
RECENT CASES

INTELLECTUAL PROPERTY — COPYRIGHT — SECOND CIRCUIT FINDS TEMPORARY ART PROTECTED UNDER THE VISUAL ARTISTS RIGHTS ACT. — *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

The Visual Artists Rights Act of 1990¹ (VARA) grants the authors of visual artworks the “non-economic ‘moral rights’” of attribution and integrity, a “statutory first in federal copyright law.”² The right of attribution is exercised to “claim [or] . . . deny authorship,” and the right of integrity allows artists “to prevent or . . . recover damages for the intentional [interference]” with the substantive nature of a work.³ An artist “retains these [moral] rights throughout [their] lifetime,” potentially well after they have ceded ownership of the physical copy of the relevant artwork, a feature that has been described as “revolutionary.”⁴ VARA’s recognition of moral rights in the artist accordingly creates significant tension with traditional conceptions of control vested in the owners of real property⁵: for example, an owner of a gallery wall on which an artist has painted may find that the artist’s right to her painting limits the owner’s right to modify that wall. Recently, in *Castillo v. G&M Realty L.P.*,⁶ the Second Circuit extended VARA’s moral rights protections to temporary works of art, holding that aerosol art⁷ in a warehouse exhibition space had achieved “recognized stature” under VARA.⁸ The

¹ 17 U.S.C. § 106A.

² Drew Thornley, *The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351, 353 (2019); see Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1935–36 (2000).

³ See Robinson, *supra* note 2, at 1936. The interferences that VARA protects against consist of “intentional distortion, mutilation, modification, or destruction of [a given] work.” *Id.*

⁴ *Id.* Christopher J. Robinson explains that VARA was meant to correct an imbalance in copyright law: visual artists are more vulnerable to harm from physical damage to their original works than are authors of literary or musical works, because “[a] disproportionate percentage of the value of a work of [visual] art is in the physical object created, rather than the exploitation of derivatives or copies.” *Id.*; see also 17 U.S.C. § 106A(e)(2).

⁵ See Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1166 (2020) (“Property owners are the editors and architects of their realty: officers with primary control over the content and arrangement of what appears there.”).

⁶ 950 F.3d 155 (2d Cir. 2020).

⁷ This comment uses the terms “street art” and “aerosol art” interchangeably. While artists and scholars often distinguish between “graffiti” and “street art,” see Margaret L. Mettler, Note, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 252 (2012), “[t]he graffiti-street art distinction has no legal significance,” *id.* at 254. This comment employs the broader and less pejorative of the two terms.

⁸ *Castillo*, 950 F.3d at 162, 166; see 17 U.S.C. § 106A(a)(3)(B). Under VARA, artists may prevent destruction of their work (exercising the artist’s right of integrity) if that work has achieved “recognized stature,” a term undefined in the statute’s text. See 17 U.S.C. § 104A(a)(3)(B). In *Castillo*, the Second Circuit relied heavily on a “two-tier[]” test set forth in *Carter v. Helmsley-Spear, Inc.*,

court's analysis, beyond concluding that temporary art could achieve recognized stature under VARA, indicated a willingness to extend the same moral protections to unauthorized art,⁹ but ultimately left the issue unresolved.

In 2002, “distinguished aerosol artist” Jonathan Cohen made an oral agreement with Gerald Wolkoff, the owner of several warehouse buildings in Long Island City, New York, to renovate them, creating “an exhibition space for artists.”¹⁰ With Cohen at the head, the space — once a target for “distasteful graffiti”¹¹ — became “a major global center for aerosol art” that “attracted thousands of daily visitors.”¹² 5Pointz, as the site came to be known, developed an artistic norm of “creative destruction,” whereby art in certain areas would remain for long periods or permanently, but in others would be “painted over” in “days or weeks.”¹³ Over the course of eleven years, the site displayed “approximately 10,650 [distinct] works of art.”¹⁴

In May 2013, Cohen discovered Wolkoff's plan “to demolish 5Pointz and . . . build luxury apartments on the site,” for which Wolkoff had already requested municipal approval.¹⁵ A group of artists, led by Cohen, filed a lawsuit against Wolkoff under VARA to prevent the demolition.¹⁶ The artists secured a temporary restraining order, but upon its expiration the court denied their request for a preliminary injunction.¹⁷ Immediately after the injunction was denied, and despite potential forthcoming directions from the court, Wolkoff “banned the artists from the site” and directed several workmen to whitewash all the art.¹⁸ With their work destroyed, the artists sought monetary damages under VARA as their only remaining recourse.¹⁹

861 F. Supp. 303 (S.D.N.Y. 1994), requiring that the plaintiff in a claim for VARA protections show first “that the visual art in question has ‘stature,’ *i.e.* is viewed as meritorious,” and upon that showing, “that [said] stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” *Id.* at 325; *see also Castillo*, 950 F.3d at 166.

