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# FROM THE STREET TO THE COURTROOM: THE LEGALIZATION OF GRAFFITI ART

Meredith Burtin\*

## INTRODUCTION

In 2002, real estate developer Gerald Wolkoff enlisted renowned graffiti artist Jonathan Cohen to turn a group of run-down warehouse buildings Wolkoff owned in Long Island City, New York into an exhibition area for artists.<sup>1</sup> Acting as curator, Cohen recruited other street artists to rent studio spaces in Wolkoff's buildings, and they quickly filled the walls with numerous pieces of artwork, which were often the subject of pertinent social and cultural issues.<sup>2</sup> Depending on the visual outcome and popularity of the piece, some works became permanent fixtures, while others existed just temporarily and were painted over by other artists in a process known as “creative destruction.”<sup>3</sup>

The site, which became known as 5Pointz, housed over 10,600 works of art throughout its existence.<sup>4</sup> It lay in clear view to travelers using the 7-subway line, and it drew the attention of daily visitors, celebrities, and various media outlets.<sup>5</sup> The artwork eventually gained world-wide recognition among artists, art enthusiasts, and casual viewers alike; 5Pointz became a “cultural landmark” in New York, cultivating a strong community focused on celebrating and developing hip-hop, youth, and art culture.<sup>6</sup>

The large-scale graffiti showcase essentially gentrified the city, leading Wolkoff to pursue municipal approval in May 2013 to demolish the buildings and replace them with multimillion-dollar luxury apartments.<sup>7</sup> Upon learning of Wolkoff's intentions, Cohen and several other 5Pointz artists filed a lawsuit against the property owner in the United States District Court for the Eastern District of New York to save their work from devastation.<sup>8</sup> They sued under the Visual Artists Rights Act (VARA)<sup>9</sup>, a federal statute that awards visual artists

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<sup>1</sup> Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d Cir. 2020).

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.*

<sup>5</sup> See Bruce Wallace, *Remembering 5Pointz: A Five-Story Building That Told Plenty More*, NPR (Nov. 21, 2013, 5:01 PM), <https://www.npr.org/2013/11/21/246549375/remembering-5pointz-a-five-story-building-that-told-plenty-more>.

<sup>6</sup> *Id.*; see generally Eli Anapur, *The Legendary 5 Pointz - History and Legacy*, WIDEWALLS (Nov. 15, 2016), <https://www.widewalls.ch/magazine/5-pointz>.

<sup>7</sup> Castillo, 950 F.3d at 162.

<sup>8</sup> *Id.* at 163.

<sup>9</sup> 17 U.S.C. § 106A (1990).

certain “moral rights” in their art in order to maintain the integrity and reputation of their work and names.<sup>10</sup>

In November of the same year, the district court issued a minute order denying the plaintiffs’ application for a preliminary injunction but also giving notice that a full written opinion would soon follow.<sup>11</sup> In the eight days between the minute order and the issue of the opinion, Wolkoff whitewashed the art from the site in frustration.<sup>12</sup> Judge Frederic Block expressed regret in his opinion for failing to find a plausible legal avenue to grant the preliminary injunction.<sup>13</sup> Yet, because Judge Block also emphasized the potential for monetary damages under VARA, Cohen amended and later consolidated his complaint with nine additional artists who sued Wolkoff for intentional destruction of their work.<sup>14</sup>

Ultimately, the United States Court of Appeals for the Second Circuit’s decision in *Castillo* is the first case to legally recognize the artistic and cultural value of graffiti or street art. Graffiti can be traced as far back as ancient Grecian times, but its emergence in the United States as the type of contemporary art recognized among ordinary citizens today began in the late 1950s.<sup>15</sup> Through the following decades, graffiti artists individualized and refined their artistic styles, often creating their art to address relevant cultural and societal issues.<sup>16</sup> Graffiti can be found today in neighborhoods of all classes, as well as in revered art galleries and exhibits.<sup>17</sup> Several cities even host events honoring graffiti as an important form of creative expression.<sup>18</sup> For example, the city of St. Louis hosts an annual event called “Paint Louis” that draws artists from around the world to celebrate graffiti and hip-hop culture.<sup>19</sup> Kansas City, Missouri also holds the “SpraySeeMO Mural Festival” each year as a similar type of artistic celebration.<sup>20</sup>

Regardless, many people still perceive graffiti artists solely as criminals and their art as a sheer nuisance, due in part to the art’s disfavored history within the United States legal system.<sup>21</sup> The type of graffiti protected by *Castillo*, however, is notably distinct from the type criminalized by several states. *Castillo* protects graffiti created with permission of the property owner—not in an act of vandalism. The decision distinguishes the two categories and announces to the general public what a large community of contemporary artists and art enthusiasts

<sup>10</sup> *Castillo*, 950 F.3d at 163.

<sup>11</sup> *Id.* at 163; *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

<sup>12</sup> *Castillo*, 950 F.3d at 163.

<sup>13</sup> *Cohen*, 988 F. Supp. 2d at 226.

<sup>14</sup> *Castillo*, 950 F.3d at 163.

<sup>15</sup> Marisa A. Gómez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 636-37 (1993).

<sup>16</sup> *Id.* at 637-39.

<sup>17</sup> *Id.* at 641.

<sup>18</sup> See generally Carol Guttery, *Your Guide to Great Global Street Art & Mural Festivals: 2020 Edition*, WAYFARING VIEWS (Nov. 22, 2019), <https://wayfaringviews.com/street-art-mural-festivals/>.

<sup>19</sup> Jimmy Bernhard, *Our Beautiful City: Paint Louis Graffiti Wall*, KSDK (June 3, 2016, 1:02 PM), <https://www.ksdk.com/article/features/our-beautiful-city-paint-louis-graffiti-wall/23025649>.

<sup>20</sup> See *SpraySeeMO Mural Festival*, SPRAYSEEMO, <https://www.sprayseemo.com/about> (last visited July 24, 2020).

<sup>21</sup> See Al Roundtree, Note, *Graffiti Artists “Get Up” in Intellectual Property’s Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959, 964 (2013).

realized about graffiti and other forms of street art decades ago: these works are, in fact, art, and they offer value to our society.

