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Navigating the Legal Landscape of a Subversive Art Form: Protecting Expression and Neglecting Embodiment

Dillon Henry Stern

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*Navigating the Legal Landscape of a Subversive Art Form: Protecting
Expression and Neglecting Embodiment*

DILLON HENRY STERN

TABLE OF CONTENTS

I. INTRODUCTION.....	555
II. GRAFFITI AS ART	557
III. COPYRIGHT LAW PROTECTS IMAGES CREATED BY GRAFFITI, NOT PHYSICAL WORKS	561
IV. THE LANHAM ACT ALLOWS FOR LIMITED MARKET CONTROL, YET IS RESTRICTED TO VISUAL IMAGERY	562
V. CONTRACT LAW SERVES AS A SOLUTION TO THE RAPID REMOVAL OF PHYSICAL WORKS	564
VI. VARA’S CURRENT APPLICATION TO GRAFFITI ART IS EMBLEMATIC OF THE INADEQUATE LEGAL PROTECTION AFFORDED TO THE ART IN ITS PHYSICAL FORM	565
VII. OVERCOMING THE INHERENT PROBLEM OF ILLEGALITY IN THE CONTEXT OF GRAFFITI ART	569
VIII. PROTECTION OF GRAFFITI ART IN ITS PHYSICAL FORM REQUIRES ADMINISTRATIVE CHANGE OUTSIDE OF TRADITIONAL INTELLECTUAL PROPERTY LAW	571
IX. CONCLUSION	572

I. INTRODUCTION

To what extent does our legal system prevent graffiti art from commercial exploitation and physical destruction? Cloaked in secrecy and rebellion, graffiti art appears to exist inherently outside of the legal realm, perpetuating a culture where property rights are communal and unbridled personal expression is the most venerable pursuit. Artists of the movement are largely known for their nonconsensual methods and effusive subject

matter, ranging from brusquely lascivious aerosol tags to intricate multi-story sociopolitical murals.

Despite its modes and methods, graffiti art is now regarded by many cultural scholars as the next great art movement.¹ Works by famous figures within the movement receive widespread critical acclaim and command secondary market prices comparable to the masters of more venerable artistic periods.² Yet unlike other styles and movements, graffiti art raises unique legal issues due to its forceful methods, recalcitrant origins, and habitually dissident content.

Graffiti art grapples with common legal issues involving misappropriation of the visual images contained within the work. This issue is distinctively amplified, however, by both the largely public nature of the work and the arguably immoral content of the imagery itself, leading many to question the level of legal protection warranted by these visual images. With visual imagery ranging from xenophobic obscenities to insightful multi-thematic works, graffiti art also forces courts and legal scholars to question if content should determine a work's legal protection. The oft-illegal method of the art form—specifically, works created on private property without the property owner's consent—also raises questions concerning whether visual imagery created through “vandalism” merits any legal protection at all.

The mode and content of graffiti art also create legal issues related to market control for the works. With many pieces created illegally and publicly, graffiti artists often face difficulty when attempting to regulate how their visual images and physical works are bought, sold, displayed, and appropriated in the expansive art market.³

The greatest practical and legal problems for graffiti art relate to the physical works themselves. The illegal method of creation triggers issues regarding ownership and preservation of the physical works, criminal liability of the artists, and the art form's acceptance by higher institutions.

1. Saskia De Melker, *The History of American Graffiti: From Subway Car to Gallery*, PBS NEWS HOUR (Mar. 31, 2011, 3:25 PM), <http://www.pbs.org/newshour/art/the-history-of-american-graffiti-from-subway-car-to-gallery>.

2. Scott Reyburn, *Off the Street, Onto the Auction Block*, N.Y. TIMES (May 2, 2014), <http://www.nytimes.com/2014/05/05/arts/international/taking-art-off-the-street-and-onto-the-auction-block.html>.

3. See Brittany M. Elias & Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 48 (2015), http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/publications/landslide/2015_may_june/ABA_LAND_v007n05_street_art_the_everlasting_divide_between_graffiti_art_and_intellectual_property_protection.pdf (American Bar Association credential required).

Generally, the U.S. legal system places an emphasis on the protection of real property over intellectual property rights. Graffiti art appears to invert this policy, operating under a legal framework that effectively protects associated visual images but fails to save the underlying physical works. This inability to protect the physical graffiti works themselves is detrimental to our nation's art and cultural heritage, and reflects larger sociopolitical concerns concerning the relationship between perception and fairness. While intellectual property law protects images created by graffiti artists, other areas of law must adapt in order to preserve the art in its physical form.

II. GRAFFITI AS ART

Despite the sociopolitical stigma surrounding its indecorous origins and method of creation, graffiti art satisfies the legal definition of "art" and is worthy of the institutional protection afforded to more widely accepted artistic works. Our nation's legal approach to evaluating artistic works is context-dependent; providing a broad interpretation in cases of image protection, and a higher standard when determining protection of the physical work itself. Both interpretive methods are mainly founded in intellectual property law.