⁹ For purposes of this comment, art that the property owner requests to be placed on their property in advance is “authorized,” whereas art placed on property without the owner's consent is “unauthorized.”

¹⁰ *Castillo*, 950 F.3d at 162; *see also Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 218–19 (E.D.N.Y. 2013).

¹¹ *Cohen*, 988 F. Supp. 2d at 218.

¹² *Castillo*, 950 F.3d at 162.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 163. The artists also sued several real estate development companies, of which Wolkoff was the principal owner. *See Cohen*, 988 F. Supp. 2d at 215.

¹⁷ *See Cohen*, 988 F. Supp. 2d at 214 & n.1; *Castillo*, 950 F.3d at 163.

¹⁸ *Castillo*, 950 F.3d at 163.

¹⁹ *See Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 435 (E.D.N.Y. 2018). Nine more artists brought a separate action against Wolkoff after their art was destroyed. *Castillo*, 950 F.3d at 163. The cases were consolidated for trial. *Id.*

The trial, which involved “voluminous documentary evidence” and dozens of witnesses, focused on “whether the artwork had achieved recognized stature,” and if so, what the value of each work was.²⁰ The district court held that forty-five of the works at issue in the case “had achieved recognized stature,” and that “Wolkoff had violated VARA by destroying them.”²¹ Concluding that it “could not reliably fix the market value of the destroyed paintings,” the court elected to award statutory damages instead.²² The district court found that Wolkoff had violated the statute willfully, acting out of “pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art.”²³ Accordingly, it awarded the plaintiffs \$150,000 for each of the forty-five works — the maximum amount of statutory damages — totaling \$6.75 million.²⁴ Wolkoff appealed.²⁵

The Second Circuit affirmed on all fronts.²⁶ Writing for a unanimous three-judge panel, Judge Parker²⁷ dealt first with Wolkoff’s challenge to the artworks’ recognized stature under VARA — the “crux of the parties’ dispute.”²⁸ The court held that a work is of recognized stature when it is “one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”²⁹ The “relevant community,” it continued, would usually be “the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.”³⁰ The court rejected the claim that temporary art, like most of the works at 5Pointz, could never achieve recognized stature.³¹ Noting that VARA’s text does not expressly adopt “permanent” or “temporary” classifications in its “highly specific definition of visual art,” the panel was unwilling to read in an additional permanence requirement.³² The opinion highlighted “street art[’s]” recent emergence as a “major category of contemporary art,” using famous street artist Banksy’s work as an example of the kind that would certainly possess

²⁰ *Castillo*, 950 F.3d at 163.

²¹ *Id.* An advisory jury — originally empaneled because the plaintiffs had demanded a jury trial and only waived the demand near the trial’s end — found that Wolkoff had violated VARA “as to [thirty-six] of the [forty-nine] works.” *Id.*

²² *Id.* at 164.

²³ *Cohen*, 320 F. Supp. 3d at 445.

²⁴ *Castillo*, 950 F.3d at 164. Normal statutory damages range from \$750 to \$30,000 per work. 17 U.S.C. § 504(c)(1). When the violation is “willful[.],” however, the Copyright Act authorizes damages up to \$150,000 per work. *Id.* § 504(c)(2).

²⁵ *Castillo*, 950 F.3d at 165.

²⁶ *Id.* at 162.

²⁷ Judge Parker was joined by Judges Raggi and Lohier.

²⁸ *Castillo*, 950 F.3d at 166.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 167.