Though ultimately positive, the outcome of the *Castillo* decision is rare. The artists' only avenue for asserting a claim was by way of a federal statute (VARA) that affords purposefully limited protection. Compared to other international moral rights legislation, VARA's impact is strained in several ways. Namely, VARA significantly limits the types of works eligible for protection,<sup>22</sup> along with the specific moral rights afforded to those works.<sup>23</sup>

This Comment focuses on the impact of the *Castillo* decision and how it should drive legislative change for increased protection of art in the United States. It also illustrates the differences between the Visual Artists Rights Act and similar international legislation, which provides guidance for how to adequately amend the current provisions in VARA. Part I discusses the progression of moral rights through history as they originated in Europe and achieved recognition in the United States decades later. Part II then analyzes the Visual Artists Rights Act through explanations of specific provisions, legislative history, and statutory interpretation in its limited case law. It also evaluates the statute against current moral rights legislation in other countries. Next, Part III explores the procedural history and holding of the United States Court of Appeals for the Second Circuit's decision in *Castillo*. Finally, Part IV explains why *Castillo* should mark a deserved victory for the 5Pointz artists but should also motivate the expansion of moral rights protection in the United States. Instead of simply adding to an already conflicting area of case law, *Castillo*, along with foreign moral rights legislation, demonstrates why change to the Visual Artists Rights Act is necessary to provide for more sufficient moral rights protection in the United States.

## I. MORAL RIGHTS HISTORY LEADING TO VARA

At the center of *Castillo* lies a debate surrounding the moral rights of the 5Pointz artists. Moral rights, originating as *le droit moral* in early nineteenth-century France, arise from the idea that artists infuse a part of themselves or their personalities into their work; the cultural and fundamental significance of the work and its creator—as reflections of diversity and human interests of the time—justifies its legal protection.<sup>24</sup> These rights derive not from the economic value of the work, but from the “spirit” the artist injects into the art during the creation process.<sup>25</sup>

In contrast, American copyright law has historically limited artists' protection to only economic rights, favoring the production of art and other works for utilitarian purposes of maximizing societal value and benefit.<sup>26</sup> The United States Constitution affords to Congress the “power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the

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<sup>22</sup> 17 U.S.C.A. § 101 (1990).

<sup>23</sup> § 106A(a)(1)(A)-(B).

<sup>24</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

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

<sup>26</sup> *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 296 (7th Cir. 2011).

exclusive right to their respective writings and discoveries.”<sup>27</sup> Congress’s right to authorize this monopoly incentivizes artists and other authors to produce creative works in order to achieve such recognition and protection, so long as their creations serve the public good.<sup>28</sup>

While the United States’ interest in affording copyrights has continued throughout history to rest mainly in their societal benefit, increased difficulty in balancing this interest with that of the specific author or artist has stimulated the enactment of several federal copyright statute amendments.<sup>29</sup> Advancements in technology and the ability to produce works unforeseen to Congress when it wrote the Constitution have also driven the creation of these amendments, which now primarily govern this area of intellectual property law.<sup>30</sup>

The Copyright Act of 1976 currently operates as the principal source of copyright law, essentially taking the place of the Copyright Act of 1909.<sup>31</sup> This 1976 Act allows copyright protection for “original works of authorship fixed in any tangible medium of expression.”<sup>32</sup> Copyright owners mainly hold a right to exclude others from using their work in certain ways, such as reproducing the work, preparing derivative works, and distributing copies of the work to the public.<sup>33</sup> These “exclusive rights” do not award the holder of the copyright full control over the use of their work, but owners are entitled to remedies if someone else infringes upon their rights.<sup>34</sup> However, another’s “fair use of a copyrighted work,” for purposes like “criticism, comment, news reporting...scholarship, or research” does not qualify as a copyright infringement.<sup>35</sup>

The Copyright Act of 1976 continued to highly value the economic interests of creators, but it also marked at least a small step for the United States in the direction of stronger collaboration with the intellectual property laws of France

<sup>27</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>28</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *see also* *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

<sup>29</sup> *Sony Corp. of America*, 464 U.S. at 429.

<sup>30</sup> *Id.* at 431.

<sup>31</sup> H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660, 1976 WL 14045.

<sup>32</sup> Section 102 of the Copyright Act lists the following categories of works of authorship: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 102(a)(1)-(8) (1990).

<sup>33</sup> § 106.

<sup>34</sup> Section 504 of the Copyright Act defines the remedies for infringement: (a) In General—Except as otherwise provided by this title, an infringer of copyright is liable for either— (1) the copyright owner’s actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c). § 504.

<sup>35</sup> § 107.

and other Berne Convention-adhering countries.<sup>36</sup> The Berne Convention for the Protection of Literary and Artistic Works, also known as the Berne Convention, was adopted in 1886 primarily in an effort to establish a basis for international intellectual property law standards.<sup>37</sup> It also aimed to recognize and protect the copyrights of artists and authors in all countries that are members of the Berne Union.<sup>38</sup> Though other countries gradually joined the Berne Union, the United States refused to do so for many years in large part due to conflicting principles of copyright “duration and formalities.”<sup>39</sup> A particular area of contention about the Berne Convention for the United States was Article 6*bis*,<sup>40</sup> which guarantees artists and authors certain moral rights in their work in accordance with several European and other international countries’ ideals.<sup>41</sup>

However, Congress introduced four bills in 1987 to amend national copyright law and allow the United States to join the Berne Union.<sup>42</sup> The Senate and House of Representatives officially enacted legislation to implement the Berne Convention in 1988,<sup>43</sup> particularly because of interests in global trade and several revisions made to the Berne Convention targeting American accession.<sup>44</sup>

## II. VARA VERSUS INTERNATIONAL MORAL RIGHTS LAWS

### A. Works Eligible for Protection

As a result of the United States’ accession to the Berne Convention, Congress enacted the Visual Artists Rights Act (VARA)<sup>45</sup> in 1990 to further

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<sup>36</sup> Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, J. L. & TECH. 71, 75 (1988) (“With the revision of Berne at Rome (1928) and Brussels (1948), and the failure of several United States revision efforts aimed at permitting United States adherence to Berne, the two paths would not even begin to converge in material ways until the enactment of the 1976 Copyright Act.”).

