the Stationers were not allowed to print freely, the charter authorized them to police printing by seizing illegally printed books and imprisoning the violators.<sup>115</sup>

The Enlightenment Era brought a wave of change which was inconsistent with the limiting and oppressive practices of the Stationers.<sup>116</sup> In 1710, after a proposal from the Stationers, Parliament enacted the Statute of Anne which allowed the Stationers to hold on to their monopoly over printing rights.<sup>117</sup> The Statute of Anne was first to explicitly vest copyright in the creator.<sup>118</sup> However, the statute was limited to written works and merely granted authors the exclusive right to print them for a specific term.<sup>119</sup> The preamble and the body of the statute mentioned the rights of authors and “proprietors.”<sup>120</sup> The Stationers still maintained proprietary rights under the statute and retained their authority to reproduce and distribute authors’ published works.<sup>121</sup> Even though the Statute of Anne was a step in the right direction, it furthered censorship and dominance over works by the Stationers and did little to change the existing copyright framework.<sup>122</sup> John Locke opposed the actions of the Stationers and developed a natural rights theory that influenced the development of copyright law.<sup>123</sup>

Locke’s philosophy supports both the economic model of the U.S. Constitution,<sup>124</sup> but also recognizes the importance of moral rights of artists in their works.<sup>125</sup> Under Locke’s natural rights theory, natural rights are human rights which are inalienable and should be enjoyed by all human beings by the virtue of being members of society.<sup>126</sup> *Le Droit d'Auteur*, or “author’s rights,” recognized that moral rights are

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<sup>114</sup> Ginsburg, *supra* note 100, at 2.

<sup>115</sup> PATRY, *supra* note 13.

<sup>116</sup> 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 1:9 (2017).

<sup>117</sup> Public Act, 8 Anne., c.19 (Gr. Brit. 1710).

<sup>118</sup> Ginsburg, *supra* note 111, at 3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> PATRY, *supra* note 116.

<sup>122</sup> *Id.*

<sup>123</sup> Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1297 (2003).

<sup>124</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>125</sup> J. Janewa Osei-Tutu, *Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus*, 20 VAND. J. ENT. & TECH. L. 207, 226 (2017).

<sup>126</sup> *Id.*

granted at birth, are personal, and non-pecuniary.<sup>127</sup> Moral rights are inherent in the creation and interest of the work of the artist.<sup>128</sup> Unlike economic rights, moral rights protect both the creative process and control over the finished work,<sup>129</sup> embracing the “sacred bond” that exists between the author and her creation.<sup>130</sup> In support of the economic model, Locke argued that every person is capable of creating a property interest in her own person that only she has a right to.<sup>131</sup> Under this theory, “he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind.”<sup>132</sup> Locke argued that the benefit of the author was to be shared and benefit society as a whole.<sup>133</sup> The philosophical framework of weaving economic and moral rights of authors gave rise to copyright laws and a social acceptance of authorship rights worldwide.

The growth of international commerce and widespread literary piracy demonstrated a need for a universal copyright protection of authors’ works.<sup>134</sup> Individual countries worked out bilateral trade agreements based on material reciprocity which guaranteed protection of each other’s copyrighted works under their own individual substantive law.<sup>135</sup> Since the system of reciprocity was complicated and shortly proven to be ineffective,<sup>136</sup> forming a multilateral

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<sup>127</sup> Elizabeth Schéré, *Where Is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 FORDHAM INT’L L.J. 773, 775 (2018).

<sup>128</sup> *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 18 (1989) (statement of Rep. Edward J. Markey) (“[T]oo often a work is treated simply as a physical piece of property, rather than as an intellectual work, like a novel. But artworks are intellectual expression, not just physical property ... . This bill recognizes that title to the soul of an artwork does not pass with the sale of the artwork itself.”).

<sup>129</sup> Schéré, *supra* note 127, at 775.

<sup>130</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 11 (4th ed. 2015).

<sup>131</sup> Garon, *supra* note 123, at 1297.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> COHEN, *supra* note 130, at 35.

<sup>135</sup> Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J. L. & TECH. 1, 8 (1988).

<sup>136</sup> *Id.* at 9. A system of material reciprocity requires the courts of state A to interpret laws of state B in order to determine whether country B gives adequate and reciprocal protection to an author from country A. Thus, the courts in country B would, potentially, have to interpret the copyright laws from many different countries in administering international copyright relations. *Id.* at 69 n.45.

agreement among nations invited uniformity of copyright law and substantive protection for authors.<sup>137</sup> The agreement that followed was the most influential international copyright treaty for over a century, the Berne Convention for the Protection of Literary and Artistic Works of 1886 (“Berne Convention”).<sup>138</sup>

The Berne Convention lays out three basic principles with which all signatories must comply.<sup>139</sup> First, under the theory of national treatment, works must be given the same protection in the signatory country as they would in their own.<sup>140</sup> By doing so, the Convention expressly granted foreign artists protection from discrimination outside of their borders.<sup>141</sup> Second, the treaty provides automatic protection of copyrighted works as soon as they are created, not contingent on compliance with procedural formalities of registration.<sup>142</sup> Third, protection in the country of origin is governed by domestic law, applicable to both national and foreign authors.<sup>143</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 170 (2016). “The Berne Convention was first adopted by Belgium, France, Germany, Great Britain, Haiti, Italy, Spain, Switzerland, and Tunisia on September 9, 1886, in Berne, Switzerland, and was later revised at several conferences: Paris, 1896; Berlin, 1908; Berne, 1914; Rome, 1928; Brussels, 1948; Stockholm, 1967; and Paris, 1971.” *International Copyright, History of The Berne Convention*, JRANK, <https://law.jrank.org/pages/5738/Copyright-International-History-Berne-Convention.html#ixzz6YpK00xpU> (last visited Feb. 22, 2021). “Today, 178 out of 195 countries in the world today have become signatories.” *Berne Convention*, COPYRIGHT HOUSE, <https://copyrighthouse.org/countries-berne-convention/> (last visited, Feb. 22, 2021).