³² *Id.*

recognized stature, even if it were temporary.³³ Finally, the court stressed that Congress was conscious of “durational limits” on protections of works when it drafted the law, as it included an exception to the statute’s provision barring “distortion, mutilation, or other modification” for damage owing to “gradual erosion” or other degradation.³⁴

The Second Circuit similarly dismissed Wolkoff’s argument that because the artists were “aware that the 5Pointz buildings might eventually be torn down,”³⁵ they should have been prepared for the possibility that their work might be destroyed.³⁶ If the artwork could be removed, VARA mandated that Wolkoff provide the artists with notice and ninety days to remove it.³⁷ If not, the statute required him to secure “a written instrument” acknowledging that the artists’ installing their work on the property left it subject to destruction, “by reason of its removal.”³⁸ He had done neither.³⁹

The court then affirmed the district court’s finding of willfulness⁴⁰ and upheld its decision to award the maximum statutory damages.⁴¹ It concluded by contrasting Wolkoff’s conduct, including his “conscious material misrepresentation[s]”⁴² at trial, with the “dignity, maturity, [and] respect” with which the artists had conducted themselves.⁴³

³³ *Id.* at 167–68.

³⁴ *Id.* at 168.

³⁵ *Id.* At trial, Cohen admitted to being aware of this possibility, but other artists testified to their ignorance. *Id.* at 168 n.6.

³⁶ *Id.* at 168.

³⁷ *Id.* at 169; see 17 U.S.C. § 113(d)(2)(B).

³⁸ *Castillo*, 950 F.3d at 169 (quoting 17 U.S.C. § 113(d)(1)(B)).

³⁹ *Id.* Pointing to the “voluminous” evidence compiled by the district court, the panel quickly rebuffed five additional challenges to the district court’s findings. These were that the district court (1) erroneously focused on “recognized quality, rather than recognized stature,” *id.* at 169; (2) assessed the artworks’ stature at the time of the trial, rather than at the time of their destruction; (3) improperly credited the testimony of the artists’ expert, who had not seen several of the works prior to their destruction, instead basing her testimony on images; (4) relied too heavily on Cohen’s testimony concerning his curation of the artwork; and (5) focused erroneously on the stature of the 5Pointz site in the aggregate rather than the individual artworks themselves. See *id.* at 169–70.

⁴⁰ Wolkoff effectively admitted that he knew destroying the art would violate VARA, and “[n]othing in the record indicate[d] that it was necessary to whitewash the artwork before beginning construction of the apartments.” *Id.* at 171.

⁴¹ See *id.* at 171, 173. The panel praised the district court’s careful consideration of the six factors relevant to a damages determination, and found no abuse of the district court’s discretion. *Id.* The court agreed that for each of the factors — listed as (1) the infringer’s state of mind, (2) the expenses saved and profit 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 infringement, and (6) the conduct and attitude of the parties — Wolkoff “[rang] the bell,” *id.* at 171. See *id.* at 171–72.

⁴² *Id.* at 173 (quoting *Cohen v. G&M Realty L.P.*, No. 13-CV-05612, 2018 WL 2973385, at *5 (E.D.N.Y. June 13, 2018)).

⁴³ *Id.*

The Second Circuit's opinion resolving the temporality dispute lauded aerosol art's rise to artistic and cultural prominence,⁴⁴ but the "handshake deal"⁴⁵ that brought about the creation of 5Pointz made this case an outlier.⁴⁶ It effectively masked an unresolved conflict between copyright and real property rights, hinging on the owner's consent to create art on their property. The legal line between street art and what might otherwise be considered vandalism is permission.⁴⁷ The unsanctioned, transgressive nature of art nonetheless remains a central element of the craft for many street artists, including those cited approvingly by the court as creating works with recognized stature.⁴⁸ Thus, although the Second Circuit's reasoning in *Castillo* evinces an inclination to interpret VARA as protecting unauthorized artworks, whether moral rights protections will actually be applied to such works remains an open question.

To understand the significance of this unresolved question, one need only consider that the moral rights conferred by VARA are distinct from ownership of the physical artwork itself. The section of VARA pertaining to the transfer and waiver of artists' moral rights in their art supports their independence from legal title.⁴⁹ The language is clear: "The rights conferred by [the other sections of the statute] may not be transferred," except via "express[] agree[ment]" by the author to do so, and "[t]ransfer of ownership of any copy of a work . . . shall not constitute a waiver of the rights conferred" by the Act.⁵⁰ As such, VARA grants artists moral rights protections in their work even in cases where the artist does not possess title to the art, including after legal sale.⁵¹ This creates a set of strange and counterintuitive incentives in the areas where the interests of the artist and the erstwhile property owner intersect. For example, if an artist sells her painting to an art collector, her

⁴⁴ See *id.* at 167–68.