<sup>37</sup> *Id.* at 72.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 75.

<sup>40</sup> Article 6*bis* reads: “(1) Independently 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....(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.” Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, as revised at Paris on July 24, 1971, S. Treaty Doc. No. 99–27 (1986).

<sup>41</sup> Oman, *supra* note 36, at 80. (“Apart from the economic rights of authors in their works and the permissible limitations upon such rights, the Berne Convention also provides for “moral rights,” which encompass a variety of specific interests authors have with respect to public utilization of their works. These interests are more in the nature of artistic and professional integrity than pure commercialism. The recognition and progressive elaboration of the moral rights of the author is and has long been one of the most distinctive features of the Berne Convention.”)

<sup>42</sup> *Id.* at 71.

<sup>43</sup> Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong., 102 Stat. 2853 (1988) (enacted).

<sup>44</sup> Oman, *supra* note 36, at 105.

<sup>45</sup> § 106A.

comply with obligations under the Berne Convention.<sup>46</sup> Similar to Article *6bis*, VARA recognizes and defends some moral rights of visual artists in their work.<sup>47</sup> While VARA may seemingly indicate a significant development in American copyright law, its adoption of moral rights is purposely limited and infrequently applied. The statute prescribes that its stipulated moral rights do not apply to or protect “any reproduction, depiction, portrayal, or other use of a work” that does not qualify as a “work of visual art.”<sup>48</sup> This classification of a “work of visual art”—effectively, the scope of the Visual Artists Rights Act—is perhaps the most limiting part of the statute. Only “visual art” as specifically outlined by Congress is eligible for protection. The definition also only applies to work that falls into an even narrower group of “pictorial, graphic, and sculptural works” protected by the Copyright Act.<sup>49</sup>

Congress explicitly defined a work of visual art both by what it is and what it is not. Paintings, drawings, prints, sculptures, and still photographic images, when produced solely for exhibition purposes, qualify as “works of visual art.”<sup>50</sup> Conversely, posters, maps, charts, applied art, advertising materials, works made for hire, audiovisual works, literary works, and motion pictures, among other types of works, do not qualify for moral rights protection as “visual art.”<sup>51</sup>

Whether these excluded works are openly named in or discreetly omitted from the statute, VARA’s exclusions seemingly outnumber its inclusions, especially in relation to comparable international laws. For example, French copyright law stipulates that an author of “a work of the mind” shall enjoy in that work “an exclusive incorporeal property right which shall be enforceable against all persons.”<sup>52</sup> This exclusive right “include[s] attributes of an intellectual and moral nature as well as attributes of an economic nature.”<sup>53</sup> Some “works of the mind” enumerated in the statutory language include the following: literary, artistic, and scientific writings; dramatic musical works; lectures and sermons; cinematographic works; architectural, geographic, and topographic works; and even applied art.<sup>54</sup>

German and Italian copyright laws largely mimic their French counterpart, protecting moral rights of authors of many similar literary, scientific, and artistic

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<sup>46</sup> H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.A.N. 6915, 6920, 1990 WL 258818.

<sup>47</sup> *Id.*

<sup>48</sup> § 106A(c)(3).

<sup>49</sup> H.R. REP. NO. 101-514 at 6921.

<sup>50</sup> § 101.

<sup>51</sup> “A work of visual art does not include— (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.” *Id.*

<sup>52</sup> CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROP. CODE] art. L111-1 (Fr.), *translated in* INTELLECTUAL PROPERTY CODE (WIPO 2003).

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

<sup>54</sup> *Id.* at art. L112-2.

works.<sup>55</sup> The German Copyright Act indicates that its protected artistic works include architectural works, applied art, and drafts of such work.<sup>56</sup> It also extends safeguards not only to photographic and cinematographic works, but also to other works “produced by processes similar to” photography and cinematography.<sup>57</sup> Moreover, the Italian Copyright Act awards moral rights security to “literary, dramatic, scientific, didactic and religious works, whether in written or oral form.”<sup>58</sup> Thus, the scope of international moral rights protection is much broader than VARA and applies to all copyrightable work instead of merely a narrow group.

VARA also lists other exceptions for the extension of moral rights.<sup>59</sup> One exception explains that modified or mutilated works will not be protected by VARA when such modification resulted from “the passage of time or the inherent nature of the materials.”<sup>60</sup> Modifications caused by conservation or public presentation, “including lighting and placement . . . of the work” also fall outside of the scope of VARA’s protection, “unless the modification is caused by gross negligence.”<sup>61</sup>

Further, many of VARA’s terms were left undefined and, therefore, open to wide and sometimes conflicting interpretation from courts—courts that also have little experience or comfort extending moral rights to claimants in the United States. In *Carter v. Helmsley-Spear*, the court addressed whether sculpture installations within a commercial building’s lobby constituted applied art, so as to be excluded from VARA’s protection.<sup>62</sup> The court held that even though parts of the sculptures were attached to areas of the lobby that served solely utilitarian purposes, the work nevertheless was not applied art.<sup>63</sup> Holding to the contrary “would render meaningless VARA’s protection for works of visual art installed in buildings.”<sup>64</sup> Thus, even if a work incorporates features serving utilitarian purposes, it may still be protected by the statute if the piece as a whole constitutes visual art.<sup>65</sup> However, after *Carter*, the court in *Cheffins v. Stewart* denied a claim for an artistically converted school bus through analysis of applied art.<sup>66</sup> It characterized the work as applied art because the bus still functioned as a vehicle, even though it had been modified by extensive artistic work.<sup>67</sup> The analysis in *Cheffins* strained the applicability of VARA by adopting the following standard: “where a functional object, despite claims of artistic merit, continues to serve a

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<sup>55</sup> URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT AND RELATED RIGHTS] Sept. 9, 1965, BGBL I at 1273, § 2 (Ger.).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> LEGGE 22 aprile 1941, n.633, art. 2 (It.).