<sup>139</sup> Burger, *supra* note 124, at 15.

<sup>140</sup> *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), WORLD INTELL. PROP. ORG., [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html#\\_ftnref](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html#_ftnref) (last visited Feb. 22, 2021).

<sup>141</sup> Burger, *supra* note 124, at 16.

<sup>142</sup> WORLD INTELL. PROP. ORG., GUIDE TO THE BERNE CONVENTION 33 (1978). The word “formality” must be understood in the sense of a condition which is necessary for the right to exist – administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright. *Id.*

<sup>143</sup> *Id.* at 34.

### A. Moral Rights; Article 6bis of the Berne Convention

The 1928 Rome revision of the Berne Convention officially codified moral rights of authors on the international level.<sup>144</sup> Article 6bis(1) of the Convention recognized the rights of paternity and integrity: moral rights which exist independent from the author's economic rights.<sup>145</sup> The right of paternity allows the author to assert that she is the work's creator.<sup>146</sup> The author may also publish anonymously or pseudonymously, with the option of later changing her mind and abandoning anonymity.<sup>147</sup> Finally, the author may prevent the use of her name applied to works she did not create.<sup>148</sup>

The right of integrity protects the author from any derogatory action which is prejudicial to the author's reputation.<sup>149</sup> This protects works from modification and total destruction.<sup>150</sup> Among the Berne Convention signatories, France provides its authors comprehensive legal protection with a predominant emphasis on their moral rights.<sup>151</sup> The legal framework of Article 6bis is deeply rooted in the philosophical doctrine of *Le Droit d'Auteur*.<sup>152</sup>

On a basic level, Article 6bis was inconsistent with existing copyright law of the United States because the goal of American copyright law is to protect economic rights of the author.<sup>153</sup> The motivation behind the United States joining the Convention nearly one

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<sup>144</sup> *Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A report of the Register of Copyrights*, U.S. COPYRIGHT OFFICE, (Apr. 2019), <https://www.copyright.gov/policy/moralrights/full-report.pdf>.

<sup>145</sup> “Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to *claim authorship of the work* and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” The Berne Convention for Protection of Literary and Artistic Works art. 6bis(1), Jul. 24, 1971, 828 U.N.T.S. 221. Contrast these rights with the three types of attribution rights created by the Visual Artists Rights Act of 1990. 3 NIMMER ON COPYRIGHT § 8D.01 (2019).

<sup>146</sup> Burger, *supra* note 124, at 41.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 423 (1999).

<sup>152</sup> Schéré, *supra* note 127, at 775.

<sup>153</sup> U.S. CONST. art. I, § 8, cl. 8.

hundred years later<sup>154</sup> was to enjoy its benefits without necessarily expanding any rights of American authors. Those who benefitted from commercially exploiting artists would be disadvantaged by the enforcement of moral rights protections, subjecting themselves to potential litigation.<sup>155</sup> Until VARA was passed in 1990, there was no statutory grant of moral rights protection under American law.

## **B. Protection of Moral Rights in the United States Prior to VARA**

Before Congress passed VARA that protected moral rights of artists, the Lanham Trademark Act stood as the sole statute for artists to claim the right to be identified with their work.<sup>156</sup> Section 1125(a) forbids “...any false designations of origin, false descriptions of fact, or false or misleading representations of fact, which – (A) is likely to cause confusion, or to cause a mistake....”<sup>157</sup> The Second Circuit in *Gilliam v. American Broadcasting Companies*<sup>158</sup> held that altering artists’ work without their consent created a false representation of the product which rendered it deformed and therefore subject to protection under the Lanham Act. The appellants, a group of British writers and performers famously known as “Monty Python,” had a licensing agreement with BBC which entitled BBC to license the transmission of the entirety of the recordings to any overseas territory.<sup>159</sup> Subsequently, ABC began to broadcast the Monty Python programs but omitted about twenty seven percent of the original recording.<sup>160</sup> The court reasoned that the editing “contravened contractual provisions that limited the right to edit Monty Python material” and violated the applicable copyright statute.<sup>161</sup> The Second Circuit held

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<sup>154</sup> Deborah Ross, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. REV. 363, 367 (1990).

<sup>155</sup> Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 805 (2001). “It is a fair statement that those who commercially exploit the works of authors (e.g., publishers and motion picture producers and distributors), all whom would be economically disadvantaged by enforcement of extensive moral rights protections, were successful in their lobbying efforts.” *Id.*

<sup>156</sup> *Id.* See also Lanham Trademark Act, *codified, as amended*, at 15 U.S.C. §1052 *et seq.* (1946).

<sup>157</sup> 15 U.S.C § 1125(a)(A).

<sup>158</sup> *Gilliam*, 538 F.2d at 24.

<sup>159</sup> *Id.* at 17.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 19.

that the editing created a false representation of the product which rendered it deformed and therefore subject to protection under the Lanham Act.<sup>162</sup> Most importantly, the court stated that “copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.”<sup>163</sup> However, in *Dastar v. Twentieth Century Fox*,<sup>164</sup> the Supreme Court declined to apply § 43(a) to enforce copyright holders’ right of attribution and warned against overextending trademark protection to copyright issues. The Court’s decision in *Dastar* reflects the long standing sentiment against moral rights protection in the United States.

### C. United States Joins the Berne Convention

The United States was one of the last developed countries to join the Convention, becoming a signatory by taking the “minimalist” approach to ratification and amending only parts of the Copyright Act of 1976, which were required for its membership.<sup>165</sup> On October 31, 1988, President Ronald Reagan signed the Berne Convention Implementation Act (BCIA), finally enabling United States to adhere to the Berne Convention.<sup>166</sup> Section 2(3) of the BCIA stated that United States copyright law already encompassed all the protections required by the Berne Convention<sup>167</sup> and that United States’ adherence to the Convention “do[es] not expand or reduce any right of an author” to assert the rights of attribution and integrity in any copyrightable work.<sup>168</sup>

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<sup>162</sup> *Id.* at 24.