The concept of fixed creative expression warranting legal protection finds its origin in copyright law. Copyright law protects original works of authorship fixed in a tangible form of expression, and sets a low bar for the level of "originality" required for a work to receive protection.⁴ In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court stated that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity."⁵ In *Mazer v. Stein*, the Court further elaborated that creating a legal distinction between what constitutes "art" versus "fine art" is not relevant to copyright law and that "individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art."⁶ As a result, copyright law provides a broad definition of "originality" that allows for protection of visual depictions across a wide variety of artistic mediums.

Assessing the artistic quality of physical works themselves relies less on copyright law and more on other areas of intellectual and cultural property law, including customs law. "In the same way that intellectual property law

4. 17 U.S.C. § 102 (2015).

5. 499 U.S. 340, 345 (1991).

6. 347 U.S. 201, 214 (1954).

(dominated by the expressive, inventive, and possessive individual) legitimize personal control over the circulation of [visual art], laws of cultural property protect the material works of culture, namely artistic, archeological, ethnological, or historical interest.”⁷ In support, *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.* holds that artists have no copyright in “the reality of subject matter,” making copyright law’s classification of protectable art more relevant with regard to protection of visual imagery than physical works.⁸

When determining if a physical work is a “work of art” worthy of relevant legal protection, courts apply a higher standard by going beyond a requirement of mere creativity and assessing the aesthetic and conceptual merit of the work. In *Brancusi v. United States*, the court held an abstract sculpture was a work of art, based on various aesthetic and creative factors. Specifically, the court stated the work was “beautiful and symmetrical in outline . . . pleasing to look at and highly ornamental . . . [and] is the original production of a professional sculptor,” and cited these as the motivating factors for defining the physical piece in question as a “work of art” eligible for customs importation exceptions.⁹

Customs law has historically exhibited a similarly high standard when determining what physical works constitute “art” for the purpose of importation law. Courts applying customs law previously determined the artistic merit of a work based on the materials used to make the work, or whether the work served any functional purpose, despite being highly ornate.¹⁰ Only upon the enactment of the Harmonized Tariff Schedule of 1989 did customs law allow pieces serving both artistic and functional purposes to be considered “art.”¹¹ Despite this higher standard set by customs law, the subjective nature of the artistic and conceptual factors set forth under *Brancusi* allow for protection of a wide array of artistic mediums and forms.

The Visual Artists Rights Act (“VARA”) provides further insight into legal qualifications of “art,” particularly when determining whether art is cultural property worthy of physical preservation. VARA provides protection for “visual works of art” and further recognizes that a work of

7. Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249, 257 (1993).

8. 575 F.2d 62 (3d Cir. 1978).

9. T.D. 43053, 54 Tres. Dec. 428 (1928).

10. *United States v. Wanamaker*, 19 C.C.P.A. 229 (1931); *Downing v. United States*, 66 Cust. Ct. 28 (1971).

11. Stephanie Giry, *An Odd Bird*, LEGAL AFFAIRS (Sept./Oct. 2002), www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp.

visual art “may be incorporated in or made part of a building.”¹² In order for a work to qualify for protection from physical destruction under VARA, however, it must be considered a work of “recognized stature” in the eyes of the court—a requirement that often proves difficult to overcome.

Citing the above factors, graffiti art amply holds all qualities necessary for protection of both its visual imagery and physical embodiment. Works of graffiti art are original works of authorship fixed in a tangible medium of expression and inherently possess the characteristics of independent creation and minimal creativity necessary for protection under *Feist*, due to their method of creation. While nearly all graffiti artists create original imagery due to the individual expressive nature of the art form, a graffiti artist appropriating an image may even be entitled to copyright protection if a court deems the act of adapting the image to an aerosol medium as fulfilling the originality requirement for copyright protection. Overall, copyright law applies a broad definition of “originality” that allows nearly all works of graffiti art to be eligible for protection.

Graffiti art generally fulfills the higher standards required for protection of physical works as well, though certain forms of graffiti art may fall short. First, it is helpful to distinguish between two types of graffiti: “bombing” and “burning.” “Bombing” typically refers to aerosol tags consisting of artist names, crew names, and short written messages, while “burning” refers to more complex mural-like pieces focusing on visual imagery and thematic elements.¹³ Graffiti works resulting from “bombing” are more difficult to define as “art,” particularly in their physical form, as they largely consist of prototypical vandalism with little aesthetic consideration. Although abstract aesthetic arguments can be made regarding their artistic value, the overall lack of creative imagery, coupled with their individualistic and extemporaneous subject matter, will almost always prevent protection of the related physical works. In contrast, works of the “burning” category of graffiti art more readily satisfy the legal considerations necessary for physical protection. Citing *Brancusi*, it is easily argued that “burning” fulfills the relevant factors for physical art worthy of protection. The works are ornamental by nature, place heavy emphasis on visual imagery, and often draw from various artistic movements, thereby satisfying all aesthetic considerations. Similarly, these works often fulfill the circumstantial factors

12. 17 U.S.C. § 113(d)(1).