<sup>59</sup> See § 106A(c)(1)-(3).

<sup>60</sup> § 106A(c)(1).

<sup>61</sup> § 106A(c)(2).

<sup>62</sup> *Carter v. Helmsley-Spear*, 71 F.3d 77, 79 (2d Cir. 1995).

<sup>63</sup> *Id.* at 85.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *Cheffins v. Stewart*, 825 F.3d 588, 595 (9th Cir. 2016).

<sup>67</sup> *Id.*



utilitarian purpose, it is applied art.”<sup>68</sup>

In *Pollara v. Seymour*, a hand-painted banner was excluded from protection because it was made for hire and effectively served as an advertising material.<sup>69</sup> The court explained that “protection of a work under VARA will often depend . . . upon the work’s objective and evident purpose.”<sup>70</sup> Even works that would otherwise be considered visual art under the statute can be excluded based on their intended meaning.<sup>71</sup> In *Phillips v. Pembroke Real Estate*, a VARA claim to prevent the removal and relocation of multiple commissioned sculptural and landscape works from a park was denied.<sup>72</sup> The court concluded that the works qualified as site-specific art—art created for a specific location that is itself an element of the work.<sup>73</sup> The court explicitly recognized that this type of art “unmistakably enriches our culture and the beauty of our public spaces,” but nonetheless denied protection because the plain language of the statute does not reference site-specific art.<sup>74</sup>

Allowing for even more ambiguity in VARA’s application, Congress indicated in its analysis of the statute that “common sense and generally accepted standards of the artistic community” should guide courts when determining whether a work is protected under VARA.<sup>75</sup> Yet, the common sense of an artist likely differs greatly from the common sense of a United States court of law. Even if artistic standards are to be applied, only a court—not the artistic community—has the power to actually enter a judgment. Congress also noted that the “medium or materials used” to create a work shall not be determinative of its status under the statute, further complicating a court’s analysis of specific works.<sup>76</sup>

Though limited, claims arising under the Visual Artists Rights Acts can differ greatly depending on the part of the statute at issue. Regardless of the type of claim, courts have shown reluctance to extend protection to works that do not obviously fit within Congress’s restricted definition of “visual art.” In summarizing the purpose of the statute, Congress noted that VARA is “a pragmatic response to a real problem . . . . We should always remember that the visual arts covered by this bill meet a special societal need, and their protection and preservation serve an important public interest.”<sup>77</sup> This “important public interest” may be more difficult to discern when considering that some works expressly or otherwise precluded from moral rights protection under VARA often are afforded such protection in other countries. While the statute does provide needed protection for some art, the burden for proving worthiness of VARA’s safeguards is steep.

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<sup>68</sup> *Id.* at 594.

<sup>69</sup> *Pollara v. Seymour*, 344 F.3d 265, 270 (2d Cir. 2003).

<sup>70</sup> *Id.* at 269.

<sup>71</sup> See *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 135 (1st Cir. 2006).

<sup>72</sup> *Id.* at 137.

<sup>73</sup> *Id.* at 140.

<sup>74</sup> *Id.* at 143.

<sup>75</sup> H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921, 1990 WL 258818.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 6915-16.

## B. Infringements

If a work of art does fall within the narrow scope of eligibility for VARA, the artist can receive some moral rights protection for the work. This protection, though, is restricted in its reach. The federal statute amended the Copyright Act, but copyright registration is not a requirement for filing a VARA claim.<sup>78</sup> Rights under VARA exist independently of any copyright in a work of art.<sup>79</sup> However, both copyright and statutory requirements must be met in order to collect damages under VARA. For reference, a claim for VARA relief was unsuccessful in *Kelley v. Chicago Park District* because an artist's wildflower garden located in a city park did not meet requirements under copyright law. It was not adequately fixated or attributable to an author, since natural forces were largely responsible for its appearance.<sup>80</sup>

Generally, moral rights are classified by four unique rights: attribution, integrity, withdrawal, and disclosure.<sup>81</sup> The right of attribution affords artists the ability to claim their work as their own and to prevent others from doing so.<sup>82</sup> The right of integrity allows artists to prevent the mutilation, modification, distortion (and sometimes even destruction) of their work.<sup>83</sup> The right of withdrawal dictates artists' ability to modify or retract a work after publication.<sup>84</sup> Finally, the right of disclosure enables artists to decide whether, when, and how a work will be published.<sup>85</sup> Countries vary as to which moral rights they affirm in their legislation. France, Germany, and Italy, for example, provide all four of these rights to authors of works that qualify for protection.<sup>86</sup> In the Visual Artists Rights Act, the United States specifies moral rights protection only for the rights of attribution and integrity.<sup>87</sup>

For the specific purposes of VARA, the right of attribution allows artists to claim rightful authorship of and recognition for their artwork.<sup>88</sup> Artists can also prevent their names from being attributed to another's work or to their own work that has been mutilated or modified in such a way that would cause harm to their

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<sup>78</sup> *Id.* at 6931-32; *see also* Carter v. Helmsley-Spear, 71 F.3d 77, 83 (2d Cir. 1995).

<sup>79</sup> § 106A(a).

<sup>80</sup> Kelley v. Chicago Park Dist., 635 F.3d 290, 304 (7th Cir. 2011).

<sup>81</sup> Cynthia Esworthy, *A Guide to the Visual Artists Rights Act*, NEA OFFICE OF GEN. COUNSEL, WASHINGTON AND LEE LAW SCHOOL, [http://www.law.harvard.edu/faculty/martin/art\\_law/esworthy.htm](http://www.law.harvard.edu/faculty/martin/art_law/esworthy.htm).

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

<sup>83</sup> § 106A(a)(2).

<sup>84</sup> Esworthy, *supra* note 81.