<sup>163</sup> *Id.* at 23.

<sup>164</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003).

<sup>165</sup> Ross, *supra* note 154, at 367.

<sup>166</sup> *Id.* at 363. The moral rights provision of Article 6*bis* was one protection not incorporated into American law. *Id.* at 367.

<sup>167</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853 (1988) (stating that “[t]he amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.”)

<sup>168</sup> *Id.* at § 3(b).

Under the United States Constitution, art is not legally distinguishable from any other kind of property.<sup>169</sup> The courts recognized that U.S. copyright law sought “to vindicate the economic, rather than personal rights of authors.”<sup>170</sup> The framers of the Constitution embraced this principle by attempting to create “a marketable right for the creators and distributors of copyrighted works, which in turn create[d] an incentive for production and dissemination of new works.”<sup>171</sup> This benefits the authors by allowing them to charge the public for access to their work.<sup>172</sup> The public is benefitted by the advances in “science and useful arts” which can be accessed free of charge once the works reach the public domain.<sup>173</sup>

Additionally, some argued that moral rights were inconsistent with the “longstanding contractual and business arrangements” protected under the American legal system and would “threaten investment in and public dissemination of the arts.”<sup>174</sup> In *Federal Moral Rights Legislation: The Need for Caution*,<sup>175</sup> Professor Robert Gorman strongly opposed adopting moral rights into the American legal framework.<sup>176</sup> He argued that the collaborative nature of the entertainment and cultural industries would inevitably lead to modification and distortion of the original works.<sup>177</sup> This potentially introduces the threat of litigation and delays public access to artistic works, harming public interest.<sup>178</sup> He also argued that such legislation would only inhibit creativity by placing a limit on producers and publishers who wish to disseminate works in secondary markets.<sup>179</sup> The American legal system values freedom of contract and introducing

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<sup>169</sup> Bella Karakis, *Moral Rights: French, United States and Soviet Compliance with Article 6bis of the Berne Convention*, 5 *TOURO INT’L L. REV.* 105, 120 (1994).

<sup>170</sup> Gilliam, 538 F.2d at 24.

<sup>171</sup> COHEN, *supra* note 130, at 7.

<sup>172</sup> *Id.*

<sup>173</sup> U.S. CONST. art. I, § 8, cl. 8; Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System’s Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 *MICH. TELECOMM. & TECH. L. REV.* 169, 173 (2016).

<sup>174</sup> Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 *NOVA L. REV.* 421, 422 (1990).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 424.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*



moral rights into these agreements would complicate contractual matters.<sup>180</sup>

Although advocating for contractual rights over moral rights may have merit as it applies to producers and publishers, it fails to adequately protect the artist and her work. Professor Gorman thoroughly discussed the rights of producers and publishers and the collaborative effort of cultural industries, yet failed to consider that without the artist herself, these industries would be obsolete. It is not the limit placed on these industries to alter the original works that would inhibit creativity, it is the restriction placed on artists to relinquish their moral rights to their works. By failing to adequately protect moral rights, Congress would not incentivize artists to work for industries which may freely destroy and alter their work. This is the primary reason why the limited scope of moral rights would harm the public good.

It is no surprise then, that Congress did not prioritize granting moral rights to artists. Until 1990, existing property and contractual rights did not adequately protect both economic and moral rights of artists.

#### IV. THE VISUAL ARTISTS RIGHTS ACT OF 1990 (VARA)

American copyright law did not sufficiently adhere to the Berne Convention and excluded moral rights protection for artists.<sup>181</sup> Senator Edward Kennedy and Representative Robert Kastenmeier introduced two moral rights bills which were incorporated and passed

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<sup>180</sup> *Id.*

<sup>181</sup> Damich, *supra*, note 17, at 946 n.5 (1990); See *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. 408 (testimony of Sydney Pollack, on behalf of the Directors' Guild of America), 426 (testimony of Frank Pierson on behalf of the Writers' Guild of America), 446 (testimony of William Smith), 798-800 (letter and attachment from W. Robert Thompson on behalf of SESAC, Inc. to Hon. Robert W. Kastenmeier), 927 (letter from Dan Rosen, Assoc. Prof. of Law Loyola Univ., to Hon. Robert W. Kastenmeier), 932 (letter from Marion Weiss on behalf of University Film and Video Association to Hon. Robert W. Kastenmeier) (1987-88); *The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 100th Cong. 2d Sess. 480 (testimony of George Lucas), 502-03 (testimony of Steven Spielberg on behalf of the Directors' Guild of America), 606 (statement of Jack Golodner, Director, Dept. of Professional Employees, AFL-CIO) (1988).

as the Visual Artists Rights Act of 1990 (“VARA”).<sup>182</sup> VARA was the first federal legislation passed to protect moral rights of artists.<sup>183</sup> VARA’s purpose is to “promote the Progress of Science and useful Arts” and failing to protect moral rights of artists would harm public welfare.<sup>184</sup> At the Congressional Hearings, Professor Jane Ginsberg testified that preservation of artists’ works will enhance “our cultural heritage” and further “enhance the creative environment in which artists labor.”<sup>185</sup> Even under the many imposed limitations, it is still evident that the United States started to move towards separating the economic and moral rights of artists, as the Berne Convention intended almost one hundred years ago.<sup>186</sup>

The scope of protection under VARA was narrowly drafted and has not fulfilled its obligations under the Berne Convention.<sup>187</sup> Even though this was a victory for visual artists in the United States, it still did not comply with the protection entitled to artists under Article 6*bis*.<sup>188</sup> The limited protection extends to visual works only, whereas 6*bis* encompasses *all* literary and artistic works.<sup>189</sup> VARA protects “works of visual art,”<sup>190</sup> defined as:

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated, sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is

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<sup>182</sup> *Id.*

<sup>183</sup> 17 U.S.C. § 106A.