13. 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>.

set forth due to the rise of professional and critically acclaimed graffiti artists—known as “burners”—often responsible for this form of graffiti art.¹⁴

Finally, graffiti art fulfills the relevant artistic considerations for protection under VARA. The underlying policy of VARA rejects discrimination between artistic mediums, stating that “[a]rtists may work in a variety of media, and use any number of materials in creating their work.”¹⁵ Similarly, recent cases have explicitly acknowledged the artistic merit of graffiti and its potential fulfillment of VARA factors, although courts are inclined to provide protection to specific renowned works created by highly acclaimed graffiti artists, rather than protecting large collective works, or endorsing the greater artistic movement.¹⁶

Unique obstacles also result from the illegal method of creation behind many graffiti works, preventing both physical and commercial protection due to statutory bars. Explicitly addressing the applicability of VARA to illegal graffiti murals, the court in *English v. BFC&R East 11th Street LLC* held 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.”¹⁷ This inapplicability reflects larger policy debates surrounding the protection of acclaimed art created through illegal means. While illegality does not prevent a work from being declared “art” under law, it can determine whether that “art” gains protection in its physical form.

While graffiti art is capable of satisfying all relevant legal requirements for protection, it nevertheless struggles to gain legal protection for works in their physical form. Even legal works of graffiti art often fail to gain such protection, either due to lack of notoriety or larger sociocultural perceptions of the medium. The legal distinction between visual imagery and physical art creates an environment where legal protection of physical graffiti works is rarely granted, thereby neglecting the preservation of countless works from what is arguably the next great art movement and irreparably damaging the nation’s cultural heritage.

14. *Id.*

15. H.R. Rep. No. 514 at 11.

16. Cohen et al. v. G & M Realty L.P et al., 988 F. Supp. 2d 212 (E.D.N.Y. Nov. 20, 2013).

17. 1997 U.S. Dist. LEXIS 19137, at *1, *4 (S.D.N.Y. Dec. 2, 1997), *aff’d sub nom.*, *English v. BFC Partners* 198 F.3d 233 (2d Cir. 1999).

III. COPYRIGHT LAW PROTECTS IMAGES CREATED BY GRAFFITI, NOT PHYSICAL WORKS

Graffiti artists often find that visual imagery from their public works are misappropriated, reproduced or distributed without their consent. Over recent years, these artists have discovered that copyright law provides ample protection against reproduction and misappropriation, despite the public and often-illegal nature of the work. While the current copyright regime provides significant legal protection for visual images, it still markedly fails to protect the physical artworks themselves from destruction and exploitation.

As noted in the previous section, copyright law affords exclusive rights to the authors of original works that are “fixed in a tangible medium of expression.”¹⁸ These exclusive rights include the right of reproduction, the right to create derivative works, the right of distribution, and the right of public display.¹⁹ Unlike VARA, the fact that a work was created via a violation of another’s physical property does not serve as a bar prohibiting protective rights—although illegal use of intellectual property can preclude such protection. With its focus on visual imagery and tolerance of the art form’s vandalistic modality, graffiti artists have successfully utilized the Copyright Act in instances of misappropriation.

Although illegality does not necessarily serve as a statutory bar, many claims and remedies under the Copyright Act require the infringed work in question to be registered with the U.S. Copyright Office.²⁰ While these works can be registered, artists of the movement are understandably hesitant to register their work, due to their methods and proclivity for anonymity. Once artists register their works, however, courts have afforded significant protection in cases of misappropriation and infringement on other exclusive rights of copyright law.

In *Hayuk v. Sony Music Entertainment*, street artist Maya Hayuk sued Sony Music Entertainment for misappropriation under the Copyright Act.²¹ The infringing use in question involved Sony’s use of Hayuk’s *Chem Trails NYC* mural during a marketing campaign for one of their label musicians.²² Although the case was settled privately,²³ the court’s acknowledgment of the potential merits of the case, coupled with the eventual settlement agreement

18. 17 U.S.C. § 102.

19. 17 U.S.C. § 106.

20. 17 U.S.C. § 411.

21. Complaint at ¶¶ 48–57, No. 1:14-cv-06659, 2014 WL 4095430 (S.D.N.Y. Aug. 19, 2014).

22. *Id.* at ¶¶ 12–37.

23. Verdict, Agreement, & Settlement, *Hayuk v. Sony Music Entertainment*, No. 1:14-cv-06659, 2015 WL 5096527 (S.D.N.Y. Jan. 26, 2015).

between the parties, prove that copyright law allows for substantial protection of public graffiti art.