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

<sup>86</sup> JEAN-MATHIEU BERTHO & AURÉLIE ROBERT, COPYRIGHT LITIGATION IN FRANCE: OVERVIEW, Thomas Reuters Practical Law (database updated Oct. 2018); 2 VALERIA FALCE ET AL., INT'L COPYRIGHT LAW AND PRACTICE ITA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019); 2 MICHAEL GRUENBERGER & ADOLF DIETZ, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

<sup>87</sup> § 106A(a).

<sup>88</sup> § 106A(a)(1)(A).

character or reputation.<sup>89</sup> Once an author exercises the right of attribution, another's failure to mention the author's name in relation to his or her work may give rise to an infringement of the right.<sup>90</sup> Copyright laws in France, Germany, and Italy include similar terms but additionally specify that an author can publish a work anonymously or by using a pseudonym of the author's choice.<sup>91</sup>

The right of integrity under VARA permits visual artists to prohibit intentional defacement, distortion, or modification of their work when doing so would damage their artistic identity, even after transferring title to the art.<sup>92</sup> However, artists can only prevent destruction of works of "recognized stature."<sup>93</sup> Whether a piece of art achieves this stature depends generally on its artistic quality and recognition by a relevant artistic community.<sup>94</sup> Any "intentional or grossly negligent destruction" of this type of work violates the author's right.<sup>95</sup>

French law recognizes the right of integrity as "the right to respect for [the author's] name, his authorship, and his work."<sup>96</sup> French authors or artists can assert this right without proving that their honor or reputation would be prejudiced, nor must they justify their reasons for preventing an act they believe would prejudice them.<sup>97</sup> Accordingly, "French law specifically seeks to preclude the public, third parties, or the courts from substituting their choices or value judgments for the author's concerning whether modifications of his work might be fitting."<sup>98</sup> German law, on the other hand, requires the author to show some harm or threat to his or her interests,<sup>99</sup> but the German Copyright Act recognizes these interests not just in terms of the author's honor and reputation, but also in terms of the author's other intellectual or personal interests in a work.<sup>100</sup>

VARA also provides limiting guidelines addressing situations in which an artist's work is incorporated into a building. Even if artwork incorporated in a part of a building cannot be removed from the building without "destruction, distortion, mutilation, or other modification of the work," no rights under VARA apply if the artist consented to the work's installation either before VARA's effective date or in a writing signed by the building owner specifying that the installation may

<sup>89</sup> § 106A(a)(1)(B).

<sup>90</sup> *Id.*

<sup>91</sup> 1 PASCAL KAMINA ET AL., *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE FRA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019); 2 INT'L COPYRIGHT LAW AND PRACTICE GER, *supra* note 85; 2 INT'L COPYRIGHT LAW AND PRACTICE ITA, *supra* note 86.

<sup>92</sup> § 106A(a)(3)(A).

<sup>93</sup> § 106A(a)(3)(B).

<sup>94</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020).

<sup>95</sup> § 106A(a)(3)(B).

<sup>96</sup> CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROP. CODE] art. L121-1 (Fr.), *translated in* INTELLECTUAL PROPERTY CODE (WIPO 2003).

<sup>97</sup> 1 PASCAL KAMINA ET AL., *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE FRA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

<sup>98</sup> *Id.*

<sup>99</sup> 2 MICHAEL GRUENBERGER & ADOLF DIETZ, *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

<sup>100</sup> *Id.*

subject the work to harm upon removal.<sup>101</sup> If a property owner seeks removal of art from a building when doing so can occur without damage or modification, an artist's moral rights prevail; however, the statute also lists two possible exceptions to this VARA protection.<sup>102</sup> The first exception prevents VARA protection if "the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art."<sup>103</sup> The second exception also denies VARA security if "the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal."<sup>104</sup>

In terms of the duration of rights under the Visual Artists Rights Act, protection for most works lasts only as long as the life of the artist.<sup>105</sup> If more than one artist created a work, the rights withstand as long as the life of the last surviving author.<sup>106</sup> VARA rights cannot be transferred to another person, but they can be waived in general in a written instrument signed by the author.<sup>107</sup> In contrast, French and Italian moral rights are perpetual.<sup>108</sup> Upon an author's death, the rights of attribution and integrity are transferred to the author's heirs or descendants, who can then exercise the rights without time limitation, even after the work falls into the public domain.<sup>109</sup> Moral rights are not perpetual in Germany, but they do not expire until seventy years after the death of the author or the last surviving coauthor.<sup>110</sup>

Compared to foreign legislation, protection of moral rights in the United States is limited in scope, length, and application. While relevant provisions in French law, which are often referenced as affording incredibly liberal security to moral rights, may not fit well in the United States legal system, a happy medium between the systems would provide more satisfactory protection for deserving artists and authors.

### C. Resolutions for Infringement

Upon sufficiently establishing a violation of the Visual Artists Rights Act, an injured party can recover either actual or statutory damages.<sup>111</sup> Ordinarily, statutory damages range from \$750 to \$30,000 per work, unless the injured party

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<sup>101</sup> 17 U.S.C. § 113(d)(1)(A)-(B) (2020).

<sup>102</sup> § 113(d)(2).

<sup>103</sup> § 113(d)(2)(A).

<sup>104</sup> § 113(d)(2)(B).

<sup>105</sup> H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 1990 WL 258818.

<sup>106</sup> § 106A(d)(3).

<sup>107</sup> § 106A(e)(1).