<sup>184</sup> Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intell. Prop. & the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong. 82 (1990) (statement of Prof. Jane Ginsburg) (emphasizing “interests of artists and public alike”).

<sup>185</sup> *Id.*

<sup>186</sup> 17 U.S.C. § 106A.

<sup>187</sup> Damich, *supra* note 17, at 947.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> 17 U.S.C. § 101.

signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Congress intended to create a narrow working definition for what constitutes a “work of visual art” to avoid interfering with other copyright works which require a collaborative effort.<sup>191</sup> Since there are multiple people involved in the process of creating such works, Congress was primarily concerned with each party’s specific goal.<sup>192</sup> Legislators feared that rights of other copyright owners would be subject to “undue interference with the successful operation of the American copyright system.”<sup>193</sup>

VARA does not provide the right of anonymity and pseudonymity.<sup>194</sup> Excluding this right is problematic for graffiti artists, who may choose to remain anonymous to avoid punishment and prosecution. Under VARA, artists may waive their rights in a signed agreement.<sup>195</sup> This is inconsistent with *6bis*, which recognizes inalienability of moral rights, where the authors still retain interest in their work.<sup>196</sup> The failure to adopt this element ignores the psychological nexus between the author and his work by allowing this connection to be severed and contracted away.<sup>197</sup> This noncompliance with the Berne Convention is indicative of the unwillingness to embrace moral rights of artists of all works.

#### A. The Right of Attribution and Integrity under

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<sup>191</sup> Marko Iglendnza, *Moral Rights Protection Under the Visual Rights Act of 1990: The Judicial Interpretation in Carter v. Helmsley-Spear*, 5 DEPAUL J. ART, TECH. & INTELL. PROP. L. 187, 193 (1995).

<sup>192</sup> *Id.* at n.34.

<sup>193</sup> *Id.* at 194.

<sup>194</sup> Damich, *supra* note 17, at 947. “Under *6bis*, this right entitles authors to publish their works anonymously and a right to stop publishing anonymously.” *Id.* “The Copyright Act confers copyrights on the works of anonymous and pseudonymous authors.” *Id.*

<sup>195</sup> 17 U.S.C. § 106A(e).

<sup>196</sup> Doriane Lambelet, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 490 (1987).

<sup>197</sup> *Id.*

### VARA

VARA grants the right of attribution which protects the honor and reputation of the artist as well as grants an author a claim of ownership of her work.<sup>198</sup> An artist can access this right by clearly signing her name in a place that is not easily missed by an observer.<sup>199</sup> Second, an author has a right to prevent the attachment of her name to works that she did not create.<sup>200</sup> Third, the author has “the right to prevent the use of the author's name as author of the work if the work has been distorted, mutilated, or modified so as to prejudice the author's honor or reputation.”<sup>201</sup> In determining what is deemed prejudicial, the House Report suggested a “flexible standard”<sup>202</sup> which protects the integrity and honor of an author.<sup>203</sup> Unlike the Berne Convention, VARA protects the right of integrity and protects the author’s work against “distortion, mutilation and modification” only if the work is of “recognized stature.”<sup>204</sup>

The courts are required to use the “recognized stature” standard to determine if an artist’s artwork is entitled to protection from destruction under VARA.<sup>205</sup> The standard is a departure from the Berne Convention because it offers protection on a basis of quality and aesthetic, rather than creation alone, therefore limiting the number of qualifying works.<sup>206</sup> To qualify for protection, the plaintiff bears the burden of showing that the artwork has stature that is recognized by art experts, critics, or by other members of the artistic community.<sup>207</sup> Works do not have to necessarily equate to famous artists such as “Picasso, Chagall or Giacometti” to be considered of recognized stature.<sup>208</sup> Even in the absence of expert testimony, courts have been

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<sup>198</sup> 17 U.S.C. § 106A(a)(1)(A).

<sup>199</sup> 3 NIMMER ON COPYRIGHT § 8D.06 (2019), citing S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, 467 (1987).

<sup>200</sup> 17 U.S.C. § 106A(a)(1)(B).

<sup>201</sup> 17 U.S.C. § 106A(a)(2).

<sup>202</sup> H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 15 (1990).

<sup>203</sup> *Id.* at 16.

<sup>204</sup> 17 U.S.C. § 106A(a)(3)(A).

<sup>205</sup> 17 U.S.C. § 106A(a)(3)(A).

<sup>206</sup> Robinson, *supra* note 19, at 1945-46.

<sup>207</sup> *Carter*, 861 F. Supp. at 324. Even though the decision was ultimately reversed in part because the work constituted a work for hire, the standard presented by the court should apply to independent works. *Id.*

<sup>208</sup> *Id.*

able to apply the recognized stature standard based on newspaper articles, letters and catalogues.<sup>209</sup> In *Bleistein v. Donaldson Lithographing Co.*,<sup>210</sup> the Supreme Court noted the importance of having a standard that courts can apply in deciding which works are entitled to protection under the statute. If judges were able to unilaterally decide which work is considered worthy, it may be possible that many works would not meet the threshold requirement.<sup>211</sup> Ultimately, the Court held 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.”<sup>212</sup>

A work can be considered of “recognized stature” - even before it is destroyed, seen by the public, or completed.<sup>213</sup> The fact that the person mutilating the art did not recognize it or did not deem it as distinguished is not dispositive.<sup>214</sup> If defendants were able to plead ignorance as a defense, no artist would be able to rely on VARA’s protection, therefore rendering the Act purposeless.<sup>215</sup> Since one of the policy motivations behind VARA is to protect “the artist’s self interest in preservation of his or her works as to enhance his or her reputation as an artist,”<sup>216</sup> it would be harmful to ignore artists’ interests upon the creation of the work.