In *Anasagasti v. American Eagle Outfitters*, graffiti artist Ahol Sniffs Glue filed suit against American Eagle, claiming copyright infringement for their use of his *Ocean Grown (FL)* mural in an advertising campaign.²⁴ Again, the case was settled out of court, but the similar reluctance to pursue litigation by the allegedly infringing parties is indicative of the newfound protection that graffiti artists have found in copyright law.²⁵

Despite this surprising level of protection for visual images created by graffiti artists, copyright law does not provide protection for the physical works. While largely rooted in legal policy and statutory purpose, the reluctance to protect physical works of graffiti art reflects larger sociocultural issues surrounding the perception of the art form. Yet graffiti's success within the realm of copyright seems to suggest that courts are not concerned with artistic merit or lasciviousness of subject matter when determining copyright eligibility. Does graffiti art thus lack legal protection of physical works due to its medium and subject matter, or is it related to greater issues involving cultural acceptance and public perception? Trademark and moral rights law provide further insight into both the unique issues facing graffiti artists and the motives behind graffiti art's current legal status.

IV. THE LANHAM ACT ALLOWS FOR LIMITED MARKET CONTROL, YET IS RESTRICTED TO VISUAL IMAGERY

Graffiti artists face various issues when their works are used in commerce or removed for sale, requiring legal mechanisms to safeguard the artists and their work from market exploitation. Although trademark law provides relief in cases involving misuse of visual imagery from graffiti art,²⁶ its inability to protect physical works from market exploitation mirrors larger institutional issues involving perceptions of graffiti art and its cultural importance.

Under the Lanham Act, artists can gain protection for names, visual images or symbols that serve as source identifiers regarding goods in the stream of commerce.²⁷ Specifically, if the use of an artist's visual image, name, or symbol on a product or good in the stream of commerce would lead

24. No. 1:14-cv-05618 (S.D.N.Y. Jul. 23, 2014)

25. *Id.*

26. 15 U.S.C. § 1125(a).

27. *Id.*

a consumer to believe that the artist was either the source or an endorser of the good, then protection may be afforded in cases of misuse. Artists can thus seek relief when their visual images are “passed off” or used in a manner that misrepresents an infringer’s goods as being produced or endorsed by the artist as trademark holder.²⁸

Similar to copyright law, various causes of action under the Lanham Act require that the trademark be registered with the United States Patent and Trademark Office.²⁹ While a graffiti artist’s desire for anonymity may appear to inhibit registration—as registration of a mark, especially in the instance of a name or pseudonym, requires the written consent and identification of the related individual—it is possible for an artist to register a pseudonym as a trademark without revealing his or her identity in the filing documents.³⁰

Recent cases show that artists can successfully prevent misuse of names and symbols from their work by seeking relief under the Lanham Act. In *Williams v. Cavalli*, graffiti artists Revok, Reyes, and Steel filed infringement claims under the Lanham Act when images from their public art were used as design elements on clothing created by renowned designer Roberto Cavalli and distributed through various retailers.³¹ The artists claimed the use of images from their graffiti art on the clothing constituted “passing off,” misleading consumers to believe the artists had either produced or endorsed the clothing line.³² A motion for summary judgment filed by Cavalli was dismissed, showing that the Lanham Act may serve as an alternate form of relief when artists find their visual images misused in commerce.³³

Unfortunately, the Lanham Act fails to provide relief for artists when their physical works are removed from buildings and sold in commerce without the artist’s consent. Artists have attempted to assert authorship claims under the Lanham Act when their physical works are removed and sold, alleging that the sale of such art—marketed as a work by the artist—serves as a false designation of origin. *Dastar Corp. v. Twentieth Century Fox Film Corp.* indicates that courts unfortunately will not interpret “origin,” as used in the Lanham Act, to include authorship claims, instead limiting its

28. *Id.*

29. *Id.*

30. Roberto Ledesma, *In re Banksy, Pseudonyms, and the USPTO*, EVERYTHINGTRADEMARK.COM (Dec. 7, 2013), <http://everythingtrademarks.com/2013/12/07/banksy>.

31. *Williams v. Cavalli*, No. CV 14-06659-AB (JEMx), 2015 WL 1247065 (C.D. Cal. Feb. 12, 2015).

32. *Id.* at *5.

33. *Id.* at *6.

definition to a product's physical source of origin and precluding such claims.³⁴

V. CONTRACT LAW SERVES AS A SOLUTION TO THE RAPID REMOVAL OF PHYSICAL WORKS

Perhaps the most pervasive problem faced by graffiti artists and their physical works involves the manner in which works are regularly removed, painted over, or defaced before viewers have an opportunity to appreciate the piece in its desired form. While defacement and removal often relate to the territorial culture beneath the art itself, many works are removed simply due to lack of consent of the property owner on which they were created. When coupled with various administrative initiatives aimed at the removal of illegal graffiti from public and private property, established graffiti artists have seen works administratively removed—or “buffed”—before the viewing public and property owners themselves were able to realize the inherent artistic and economic value of the work.³⁵

Recent collaborative efforts between graffiti artists and local organizations show that contract law provides a solution to the problem of rapid removal of physical works of graffiti art.³⁶ While many graffiti artists adhere to the belief that the art form should remain nonconsensual, other artists are willing to reach agreements with property owners, demonstrating how graffiti art can be legally integrated into neighborhood aesthetics and physically preserved as art worthy of appreciation.³⁷ Organizations such as the Bushwick Collective and the LISA Project in New York City have successfully utilized contract law to facilitate the legal proliferation of graffiti art in various neighborhoods, thereby further establishing aerosol art

34. 539 U.S. 23, 32 (2003) (“[‘Origin’ is] incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.”); *see also* Gilbert v. Indiana, No. 09-CV-6352(KBF), 2012 WL 688811 (S.D.N.Y. Mar. 2, 2012) (dismissing authorship claim under Lanham Act regarding accuracy of statement about creator of work when work of graffiti art was sold without author’s consent).