<sup>108</sup> 2 VALERIA FALCE ET AL., *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE ITA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019); 1 PASCAL KAMINA ET AL., INT'L COPYRIGHT LAW AND PRACTICE FRA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

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

<sup>110</sup> 2 MICHAEL GRUENBERGER & ADOLF DIETZ, *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

<sup>111</sup> § 504(a)(1)-(2).

proves a violation was “willful.”<sup>112</sup> In the case of a willful violation, the statute authorizes statutory damages up to \$150,000 per work.<sup>113</sup>

Foreign laws also specify possible damages for moral rights infringements. German law even provides that anyone who negligently or intentionally invades another’s moral rights must compensate the injured party “for the prejudice suffered as a result of the infringement.”<sup>114</sup> The calculation of damages may be influenced by profits gained by the infringer as a result of the violation or “the amount the infringer would have had to pay in equitable remuneration if the infringer had requested authorisation to use the right infringed.”<sup>115</sup> Certain rightsholders may also receive compensation for non-pecuniary damages to the extent that is equitable.<sup>116</sup> German law additionally specifies potential criminal penalties of up to three years’ imprisonment or a fine for infringing upon, or attempting to infringe upon, an artist’s right of attribution.<sup>117</sup> The same punishment is available for any distribution, communication, adaptation, or reproduction of a work without permission of the author.<sup>118</sup>

In France, an infringer may be charged with a criminal offense of up to three years’ imprisonment or a fine up to €300,000 (\$353,700).<sup>119</sup> An organized group guilty of a violation is subject to five years’ imprisonment or a maximum €500,000 (\$592,120) fine.<sup>120</sup> Additional sanctions are also possible in the presence of aggravating circumstances.<sup>121</sup> Further, in Italy, an intentional infringement of the right of authorship or integrity is punishable by up to a year in prison or a fine of not less than 1,000,000 lire (\$1,363,077).<sup>122</sup> If such a violation was negligent, only a fine of up to 2,000,000 lire (\$2,726,154) may be imposed.<sup>123</sup>

Regardless of the amount of monetary compensation available internationally, the potential for criminal sanctions in these countries indicates the significant value they attribute to moral rights. Imposing criminal punishment for these infringements may not be realistically possible in the United States due to our historic propensity to limit legal protection of creative works, but the importance of moral rights and the variety of benefits of the creation of artwork in

<sup>112</sup> § 504(c)(1), (2).

<sup>113</sup> § 504(c)(2).

<sup>114</sup> URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT AND RELATED RIGHTS] Sept. 9, 1965, BGBl I at 1273, § 97(1) (Ger.).

<sup>115</sup> *Id.* § 97(2).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* § 107(1).

<sup>118</sup> *Id.* § 106(1).

<sup>119</sup> CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROP. CODE] art. L335-2 (Fr.), translated in INTELLECTUAL PROPERTY CODE (WIPO 2003).

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

<sup>121</sup> JEAN-MATHIEU BERTHO & AURÉLIE ROBERT, *supra* note 86, COPYRIGHT LITIGATION IN FRANCE: OVERVIEW, Thomas Reuters Practical Law (database updated Oct. 2018).

<sup>122</sup> LEGGE 22 aprile 1941, n.633, art. 171 (It.).

<sup>123</sup> *Id.* at art. 172.

general nevertheless calls for greater protection.

### III. *CASTILLO v. G&M REALTY L.P.*

*Castillo v. G&M Realty L.P.* marks the first time an artist or group of artists has attempted to state a claim under the Visual Artists Rights Act for works of aerosol art or, more specifically, graffiti art.<sup>124</sup> The 5Pointz artists specifically asserted violations of their moral rights to the integrity of their work. The case eventually made its way to the United States Court of Appeals for the Second Circuit but not before encountering several obstacles.

#### A. Procedural History

The legal history of 5Pointz began in 2013.<sup>125</sup> After being denied a petition for the site to be designated as a landmark, seventeen graffiti artists filed suit under VARA to prevent its destruction.<sup>126</sup> The artists sought a preliminary injunction to prevent property owner Gerald Wolkoff from tearing down the buildings to erect two luxury apartment buildings in their place.<sup>127</sup>

Less than a month later, the court issued a minute order that denied the preliminary injunction and indicated that a full written opinion from Judge Frederic Block would soon be released.<sup>128</sup> The opinion followed just eight days later, but, within this short time, Wolkoff denied the artists access to the site and ordered the whitewashing of the art—without formally notifying the artists.<sup>129</sup> The evidence suggests that Wolkoff knew at the time that VARA would have otherwise required him to give 90 days' notice to the artists to salvage some of the work that the court previously deemed removable.<sup>130</sup>

However, because Judge Block's opinion indicated the potential for significant monetary damages if a trial court were to determine that the artwork achieved recognized stature under VARA,<sup>131</sup> the artists amended their complaint in 2014.<sup>132</sup> Accordingly, they alleged that their work achieved such recognized stature and that Wolkoff's whitewashing qualified as a willful violation of their statutory rights.<sup>133</sup> In 2015, ten other artists filed a separate lawsuit against Wolkoff and consolidated both claims into *Castillo*.<sup>134</sup>

Ultimately, the district court held that the art possessed recognized

<sup>124</sup> See *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

<sup>125</sup> See generally *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

<sup>126</sup> Plaintiffs' Memorandum of Law in Support of Their Motion for a Temp. Restraining Order & Preliminary Injunction, *Cohen v. G&M Realty L.P.*, No. 13-5612 (E.D.N.Y. Oct. 10, 2013).

<sup>127</sup> *Id.*

<sup>128</sup> *Cohen*, 988 F. Supp. 2d at 214.

<sup>129</sup> *Castillo*, 950 F.3d at 163.

<sup>130</sup> *Id.* at 164; see also § 113(d)(2)(B).

<sup>131</sup> *Cohen*, 988 F. Supp. 2d at 226.

<sup>132</sup> Second Amended Complaint, *Cohen v. G&M Realty L.P.*, No. 13-5612 (E.D.N.Y. June 17, 2014).