The “recognized stature” test presents issues for artists who must show that their work is meritorious to qualify for protection. This could potentially deny protection to artwork that is misunderstood and disliked, even if it may be undeniably important to some cross section of the community, particularly when it comes to street art. Since graffiti is illegal, the recognized stature standard is a difficult one to reach unless courts would be willing to apply the standard with greater flexibility.

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<sup>209</sup> *Martin v. City of Indianapolis*, 192 F.3d 608, 612-13 (7th Cir. 1999).

<sup>210</sup> *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 251.

<sup>213</sup> *Pollara v. Seymour*, 150 F. Supp. 2d 393, 399 (N.D.N.Y. 2001).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 398.

<sup>216</sup> 17 U.S.C. § 106A(a)(3)(A).

## B. Removability and Consent

Graffiti artists are entitled to relief if their art can be safely removed from a building and the building owner fails to inform the artist of her intent to remove the art.<sup>217</sup> This is one of the most important statutory exceptions available to graffiti artists at this time. An artwork is non-removable if its removal from a “building will cause the destruction, distortion, mutilation, or other modification of that work.”<sup>218</sup> If the artwork can be safely removed, the artist is entitled to relief if the building owner fails to make a diligent, good faith attempt to notify the artist of his intent to remove the art.<sup>219</sup> Additionally, the artist is entitled to relief if the building owner provides notice but fails to grant the artist ninety days upon receipt of notice to remove the work or pay for its removal.<sup>220</sup> Subsection (3) of § 113(d) allows artists to register their identity and the location of the art with the Copyright Office.<sup>221</sup> This subsection also allows property owners to register their attempts to comply with the procedural requirements under VARA.<sup>222</sup> Graffiti artists can benefit from § 113(d) because property owners who have not complied with these requirements will be subject to liability. Additionally, property owners’ diligent efforts to register their attempts to contact the graffiti artist can be fatal to an otherwise legitimate VARA claim.

Since graffiti is still socially unacceptable and even punishable by law in the United States, many artists are afraid to sign or “tag” their work and cannot be easily located.<sup>223</sup> Additionally, artists cannot rely on VARA to protect their art if they consented in writing that the installation may be subject to destruction if it is to be removed.<sup>224</sup> Understanding the distinction between removable and non-removable works is imperative towards determining the rights of parties in a lawsuit. Since graffiti is generally non-removable, and the artist does not give consent subjecting their art to potential destruction, the artist

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<sup>217</sup> 17 U.S.C. § 113(d).

<sup>218</sup> 17 U.S.C. § 113(d)(1)(A).

<sup>219</sup> *Id.*

<sup>220</sup> 17 U.S.C. § 113(d)(2)(A)(B).

<sup>221</sup> 17 U.S.C. § 113(d)(3).

<sup>222</sup> *Id.*

<sup>223</sup> *Martin*, 192 F.3d at 611. In the opinion, the court stated that “VARA seems to be a stepchild of our copyright laws but does not require copyright registration.” *Id.*

<sup>224</sup> 17 U.S.C. § 113(d)(1)(B).

can enjoy rights afforded to them under §§ 106A(a)(3)(A) and (B).<sup>225</sup> This becomes important when discussing the property rights of owners versus the moral rights of graffiti artists. Courts have taken on the issue of the applicability of VARA when the artist work is placed on a building without the property owner's consent. In *English v. BFC&R East 11th Street LLC*,<sup>226</sup> the Second Circuit held that VARA does not apply to artworks that are illegally placed on the property. The court noted that extending protection to graffiti works would be "constitutionally troubling" and "defy rationality" and would effectively allow artists to freeze development on future construction sites.<sup>227</sup> In, *Pollara v. Seymour*,<sup>228</sup> the court questioned the broad holding of the *English* court. Specifically, the court clarified that *English* is limited to non-removable works.<sup>229</sup> Additionally, the court held that VARA does not grant property owners a general right to destroy works of art which are on their property without their permission.<sup>230</sup> The legal battle between moral rights of graffiti artists under VARA and constitutionally protected rights of property owners is clearly unsettled.

## V. CASTILLO V. G&M REALTY L.P. AND ITS AFTERMATH

### A. Procedural History

*Castillo v. G&M Realty L.P.* was a landmark case for graffiti artists and proponents of moral rights recognition in copyright law.<sup>231</sup> This case provided much-needed guidance in understanding and applying VARA, particularly the "recognized stature" standard.

In 2002, defendant Wolkoff and plaintiff Cohen entered into a verbal agreement to allow Cohen to use his 200,000 square foot warehouse as an exhibition space for graffiti artists.<sup>232</sup> Wolkoff allowed Cohen to curate the space and bring in graffiti artists of his

<sup>225</sup> Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 CIV.1226 DAB, 2003 WL 21403333, at 9 (S.D.N.Y. Jun. 17, 2003).

<sup>226</sup> *English v. BFC&R E. 11th St. LLC*, 1997 WL 746444, at \*4 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom. English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999).

<sup>227</sup> *Id.*

<sup>228</sup> *Pollara v. Seymour*, 150 F. Supp. 2d 393, 399 n.4. (N.D.N.Y. 2001).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Castillo*, 950 F.3d at 164.