35. *See* Jonathan Pearlman, *Valuable Banksy Artworks Lost in Australia as Man Paints Over Wall*, THE TELEGRAPH (Sep. 29, 2013, 5:23 PM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/10342622/Valuable-Banksy-artworks-lost-in-Australia-as-man-paints-over-wall.html>; *see also* *Oops! U.K. City Council Destroys Mural Created by Iconic Artist*, CBS NEWS (Oct. 2, 2014, 10:40 AM), <http://www.cbsnews.com/news/banksy-mural-accidentally-destroyed-by-british-city-council>.

36. *See* Felisbret, *supra* note 13.

37. *See* Bucky Turco, *Graffiti Writer Zexor Declares War on Gentrification, Street Artists, and the Bushwick Collective*, ANIMAL NEW YORK (Jan. 22, 2015, 3:36 PM), <http://animalnewyork.com/2015/graffiti-writer-zexor-declares-war-street-artists-bushwick-collective>; *see also* Felisbret, *supra* note 13.

as a legitimate art form and generating the public favor necessary for protection and preservation in other areas of the law.³⁸

VI. VARA'S CURRENT APPLICATION TO GRAFFITI ART IS EMBLEMATIC OF THE INADEQUATE LEGAL PROTECTION AFFORDED TO THE ART IN ITS PHYSICAL FORM

The levels of protection afforded by the above areas of law are emblematic of a greater inability to prevent destruction and removal of graffiti art in its original form. This reluctance to accept graffiti art as physical works worthy of preservation stems largely from sociocultural perceptions of the art form and its undetermined place in art history, best shown through cases where artists attempt to prevent physical destruction of their works under VARA.

VARA only affords protection to legal works of art, thus emphasizing the importance of contractual agreements between graffiti artists and property owners when addressing an artist's ability to preserve physical works.³⁹ When artists create works through illegal methods, they surrender significant legal protection over the physical work. Although these works often bear as much, if not more, artistic merit and economic value than legal works of graffiti art, their preservation is determined by private property law, leaving their fate in the hand of the property owner or even the paint brush of an unsuspecting city cleaner. This underscores the importance of a willingness to adopt more legitimate methods of creation in order to acquire rights that facilitate preservation of the art itself.

For legal works of graffiti art, VARA also illustrates how sociocultural perceptions of the art can determine its physical fate. The right to prevent destruction of works of art under VARA requires that the work in question be a work of "recognized stature."⁴⁰ In *Carter v. Helmsley-Spear, Inc.*, the Second Circuit set forth a standard for determining "recognized stature" under VARA that has been embraced by several courts.⁴¹ Under *Carter*, a work must satisfy two factors in order to have recognized stature: "(1) that the visual art in question has 'stature,' *i.e.* is viewed as meritorious and (2)

38. *Id.*

39. *English v. BFC&R E. 11th St. LLC*, 1997 U.S. Dist. LEXIS 19137, at *8 (S.D.N.Y. Dec. 2, 1997), *aff'd sub nom., English v. BFC Partners* 198 F.3d 233 (2d Cir. 1999)).

40. 17 U.S.C. § 106A(a)(3)(B).

41. 861 F. Supp. 303, 325 (S.D.N.Y. Aug. 31, 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995); *see also* *Hunter v. Squirrel Hill Assoc's.*, 413 F. Supp. 2d 517, 520 (E.D. Pa. Aug. 17, 2005) (recognizing the complaint properly alleged a VARA claim under *Carter*); *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 97 (D. Mass. Oct. 24, 2003) (citing *Carter* when evaluating VARA entitlement).

that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”⁴² Courts traditionally find that a work of graffiti art fulfills the first prong; likely due to a reluctance to qualify “artistic merit.”⁴³ Fulfilling the second prong, however, has proven to be one of the greater legal obstacles involving preservation of the art in its physical form.