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

<sup>134</sup> See Complaint, *Castillo v. G&M Realty L.P.*, No. 15-3230 (E.D.N.Y. June 3, 2015).

stature.<sup>135</sup> The court relied heavily upon expert testimony in favor of the quality and recognition of the 5Pointz art, along with testimony explaining the prominence of graffiti in the art world.<sup>136</sup> It even noted that VARA defends temporary art from destruction.<sup>137</sup> Additionally, the court found that Wolkoff intentionally demolished the 5Pointz art.<sup>138</sup> Though the district court found actual damages to be inadequate under the circumstances, it did analyze statutory damages for the infringement.<sup>139</sup> It awarded \$6.75 million—the maximum amount of statutory damages allowed by VARA—for the demolished work.<sup>140</sup>

Wolkoff and his company, G&M Realty, then appealed the judgment,<sup>141</sup> and in February 2020, the United States Court of Appeals for the Second Circuit upheld, for the first time, that the work of an exterior aerosol artist is deserving of legal protection.<sup>142</sup>

### B. Analysis and Holding of the United States Court of Appeals for the Second Circuit

After reviewing the lower court's decision, the Court of Appeals affirmed the judgment.<sup>143</sup> Wolkoff contested the district court's conclusion that the graffiti art at 5Pointz, some of which was inherently temporary, achieved "recognized stature."<sup>144</sup> Yet, no provision in VARA explicitly prohibits temporary artwork from reaching this stature, and Wolkoff's own expert witness testified that a work's temporary nature does not preclude it from achieving "recognized stature."<sup>145</sup>

The United States Court of Appeals for the Second Circuit also acknowledged the emergence of street art as a valuable and culturally significant form of contemporary art, specifically referencing the work of famous street artist Banksy<sup>146</sup> as such that would be considered of "recognized stature."<sup>147</sup> For these reasons, along with expert testimony attesting to the high artistic quality of the 5Pointz art, the court upheld the district court's decision to acknowledge the

<sup>135</sup> *Castillo*, 950 F.3d at 170.

<sup>136</sup> *Cohen*, 988 F. Supp. 2d at 221-22.

<sup>137</sup> *Id.* at 226.

<sup>138</sup> *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 428 (E.D.N.Y. 2018).

<sup>139</sup> *Id.* at 445. "When determining the amount of statutory damages to award for copyright infringement, courts consider: (1) the infringer's state of mind, (2) the expenses saved, and profits earned, by the infringer, (3) the revenue lost by the copyright holder, (4) the deterrent effect on the infringer and third parties, (5) the infringer's cooperation in providing evidence concerning the value of the infringing material, and (6) the conduct and attitude of the parties." § 504(c).

<sup>140</sup> *Cohen*, 320 F. Supp. 3d at 447.

<sup>141</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

<sup>142</sup> *Id.* at 164.

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

<sup>144</sup> *Id.* at 167.

<sup>145</sup> *Id.*

<sup>146</sup> See Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAGAZINE (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/> (detailing the anonymous British graffiti artist's famed career leading to his *Time* magazine selection for one of the world's 100 most influential people in 2010).

<sup>147</sup> *Castillo*, 950 F.3d at 167-68.

5Pointz graffiti art as attaining “recognized stature.”<sup>148</sup>

Wolkoff’s deliberate behavior was also crucial in determining the outcome of this conflict. Solely because his actions constituted a willful violation of VARA, both the district and appellate courts imposed additional statutory damages against Wolkoff.<sup>149</sup> He gave conflicting, untrue statements in his affidavit and testimony regarding the necessary start date for demolition of the building.<sup>150</sup> Then, having no sincere business reason to do so, he whitewashed the art from the site in an “act of pure pique and revenge.”<sup>151</sup> The district court further elaborated on Wolkoff’s state of mind, noting that as an experienced real estate developer, he showed a willingness “to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion-dollar luxury condo project.”<sup>152</sup> The damages accumulated to a maximum amount of \$6.75 million and served simultaneously as compensation for the loss of distinguished artwork and deterrence against an intentional infringement upon artists’ rights.<sup>153</sup>

#### IV. CONCLUSION

*Castillo* highlights much of the controversy that has developed throughout the existence of the Visual Artists Rights Act. The original purpose of the statute was to expand moral rights protection in the United States,<sup>154</sup> but VARA’s excessive limitations have impeded its ability to truly achieve that goal.

Most notably, *Castillo* demands an expansion of the definition of a “work of visual art” under VARA. Judge Barrington Parker recognized graffiti not just as a rising form of contemporary art, but also as a type of “high art.”<sup>155</sup> Though not specifically enumerated in the statute as a “work of visual art,” graffiti art surpassed VARA’s limitations and loopholes in *Castillo* and earned the protection it deserves. Yet, the rarity of this case invites inquiry into other impressive and impactful works of art that could have been destroyed or damaged without reparation because of VARA’s exclusivity. In order to avoid future denial of protection to such artwork, VARA’s definition of a “work of visual art” should be amended to more closely mirror the statutory language of international legislation. The Italian Copyright Act, for example, affords moral rights to artists of “works of sculpture, painting, drawing, engraving and similar figurative arts, including scenic art.”<sup>156</sup> This language leaves more adequate space for protection of works that do not fit within the narrowest characterization of art.

To accompany a broader definition of visual art, extension of the duration of rights under VARA would also allow for more sufficient moral rights protection.

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<sup>148</sup> *Id.* at 167-69.

<sup>149</sup> *Id.* at 162.

<sup>150</sup> *Id.* at 164.

<sup>151</sup> *Id.* at 172.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See H.R. REP. NO. 101-514 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 1990 WL 258818.

<sup>155</sup> *Castillo*, 950 F.3d at 167.

<sup>156</sup> LEGGE 22 aprile 1941, n.633, art. 2 (It.).



In the United States, Congress touted the “special societal need”<sup>157</sup> for the works of art protected by the statute, but it failed to allow protection for longer than the life of the artist. Without changing the law so far as to afford perpetual moral rights, like in Italy or France, VARA should be amended to allow protection to last for a defined number of years after the artist’s death—perhaps seventy years, as is the law in Germany.<sup>158</sup>

Both the Visual Artists Rights Act and *Castillo* have evoked intense reactions—such as triumph, pride, disdain, and even outright disgust—from a variety of people and communities.<sup>159</sup> The art community has celebrated the *Castillo* decision and its enforcement of VARA. Conversely, a large part of the legal community in the United States has scrutinized the United States Court of Appeals for the Second Circuit for its holding. Much of their contention stems from traditional United States legal principles honoring contracts and property law.<sup>160</sup> Outside of the legal community, the Daily News Editorial Board, labeling the art as “vandalism that would otherwise be illegal,” even called the decision “a frontal assault on property rights.”<sup>161</sup> However, VARA explicitly provides provisions balancing—not exclusively honoring—the artists’ rights with those of a property owner.<sup>162</sup> Only because of Wolkoff’s impudence in prematurely whitewashing 5Pointz were the artists able to receive \$6.75 million in damages.<sup>163</sup>