⁴⁵ See *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 219 (E.D.N.Y. 2013) (discussing Wolkoff giving Cohen his "oral blessings" for the 5Pointz project but no formal agreement ever being signed).

⁴⁶ See Peter N. Salib, *The Law of Banksy: Who Owns Street Art?*, 82 U. CHI. L. REV. 2293, 2295 (2015) ("[S]treet artists generally break the law to produce their art . . .").

⁴⁷ Nicole Martinez, *Street Art or Vandalism?*, ART L.J. (Jan. 15, 2017), <https://alj.entrepreneur.com/street-art-or-vandalism> [<https://perma.cc/FT2W-LM48>]; see also Mettler, *supra* note 7, at 252 (describing the line distinguishing street art from graffiti as "blurred").

⁴⁸ *Castillo*, 950 F.3d at 168; see also Salib, *supra* note 46, at 2295.

⁴⁹ See 17 U.S.C. § 106A(e).

⁵⁰ *Id.*; see also *id.* § 106A(b). Some commentators have suggested that common law principles of accession may provide a simple solution to disputes arising from this overlap, once one recognizes that they are "instantiations of the [more general] problem of resolving competing claims to indivisible entitlements." Note, *Accession on the Frontiers of Property*, 133 HARV. L. REV. 2381, 2387 (2020). If courts found accession principles relevant to VARA disputes, the moral-property rights distinction could suggest that VARA's moral rights do apply to unauthorized artwork, as the ownership of the underlying physical instantiation of the work would be distinguishable. See *id.* at 2388.

⁵¹ See Robinson, *supra* note 2, at 1939 (describing how moral rights respect a "creative persona . . . which remains a part of the work despite . . . physical relinquishment of the object to others").

perpetual moral rights under VARA allow her to prevent the collector from modifying or altering the work even after she transfers title.⁵² That being the case, another question may occur to the property owner. If an artist can possess such moral (and legally enforceable) rights to an artwork after transferring title to another, what keeps them from exercising the same rights to a work they never had title to in the first place?

Imagine that the hypothetical artist, instead of selling her art to the art collector, spray-paints her art on the gallery's wall without the collector's consent. It may be assumed that the artist, whose act of creation is unlawful, does not possess legal title to the work.⁵³ But VARA expressly does not require artists to have title to assert moral rights,⁵⁴ leaving the question of possessory interests in unauthorized art unresolved. Seeing as VARA's text does not include an exception for art created illegally, and courts have expressed a disinclination to read additional limiting principles into the Act,⁵⁵ it seems, at minimum, possible that moral rights protections could apply to unauthorized art.⁵⁶

Related anxieties over this possibility have been expressed both in the academic literature on the subject and in the courts.⁵⁷ Indeed, there is already apparent disagreement on this question at the district court level. In *English v. BFC & R East 111th Street LLC*,⁵⁸ the United States District Court for the Southern District of New York issued the strict admonition that "VARA does not apply to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question."⁵⁹ The Northern District of New York, by contrast, distinguished *English* in indicating

⁵² See *id.*

⁵³ Salib, *supra* note 46, at 2295 (noting that "because street artists generally break the law to produce their art," attempts to appear after the fact to "take ownership of and, therefore, responsibility for [their] art will be rare").

⁵⁴ See 17 U.S.C. § 106A(e)(2).

⁵⁵ See *Castillo*, 950 F.3d at 167 ("In light of [VARA's] specificity, we see no justification for adopting an additional requirement not included by Congress.").

⁵⁶ It is also worth noting that certain VARA protections extend to works without recognized stature. "[A]ny intentional distortion, mutilation, or modification of [an artist's] work which would be prejudicial to [their] honor or reputation" may also be prevented. 17 U.S.C. § 106A(a)(3). A scenario where a work of street art did not possess recognized stature but its creator possessed "honor or [a] reputation" meriting protection seems unlikely, but by no means impossible.

⁵⁷ See Thornley, *supra* note 2, at 371 (suggesting that VARA's recognized stature provision could be weaponized to prevent property owners from modifying their property "as they see fit"); see also *English v. BFC & R E. 111th St. LLC*, No. 97 Civ. 7446, 1997 WL 746444, at *4 (S.D.N.Y. Dec. 3, 1997) (stating that moral rights did not apply to street art, because if they did, "parties could effectively freeze development of vacant lots by placing artwork there without permission . . . [which] would be constitutionally troubling [and] would defy rationality").