When evaluating whether a work bears stature that is “recognized” under *Carter*, courts evaluate the stature of the individual work of graffiti art itself.⁴⁴ Since many works are removed or destroyed before the larger community can assess their artistic merit, graffiti art is inherently hindered from achieving the level of recognition necessary for physical protection under VARA. In addition, graffiti art is often publicized as part of a collective body of work, with less emphasis on particular works. While courts acknowledge the potential for a graffiti artist to be so widely renowned that any created work is inherently one of recognized stature—regardless of its level of publicity or explicit critical acclaim—this serves as a rare example that does not apply to the vast majority of graffiti artists seeking protection.⁴⁵

Recent litigation under VARA provides insight into the legal and cultural obstacles preventing graffiti art from gaining protection in its physical form. In *Cohen*, the court was tasked with determining whether works of graffiti art located at 5Pointz were entitled to protection under VARA.⁴⁶ Cited as a “graffiti mecca” by *The New York Times*, 5Pointz was a building complex in Long Island City, New York that served as a cultural hub for graffiti artists, because they were granted permission to adorn the entire exterior of the property with their work.⁴⁷ Due to its unique acceptance and celebration of graffiti art and the resulting works covering nearly every surface of the building, 5Pointz became a highly recognized and distinguished tourist destination.⁴⁸ Though the court acknowledged that 5Pointz was highly regarded as a collective work, it held that protection

42. *Carter*, 861 F. Supp. at 325.

43. See *Scott v. Dixon*, 309 F. Supp. 2d 395, 400–01 (E.D.N.Y. Mar. 19, 2004) (finding work “may have had artistic merit”); see also *Pollara v. Seymour*, 206 F. Supp. 2d 333, 336–37 (N.D.N.Y. May 30, 2002), *aff’d*, 344 F.3d 265 (holding mural at issue was “unquestionably meritorious”).

44. *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 226 (E.D.N.Y. Nov. 20, 2013).

45. *Scott*, 309 F. Supp. 2d at 400.

46. *Cohen*, 988 F. Supp. 2d at 214.

47. Cara Buckley & Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens*, N.Y. TIMES (Nov. 19, 2013), <http://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html>.

48. *Cohen*, 988 F. Supp. 2d at 219 (“5Pointz is listed in *Time Out New York* as a ‘New York must-see,’ and is in 150 tour guide books.”).

under VARA only applies to individual works; this was best exemplified by visitors coming to 5Pointz for the purpose of viewing a particular work of graffiti art, rather than the collective work as a whole.⁴⁹ This reluctance to view graffiti-adorned buildings as “visual works” protected under VARA prevents examples of collective graffiti from gaining protection and is representative of a larger sociocultural belief that graffiti-laden buildings should be averted rather than protected.

While courts are reluctant to view buildings similar to 5Pointz as works of visual art entitled to VARA protection, a statutory exception may provide relief in future cases, and allow preservation of similar collective works. Under VARA’s “building exception,” a work may be entitled to protection if it is “incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work.”⁵⁰ VARA’s building exception acknowledges the potential for works to be inextricably intertwined with a building, allowing the building to serve as a necessary characteristic of the work. Therefore, it can be argued that a particular work of recognized stature situated within a larger collective work, such as 5Pointz, is necessarily entitled to protection of the collective work as a whole, since the work’s placement within the larger building as a collective work is integral to its artistic function.

The contextual nature of graffiti art and its consequent legal issues are more directly addressed in cases where artists claim a work to be site-specific, and that removal of the work from its current location would cause significant harm to the integrity and quality of the art. Currently, federal courts are split on whether VARA affords protection to site-specific artwork, and the relevant cases provide valuable insight into legal evaluations of public art and its greater place in society.

In *Phillips v. Pembroke Real Estate Inc.*, the First Circuit held that VARA protection does not apply to site-specific artwork.⁵¹ *Phillips* supported this decision by citing VARA’s public presentation exception, which allows modification of visual artwork for the purpose of public presentation or conservation. The court reasoned VARA’s public presentation exception is incompatible with protection of site-specific art, where modification would amount to destruction of the work.⁵² In addition

49. *Id.* at 226.

50. 17 U.S.C. § 113(d)(1)(A).

51. *Phillips v. Pembroke Real Estate Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

52. *Id.*

to citing relevant legislative history, the court observed that there is no explicit reference to site-specific protection in the statutory language of VARA.⁵³ The court further articulated that protection of site-specific art under VARA would have far-reaching effects that dramatically change real property interests and laws, since protection would allow the property interests of the artist to triumph over that of the physical property owner.⁵⁴ This reflects larger concerns surrounding institutional support of graffiti art, due to its perceived disregard for private property interests, and substantial emphasis on sociopolitical change.