<sup>232</sup> *Cohen v. G & M Realty*, 988 F. Supp. 2d 212, 218 (E.D.N.Y. 2013).

choice.<sup>233</sup> He welcomed these creative efforts because he admittedly recognized the high level of artistry of Cohen and his artists.<sup>234</sup> In the art world, Cohen was a principal contributor to graffiti art and was famously known as “Meres One.”<sup>235</sup> Cohen renamed the site to “5Pointz” and curated an artistic forum of graffiti artists from all over the world.<sup>236</sup> For a span of eleven years, Cohen and his artists worked on the space and created roughly 10,650 art pieces.<sup>237</sup> 5Pointz was labeled as a “graffiti mecca,” attracting many locals and tourists.<sup>238</sup>

Eventually, Wolkoff decided to knock down the existing structures to convert the site to two luxury apartment complexes.<sup>239</sup> As one of the conditions for the issuance of the building permit, the City Planning Commission required Wolkoff to erect 3,300 square feet of exterior panels to maintain artists’ street art.<sup>240</sup> Fearing that their artwork was going to be demolished, Cohen applied for a temporary restraining order to prevent Wolkoff from demolishing the site, which was granted.<sup>241</sup> When the temporary restraining order expired, Cohen sought preliminary injunctive relief which was denied on November 12, 2013.<sup>242</sup> Granting a preliminary injunction requires, *inter alia*, a showing that irreparable harm will be suffered by the movant in the absence of the granted relief.<sup>243</sup> In a written opinion, Judge Block concluded that Cohen and his artists should have known the temporary nature of their art work because of the possibility of Wolkoff’s redeveloping the property.<sup>244</sup> Nevertheless, he also acknowledged that if the trial court found that the graffiti was of “recognized stature,” Cohen would be entitled to a substantial monetary award for its

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 220.

<sup>235</sup> *Id.* at 219.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 220.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 214.

<sup>242</sup> *Cohen v. G & M Realty*, 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018).

<sup>243</sup> *Cohen*, 988 F. Supp. 2d at 225.

<sup>244</sup> *Id.* at 224. “Cohen and his fellow plaintiffs undoubtedly understood that the nature of the exterior aerosol art on Wolkoff’s buildings was transient, and that all of the works that he allowed to be painted on the buildings would last only until they would be demolished to make room for Wolkoff’s housing project....” *Id.*



ultimate destruction because temporary works of art are protected under VARA.<sup>245</sup>

Without waiting for the court to issue a written opinion, Wolkoff banned the artists from coming onto the property and whitewashed all the works overnight.<sup>246</sup> Without being able to prevent the destruction of their works, the plaintiffs shifted their focus to seeking a remedy for destruction of *5Pointz*.<sup>247</sup> At trial, both parties waived a jury and the trial was held before an advisory jury instead.<sup>248</sup> The advisory jury found that Wolkoff willfully violated the artists' VARA rights in destroying 36 out of 49 of the artworks.<sup>249</sup> Even though the findings of the advisory jury were not binding on the court, they served an important role of permitting community participation and the public's view of morality.<sup>250</sup> The court held that liability should attach to all 49 of the works and the plaintiff should be entitled a full statutory award of \$6,750,000.<sup>251</sup>

Wolkoff moved to set aside the court's findings of fact and conclusions of law, which the district court denied.<sup>252</sup> Wolkoff further appealed the judgment of the district court on the ground that that the graffiti art in question did not qualify for protection because it was not of recognized stature.<sup>253</sup> Additionally, Wolkoff argued that the court erred and abused its discretion in awarding the maximum statutory award for the destruction of each work.<sup>254</sup> He supported this by attempting to show that the record did not reflect that he willfully destroyed the *5Pointz* site.

## **B. Holding of the United States Court of Appeals for**

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<sup>245</sup> *Id.* at 214.

<sup>246</sup> *Id.*

<sup>247</sup> *Cohen*, 320 F. Supp. 3d at 435.

<sup>248</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 165 (2d Cir.), *as amended* (Feb. 21, 2020), *cert. denied sub nom. G & M Realty L.P. v. Castillo*, 141 S. Ct. 363, 208 (2020).

<sup>249</sup> *Id.*

<sup>250</sup> *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002).

<sup>251</sup> *Id.*

<sup>252</sup> *Castillo*, 950 F.3d at 164.

<sup>253</sup> Brief for Petitioners, *G&M Realty L.P. v. Castillo*, at 25 (2020) (No. 20-\_\_\_).

<sup>254</sup> *Id.* at 31.

### the Second Circuit

On February 20, 2020, the Second Circuit brought an astounding victory to the artists by affirming the decision of the lower court and holding that graffiti may achieve “recognized stature” under VARA.<sup>255</sup> The court rejected both arguments offered on appeal, focusing its attention on a multitude of evidence from experts and other artists as to the quality of the art.<sup>256</sup>

In reviewing the case, the Second Circuit acknowledged that VARA does not explicitly state what constitutes an artwork of “recognized stature,” but the court stated that the component of stature needs to be evaluated based on artistic quality.<sup>257</sup> The work of recognized stature is one of high quality, status, or caliber that has been acknowledged by a relevant community.<sup>258</sup> Since one of the goals of VARA is public interest in preservation of the nation’s culture, this goal is accomplished by letting the people play the determinative factor, rather than the court, in deciding what work is of recognized stature.<sup>259</sup> The court held that experts deemed the 5Pointz graffiti art meritorious and the graffiti artists behind the works were internationally recognized by the art world.<sup>260</sup> On the issue of willfulness, the court found inconsistencies in Wolkoff’s affidavit and testimony at trial about the time construction was supposed to commence.<sup>261</sup> Based on the record, it was apparent that Wolkoff did not whitewash the artwork because of the time constraint for demolition of the site.<sup>262</sup> The court also acknowledged the effect of this egregious whitewashing, not only on the artist, but also on the community.<sup>263</sup>

### C. The Future of the “Recognized Stature” Standard

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<sup>255</sup> *Castillo*, 950 F.3d at 173.

<sup>256</sup> *Id.* at 164.

<sup>257</sup> *Id.* at 166.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Cohen*, 320 F. Supp. 3d at 438.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 165.