Awareness and understanding of adequate moral rights protection under VARA are even more imperative in light of recent events. On July 20, 2020, Wolkoff’s counsel filed a writ of certiorari to the Supreme Court of the United States.<sup>164</sup> In their attempt to invalidate *Castillo*, they suggested that Congress never had the power to enact the Visual Artists Rights Act, claiming that moral rights fail to serve the following copyright objectives: (1) rewarding copyright owners any rightful financial compensation for their work, and (2) encouraging the creation or dissemination of useful art.<sup>165</sup> Perhaps less obvious to those engulfed in highly technical legal research and analysis, though, many types of art actually have a profound impact on our society.<sup>166</sup> Even after its destruction, 5Pointz has

<sup>157</sup> H.R. REP. NO. 101-514 at 6915.

<sup>158</sup> 2 MICHAEL GRUENBERGER & ADOLF DIETZ, *supra* note 86, INT’L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int’l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

<sup>159</sup> See Louise Carron, *Case Review of the 5Pointz Appeal: Castillo et al. v. G&M Realty L.P.* (2020), CENTER FOR ART LAW, <https://itsartlaw.org/2020/03/02/case-review-castillo-et-al-v-gm-realty-l-p/> (Mar. 2, 2020); Daily News Editorial Board, *Paint That a Shame: The Crazy Precedent Set by a 5Pointz Appeals Ruling*, DAILY NEWS (Feb. 26, 2020), <https://www.nydailynews.com/opinion/ny-edit-graffiti-is-illegal-20200226-n6chh5ijgvahzavxkns3ymr6ny-story.html>; Cathay Y.N. Smith, *Community Rights to Public Art*, 90 ST. JOHN’S L. REV. 369 (2016).

<sup>160</sup> See generally Drew Thornley, *The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351 (2019).

<sup>161</sup> *Paint That a Shame*, *supra* note 159.

<sup>162</sup> See § 113(d)(1)-(2).

<sup>163</sup> *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 447 (E.D.N.Y. 2018).

<sup>164</sup> *Petition for Writ of Certiorari, Castillo v. G&M Realty*, 950 F.3d 155 (2020) (No. 20-66).

<sup>165</sup> *Id.* at 5-6.

<sup>166</sup> GEOFFREY CROSSICK & PTRYCJA KASZYNSKA, UNDERSTANDING THE VALUE OF ARTS & CULTURE 1, 60, 86, 74, 103 (Arts & Humanities Research Council, 2016) (indicating a connection between civic engagement and the arts; reporting that creative industries account for 1.71 million jobs; linking art

continued to significantly affect local and outside communities.<sup>167</sup> Congress has explicit Constitutional power to promote the creation of such “useful” and impactful art.<sup>168</sup> Accordingly, artists should be able to claim and protect their art, just like any other tangible or intellectual property owner.

The writ also indicated that the difficulty of determining whether a work of art achieves “recognized stature” violates the Fifth Amendment’s due process clause.<sup>169</sup> It claimed that the statute’s absence of an explicit definition of “recognized stature” “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”<sup>170</sup> While courts have employed more than one approach to proving “recognized stature,” the district court noted that the variety of exhibits and credible testimony presented by the artists proved the 5Pointz art achieved the necessary status “even under the most restrictive of evidentiary standards.”<sup>171</sup> The petitioners’ “void for vagueness” argument carries even less weight when considering the otherwise incredibly narrow nature of the statute. Currently, art must meet very specific criteria in order to even qualify as a “work of visual art,” so the issue of whether a work would achieve “recognized stature” would likely not be a difficult one to solve with the help of research and expert witnesses. Perhaps Congress purposefully left the term undefined for this reason, or maybe it wanted to allow broad interpretation from courts given the restricted applicability of VARA. The petitioners failed to recognize that judicial interpretation is not, in its essence, an infringement upon the separation of powers. Thankfully, on October 5, 2020, the Supreme Court denied the petitioners’ writ of certiorari.<sup>172</sup> Still, without any legislative action, the fight for increased moral rights protection in the United States continues.

Art of any kind, including visual art, is meant to be a fluid concept subject to different interpretations from different people with different perspectives. Though art may be difficult to quantify in any legal system, its value and impact on society, which are gifted to us by the artists themselves, justify its protection. To see the 5Pointz art and hear the words of its creators and admirers is to understand the effort, inspiration, and power behind each piece. *Castillo* and the graffiti artists involved in the case deserve to be protected by the Visual Artists Rights Act. 5Pointz is gone, but with necessary changes to VARA, the future of

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and cultural activity to economic and urban regeneration; and identifying one report of multiple clinical benefits in a hospital that integrated visual arts in its new design).

<sup>167</sup> Laura Hard, *5 Years Ago, Their 5Pointz Art Was Erased. Now There’s a Museum for It*, N.Y. TIMES, (Sept. 16, 2018), <https://www.nytimes.com/2018/09/16/nyregion/5pointz-street-art-graffiti-museum-nyc.html> (referencing the Museum of Street Art now located in Lower Manhattan honoring the history and meaning of 5Pointz and showcasing work from 20 original 5Pointz artists); see generally Geoff Cobb, *The Tragic Death and Lasting Legacy of Five Pointz*, GREENPOINTERS (Apr. 30, 2019), <https://greenpointers.com/2019/04/30/the-tragic-death-and-lasting-legacy-of-five-pointz/>.

<sup>168</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>169</sup> Petition for Writ of Certiorari, *supra* note 164, at 6.

<sup>170</sup> *Id.*

<sup>171</sup> *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 438 (E.D.N.Y. 2018).

<sup>172</sup> *G&M Realty L.P. v. Castillo*, No. 20-66, 2020 U.S. LEXIS 4495 (2d. Cir., Feb. 20, 2020), *cert. denied*.

art in the eyes of the law can be as bright as the white walls that helped secure the artists' rightful victory.