The Seventh Circuit took a different position in *Kelley v. Chicago Park Dist.*, stating that the First Circuit's approach to site-specificity under VARA "may be unwarranted" and leaving open the possibility of protection.⁵⁵ Specifically, *Kelley* cited several ways in which the site-specificity analysis of *Phillips* was flawed. While acknowledging that the public presentation exception in VARA appears to conflict with protection site-specific work, the court stated that such an exception should not serve as a bar preventing site-specific work from protection.⁵⁶ Rather, the court stated that the exception simply limits the amount of protection afforded to site-specific art under VARA, and cited various other applicable rights—such as the right of attribution—that are not necessarily affected by the public presentation exception and should be afforded to site-specific art.⁵⁷ The court also noted that VARA's building exception appears to cover a form of site-specific art, in that it protects artworks that have become inextricably intertwined with a physical location.⁵⁸ While the case was decided on other grounds, it reinforces the potential applicability of VARA to site-specific art and illustrates the inherent legal friction between graffiti art and other areas of property law.⁵⁹

The thin legal protection afforded to graffiti art in its physical form—and the greater perception of graffiti art as lacking physical worth—is perhaps best highlighted by the reluctance of courts to view physical destruction as a form of irreparable harm under VARA. The *Cohen* court's discussion of irreparable harm and its inapplicability to the destruction of

53. *Id.* at 139.

54. *Phillips*, 459 F.3d at 142.

55. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 307 (7th Cir. 2011) (stating that "the statute suggests that site-specific art is not categorically excluded from VARA" but declining to decide whether VARA is inapplicable to site-specific art because the VARA claim at bar was decided on other grounds).

56. *Id.* at 306.

57. *Id.*

58. *Id.* at 307.

59. *Id.*

graffiti art inadvertently highlights the incompatibility between graffiti culture and the legal understanding of art. The court in *Cohen* views monetary damages as an adequate remedy in cases of the physical destruction of graffiti art, reasoning that “paintings generally are meant to be sold” and that “surely the [artists] would gladly have accepted money from the defendants to acquire their works, albeit on a wall rather than a canvas.”⁶⁰ Given the largely sociopolitical nature of graffiti art, it is unlikely that the majority of artists would view monetary relief as a sufficient remedy for the removal or destruction of their work. Similarly, many graffiti artists are motivated by personal expression, rather than financial success, and may view such destruction as reflective of larger issues of censorship and cultural gentrification that override monetary considerations. Ultimately, the *Cohen* court held that the graffiti art in question “can live on in other media” and that copyright protection afforded to visual imagery—coupled with monetary relief arising from physical destruction—prevents a showing of irreparable harm.⁶¹ The indifference exhibited by courts when addressing the physical preservation of graffiti is reflective of the greater sociopolitical issues facing its artists, along with the limited protection afforded to graffiti art relative to other works of art and the way in which public and institutional perceptions of an art form can determine its physical fate.

VII. OVERCOMING THE INHERENT PROBLEM OF ILLEGALITY IN THE CONTEXT OF GRAFFITI ART

Many graffiti artists choose to execute their works without permission of property owners. As a result, the historically illegal nature of the art form yields numerous problems for both artists and their physical works. Nonconsensual execution of graffiti art constitutes “vandalism” and is punishable in varying degrees based on jurisdiction.⁶² Coupled with the disqualification of illegal works under VARA and the larger stigma of an art form cloaked in dissent, the illegal execution of graffiti creates barriers that prevent institutional acceptance and legal sustenance.

Given their extreme differences in motivation and subject matter, it would be beneficial to draw a legal distinction between the “bombing” and “burning” forms of graffiti. Such a distinction would help condemn

60. *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 221 (E.D.N.Y. Nov. 20, 2013).

61. *Id.*

62. 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>.

thoughtless vandalism, encourage creation of the art in a more socially beneficial form, and spread awareness regarding the dissimilarity between the two types of graffiti to facilitate acceptance of the latter form by higher institutions. Unfortunately, a legal distinction is likely impossible, due to constitutional issues concerning viewpoint discrimination. Specifically, the First Amendment holds that the “government has no power to restrict expression because of its message [or] its ideas” and creating a regime that penalizes one form of graffiti while favoring another would likely constitute an unconstitutional restriction.⁶³ While it is possible to argue that “bombing” should yield harsher punishments due to its content—akin to heightened punishments for hate speech—it is extremely unlikely for a court to institute such a law, due to the extremely inconsistent subject matter of the graffiti in question and its substantial relation to sociopolitical expression.

Providing an exception under VARA for artists of “recognized stature” may help overcome problems arising from illegality and can be executed in a manner that does not significantly impair private property interests and law. By including an exception for artists of the type noted in *Scott*, whose works would automatically be considered those of “recognized stature” due to their established status as a highly acclaimed artist, legislators can serve the interests of both artists and property owners.⁶⁴ While this may appear to afford too much protection to the artist, the exception could require the local government or property owner to approve the work itself before providing VARA protection, in order to prevent an improper balance of property interests.

Lastly, the rising market for graffiti art raises questions concerning whether the execution of works by certain artists is properly defined as “vandalism,” regardless of the property owner’s consent. With certain works of illegal graffiti art selling for over six figures, a court would struggle to reason that such high-value works painted on private property without the owner’s consent constitute property damage or vandalism outside of an extremely literal statutory interpretation.⁶⁵ The overarching clash between graffiti art and the legal infrastructure protecting art and cultural property indicate that larger institutional change is required for the art form to receive adequate protection.