<sup>263</sup> *Id.* at 445. “The whitewash did not end the conflict in one go; the effects lingered for almost a year. The sloppy, half-hearted nature of the whitewashing left the works easily visible under thin layers of cheap, white paint, reminding the plaintiffs on a daily basis what had happened.” *Id.*

**Post *Castillo***

The goal of copyright law to encourage creation and dissemination of art is not presently promoted by VARA. The “recognized stature” standard requirement is one of the many departures from the Berne Convention.<sup>264</sup> Aesthetic quality and worth of visual art are now questions of fact for the factfinder and experts to determine.<sup>265</sup> Requiring individuals to make an objective finding based on their subjective opinion is a fundamentally flawed standard that ignores potential prejudice and dislike of graffiti as an art form.

The “recognized stature” test will to be even more stringent after *Castillo*. In making its determination whether 5Pointz qualified for protection under VARA, the court considered the reputation and fame of the artists.<sup>266</sup> In this case, the curator of the space, Jonathan “Meres One” Cohen, is a world-renowned graffiti artist.<sup>267</sup> Cohen has been hired by Fortune 500 companies and appeared in music videos and documentaries.<sup>268</sup> The court stated that “[a]n artist whose merit has been recognized by another prominent artist, museum curator, or art critic is more likely to create work of recognized stature than an artist who has not been screened.”<sup>269</sup> *Castillo* can set a potentially discriminatory precedent for a future plaintiff who is not widely recognized. Courts will be able to use *Castillo* to deny protection to emerging graffiti artists by comparing their work to 5Pointz. In future street art litigation, courts should be mindful that VARA’s legislative history clearly states that “less well-known or appreciated artists also have honor and reputations worthy of protection.”<sup>270</sup>

Protest street art will have a particularly tough time meeting this standard. These works represent systemic racism, inequality, police brutality and social and political issues that African Americans face every day. Leading experts, archivists, curators and museum technicians leading the occupation are predominantly white,<sup>271</sup> which makes it so much more difficult for a graffiti artist of color to anticipate

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<sup>264</sup> Robinson, *supra* note 19, at 1965.

<sup>265</sup> *Id.* at 1966.

<sup>266</sup> *Cohen*, 320 F. Supp. 3d at 438.

<sup>267</sup> Jonathan “Meres One” Cohen- *cbs,otm*, MERES ONE ART, <http://www.meresone.com/about> (last visited Mar. 10, 2021).

<sup>268</sup> *Id.*

<sup>269</sup> *Castillo*, 950 F.3d at 169-70.

<sup>270</sup> H.R. Rep. No. 101-514, at 13 (1990).

<sup>271</sup> DATA USA, *supra* note 95.

an objective opinion.<sup>272</sup> This does not imply that white art experts cannot judge an art work objectively nor does it mean that white art experts are inherently racist. It does mean the experts generally come from different socioeconomic and political backgrounds and do not have the same experience as African Americans do. Additionally, when artwork is charged with a powerful political message, it invites bias and prejudice which may be near to impossible to screen for adequately. VARA asks the court to rely on experts who have historically been unaccepting of graffiti as an artform.

## **VI. “RECOGNIZED STATURE” STANDARD SHOULD BE AMENDED**

### **A. Cultural and Social Importance of Protest Street Art**

For the “recognized stature” test to be effective in protest art litigation, courts must consider the importance of the message and meaning behind the works. Protest art stems from the same rebellious spirit of graffiti, yet, in the case of the Black Lives Matter movement, the protest art represents a cry for help and support for the grieving Black community. The recognized stature standard must also consider the significance of the message behind the art and the importance of that message to the community it represents when determining if the art meets the standard. If the meaning behind the work is not considered, such an interpretation of the standard would undermine the spirit of the Berne Convention.

Courts must admit the opinion of the community as well as art expert opinions into evidence before issuing a ruling. To address the potential prejudice and bias of expert witnesses, the statute should be amended to only allow experts to compare street art to works of similar nature. This would invite other street artists, like Cohen, with

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<sup>272</sup> “An earlier version of VARA provided that a ‘court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature.’” S. 1198, 101st Cong., 1st Sess., 135 Cong. Rec. S6811–13135 Cong. Rec. S6811–13 (daily ed. June 16, 1989). “Although this provision was eliminated from VARA prior to enactment, thus providing courts greater discretion with regard to what sources may be considered in determining whether a given work of visual art is a work of recognized stature, courts can, and should, consider these sources in determining whether a given work is of recognized stature.” *Carter*, 861 F. Supp. at 324 n. 14.

experience creating and curating graffiti art, to present their expert opinion about the artwork. Additionally, the opinion of the community should be considered because its members are most affected by the placement of graffiti and should have a say in its fate. If protest art truly reflects the voice of the community, their opinion would be paramount in establishing the cultural importance of its presence. Advisory juries or committees would be helpful in representing the voices of the relevant cross section of society to ensure that they are not being potentially silenced by prejudicial views of art critics and judges.

### **B. Mandatory Advisory Committees for Protest Art Litigation**

Integrating advisory juries or committees would be helpful in adjudicating protest art cases because of their controversial nature.<sup>273</sup> Under Federal Rule of Civil Procedure 39(c),<sup>274</sup> a judge has discretionary authority to appoint an advisory jury where a jury is not otherwise permitted to preside.<sup>275</sup> The “verdict” rendered by the jury is merely advisory and judges are free to disregard their findings.<sup>276</sup> One court suggested that advisory verdicts serve as additional piece of evidence that are should be taken into consideration when arriving at a conclusion.<sup>277</sup> Other courts suggested that trial judges “must give [advisory verdicts] great weight.”<sup>278</sup> The vagueness of VARA and the subjectivity of “recognized stature” determination would allow advisory juries to maintain legal legitimacy in the courtroom.<sup>279</sup> Additionally, cases involving special factors would greatly benefit from a jury composed of members of the community.<sup>280</sup>

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<sup>273</sup> *Note: Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1371 (1987).