⁵⁸ 1997 WL 746444.

⁵⁹ *Id.* at *5. Although the artist appealed to the Second Circuit, the panel affirmed summary judgment for the City of New York on procedural grounds without reaching the VARA question. *English v. BFC Partners*, 198 F.3d 233 (2d Cir. 1999) (unpublished opinion).

that unsanctioned *removable* artwork may be subject to VARA protections, and cast further doubt on the basis for the Southern District's holding, stating that "there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner."⁶⁰

Though the Second Circuit did not directly address VARA protections for such unauthorized art in *Castillo*, or indicate that the issue was before the court at all, several elements of the opinion's analysis belie that limited frame. The circuit's opinion, and the district court decision it reviewed, both placed great emphasis on the artistic community's judgment of the quality of a work, identifying that collective acknowledgment as the determining factor in the recognized stature inquiry.⁶¹ The court also took care to note Justice Holmes's classic nondiscrimination principle, "that '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [visual art],'" emphasizing the cruciality of expert testimony from the artistic community in drawing conclusions as to recognized stature.⁶² Street art's rise in prominence has occurred not only in popular culture but in the world of high art as well.⁶³ Following this line of reasoning, the value the court places on the artistic recognition of street art — much of which remains illicit⁶⁴ — appears to weigh in favor of the application of moral protections to unauthorized art.

Further, the court in *Castillo* cited to Banksy as the kind of artist whose work would likely receive recognized stature under VARA⁶⁵ — an artist whose body of work consists almost entirely of unauthorized art.⁶⁶ Known for "stenciling irreverent politically-charged street art pieces on walls around the globe," Banksy cut his teeth painting works on the walls of public and private buildings without seeking permission from the owners.⁶⁷ Though his works have grown in popularity to the degree that their appearance on an unwitting property owner's wall would likely be more of a boon than an annoyance, citing his work in the VARA context nonetheless sends a relatively straightforward message. The court's use of Banksy's work as emblematic of art having

⁶⁰ *Pollara v. Seymour*, 150 F. Supp. 2d 393, 396 n.4 (N.D.N.Y. 2001).

⁶¹ *Castillo*, 950 F.3d at 166.

⁶² *Id.* (alteration in original) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

⁶³ Mettler, *supra* note 7, at 252–54; *see also Castillo*, 950 F.3d at 167 (noting that street art had become "a major category of contemporary art . . . [and] high art" (citing Richard Chused, *Moral Rights: The Anti-rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 583 (2018))).

⁶⁴ *See Jenny E. Carroll, Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1288 (2019).

⁶⁵ *Castillo*, 950 F.3d at 168.

⁶⁶ *See id.* *See generally* BANKSY, <http://www.banksy.co.uk> [<https://perma.cc/6J2A-JPKH>].

⁶⁷ Mettler, *supra* note 7, at 253 ("[D]espite his commercial success, Banksy continues to create uncompensated, *uncommissioned* street art on walls and bridges throughout the world." (emphasis added)).

recognized stature gives a strong indication that other unauthorized works could receive VARA moral rights protections.

Having resolved the admittedly important temporality question about the extent of VARA's protections for street art, the Second Circuit has thus far left the more complex question of permission, masked by the facts of *Castillo*, undetermined. But the panel's reasoning hints at the viability of moral rights protections for the unauthorized work of street artists. Without the clear guidance of an explicit appellate decision, property owners and street artists will continue to bear unnecessary additional costs.⁶⁸ Lacking clear direction on whether they have authority to remove unsanctioned artworks that appear on their property, owners could be placed in the decidedly awkward position of having to individually contract with oft-elusive street artists to avoid potential liability.⁶⁹ Street artists, particularly those whose works are recognized as culturally significant, will have a limited understanding of whether their work will be protected.⁷⁰ The stakeholders here deserve clarity. An appellate holding on the protections VARA affords to unauthorized artworks may not motivate street artists to reveal their identities, but it will, at minimum, bring light to how they should bargain to protect their work.

⁶⁸ See, e.g., Virginia M. Cascio, Case Note and Comment, *Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under VARA*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 167, 194–97 (2009) (arguing that the lack of an explicit doctrine protecting site-specific art under VARA “goes against the ultimate purpose of VARA to encourage artistic creation,” *id.* at 197, and forces artists to contract with property owners instead, *see id.* at 194–97).

⁶⁹ See *id.*

⁷⁰ See *id.* at 197.