63. *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

64. *See Scott v. Dixon*, 309 F. Supp. 2d 395, 400–01 (E.D.N.Y. Mar. 19, 2004).

65. Scott Reyburn, *Disputed Banksy Mural Sells for More Than \$1.1 Million*, BLOOMBERG BUS. (Jun. 3, 2013, 8:10 AM), <http://www.bloomberg.com/news/articles/2013-06-02/disputed-banksy-mural-sells-for-more-than-1-1-million>.

VIII. PROTECTION OF GRAFFITI ART IN ITS PHYSICAL FORM REQUIRES ADMINISTRATIVE CHANGE OUTSIDE OF TRADITIONAL INTELLECTUAL PROPERTY LAW

Public and institutional recognition of graffiti art significantly affects its legal protection under intellectual and cultural property law, requiring greater sociopolitical change to facilitate acceptance of graffiti as an art form worthy of physical preservation. Changes in other areas of law, particularly landmark law, can help graffiti art gain the protection necessary for longstanding cultural appreciation. As stated in *Cohen*, landmark law sets aesthetic and temporal requirements that restrict its ability to protect unconventional buildings with significant cultural value.⁶⁶ Specifically, 5Pointz was unable to achieve landmark status both due to its inability to fulfill the law's temporal requirement—that the building be in existence for at least thirty years—and its lack of sufficient architectural distinction.⁶⁷ Given the rapid nature in which neighborhood gentrification and administrative policies can lead to the removal and destruction of graffiti art, landmark law should adopt less stringent temporal and aesthetic requirements to enable protection of unique and highly regarded examples of cultural property, such as 5Pointz.⁶⁸

Citing VARA's "recognized stature" requirement, greater institutional acceptance of graffiti as an art form is required to enable its physical preservation. As stated in *Carter*, "the recognized stature requirement is best viewed as a gate-keeping mechanism—protection is afforded only to those works of art that art experts, the art community, or society in general view as possessing stature."⁶⁹ Although graffiti art has gained a significant following and level of appreciation by certain segments of the art community—as exhibited through its explored importance in art history and exemplary auction results—larger acceptance by venerable museums and esteemed scholars can elevate graffiti into the realm of "fine art" and furnish the accord necessary for physical preservation of the art in its original form.⁷⁰

66. *Cohen*, 988 F. Supp. 2d at 236.

67. Malika Rao, *Artists Bid Sad Farewell to 5Pointz, New York City's Graffiti Mecca*, HUFFINGTON POST (Nov. 21, 2013), http://www.huffingtonpost.com/2013/11/21/5-pointz_n_4316483.html; Tom Namako & Nick Pinto, *Graffiti Mecca, Whitewashed Away*, WALL ST. J. (Nov. 19, 2013), <http://online.wsj.com/articles/SB10001424052702303531204579208100072483852>.

68. Namako & Pinto, *supra* note 67; 'Gentrification in Progress' at 5Pointz, N.Y. MAG. (Mar. 10, 2014), <http://nymag.com/daily/intelligencer/2014/03/gentrification-in-progress-at-5pointz.html>.

69. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. Aug. 31, 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

70. Reyburn, *supra* note 2.

In *Bleistein v. Donaldson Lithographing Co.*, Judge Holmes famously stated his concerns about leaving judges to determine what works bear artistic worth. Holmes understood that:

[S]ome works of genius would be sure to miss appreciation [since] their novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.⁷¹

Although judges largely adhere from determining the artistic merit of a work, these concerns still mirror the larger issues involving the current treatment of graffiti and its potential effect on greater art history. As works are rapidly removed and destroyed, the public and greater art community are not given an adequate opportunity to consider whether the art merits physical preservation. According to the policy underlying VARA, graffiti's unique method and medium should not hinder its physical preservation, yet its medium largely prevents its physical protection.⁷² Cultural property law's significant dependence on artistic recognition and stature thus requires greater institutional change to adequately protect and preserve works of graffiti art for future generations.

IX. CONCLUSION

Graffiti artists find substantial protection for visual imagery in intellectual property law, yet their inability to protect physical works from exploitation and destruction is indicative of larger issues involving sociocultural perception of the art form. Although interpretive changes to VARA can facilitate preservation of the art, legal change alone will be insufficient; all relevant parties—including both the art community and graffiti artists themselves—must strive to modify their current regimes in order to facilitate the wider recognition necessary for heightened legal protection. Graffiti artists gain significant legal protection by executing their work legally, and the formulation of legal agreements with property owners must be more readily embraced by the underlying culture, rather than dismissed as a form of impurity. Museums and other art institutions must also reconsider the artistic merit of graffiti art, and acknowledge their unique position of responsibility given how heavily legal protection depends on their societal acceptance. While legal change may provide further relief, the fate of graffiti art is largely left to the fortuitous waves of cultural perception.

71. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

72. H.R. Rep. No. 514 at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921 (“[W]hether a particular work falls within the definition should not depend on the medium or materials used.”).

Therefore, society as a whole must embrace the art form in order to ensure its progress and survival.