<sup>274</sup> Fed. R. Civ. P. 39(c) (In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties’ consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1376-77.

<sup>280</sup> *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002).

In *Castillo*, the verdict of an advisory jury was taken under advisement in deciding the case because the graffiti art in question required the judgment of the community.<sup>281</sup> The court commended the advisory jury on their extraordinary work and attention to a difficult and tedious task before them.<sup>282</sup> The use of advisory juries in cases of moral rights of protest artists would serve a great use to the court by presenting a different perspective that the judge might not have been exposed to before.

VARA should implement a mandatory advisory committee to preside over every case where moral rights of protest artists are being decided. An advisory committee would serve the same goal of a jury in aiding the court's determination.<sup>283</sup> The committee should be assembled from the residents of the neighborhood in which the artwork is created, regardless of the artist's residency. The role of an advisory committee allows the community to actively participate in the decision-making process of art that applies to them and ultimately represents their struggle. It would be unrealistic to modify the existing Federal Rules of Civil Procedure and take away judges' discretionary authority to utilize advisory juries. VARA should be amended to include the mandatory use of advisory committees in a very narrow protest art exception.

### C. The "Recognized Stature" Balancing Test

VARA should also incorporate a balancing test which weighs the moral rights of graffiti artists under VARA with traditional property rights of building owners. First, the court must establish that the street art in question has social and cultural significance and it is of "recognized stature" compared to other works in the recognized graffiti world. Once that element is established, courts should balance the effect of destruction on the artist and the community with the burden of preservation on the property owner. In *Castillo*, the City Planning Commission required Wolkoff to erect 3,300 square feet of exterior panels to maintain artists' street art and provide seventy-five affordable housing units in the new development.<sup>284</sup> In this case,

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<sup>281</sup> *Cohen*, 320 F. Supp. at 430.

<sup>282</sup> *Id.*

<sup>283</sup> *NAACP*, 226 F. Supp. 2d at 399.

<sup>284</sup> *Cohen v. G & M Realty*, 988 F. Supp. 3d 212, 221 (E.D.N.Y. 2018).

artists were able to protect their artwork and Wolkoff could resume construction of the new development.

An agreement between the property owner and graffiti artist, where the owner grants the artist consent to create an artwork on her property would be one of the most important elements in deciding the fate of the artwork. In such cases, the *Castillo* precedent would apply seamlessly. However, the fate of graffiti works which are created without consent should be subject to high scrutiny to protect the interests of the property owner. Since the case law is not settled on this matter, the courts should consider certain factors in deciding whether an artwork should be preserved.<sup>285</sup> First, the court may look to see if the owner impliedly consented to the artwork being created on her property. The plaintiff can show that because of length of time that the property owner allowed the artist to create and maintain the artwork, the plaintiff had a reasonable expectation that such consent was given. In this case, the owner would have to be on actual or constructive notice of the artwork. This approach would protect property owners if they timely object and wish to remove the artwork. It would benefit the artist who invested time and creative effort into the artwork and the community that might have grown attached to it. By the same token, if the community disapproves of the graffiti, the courts must be able to take that into consideration as well. This would also benefit public policy by encouraging property owners to properly inspect and maintain their property. Abandoned property has historically been shown to breed crime and depress the economy.<sup>286</sup>

Finally, the courts must consider a benefit derived by the property owner because of the popularity of graffiti art. Before 5Pointz was whitewashed, the site received so much recognition that Cohen commonly hosted tours, video and photo shoots on the premises.<sup>287</sup> Social media has contributed to the spread of graffiti in popular culture. Graffiti attracts visitors from all over the world to cities like Philadelphia, Detroit, Los Angeles, and New York to experience urban

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<sup>285</sup> *Pollara*, 150 F. Supp. 2d. at 399 n.4.

<sup>286</sup> Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUS. L. REV. 1385, 1387 (2015).

<sup>287</sup> Rachel Alban, *A Tour of 5Pointz Aerosol Art Center*, UNTAPPED CITIES <https://untappedcities.com/2013/03/13/a-tour-of-5pointz-aerosol-art-center/> (last visited on Mar. 10, 2021).

culture through graffiti.<sup>288</sup> Graffiti contributes to community development by making areas of the city attractive to visitors, driving foot traffic for businesses, and raising the overall value of local real estate.<sup>289</sup> If the property owner was able to derive benefit from an art work in any way, courts should consider it when making a determination.

The balancing test factors listed above are not an exhaustive list, but they would be helpful in guiding the court's analysis. By enacting VARA, Congress intended to extend moral rights to visual artists. By applying the balancing test above, the courts can consider both the rights of the property owner and the graffiti artist.

## VII. CONCLUSION

Undoubtedly, *Castillo v. G & M Realty L.P.* was a tremendous step in the right direction for protecting moral rights of graffiti artists. However, serious limitations set by this precedent must be acknowledged to protect future works of graffiti art. VARA was enacted to protect moral rights of artists effectively safeguarding the intimate relationship between the artist and her work. As it presently stands, VARA does not comply with Article 6bis of the Berne Convention and does not serve the overall goal of copyright law to encourage creation and dissemination of graffiti works.<sup>290</sup> The goal of the statute would be better served by understanding the cultural impact protest art has on the African American communities and their allies. Introducing advisory committees into all protest art litigation would help bridge the gap not only between the legal world and the art world, but communities and their local courts. America desperately needs systemic change and criminal justice reform which cannot happen overnight. There is no better time than now to recognize the vulnerability and the message behind protest art and stand together with the artists.

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<sup>288</sup> Nicole Rupersburg, *The Best Cities in America for Street Art*, THRILLIST (Jul. 7, 2016), <https://www.thrillist.com/travel/nation/best-american-street-art-graffiti-murals>.

<sup>289</sup> *Id.*

<sup>290</sup> Robinson, *supra* note 19, at 2000.