2019

What Protections Are Available to Graffiti Artists?

Molly Lamovec

Follow this and additional works at: https://open.mitchellhamline.edu/cybaris

Part of the Entertainment, Arts, and Sports Law Commons, Intellectual Property Law Commons, and the Law and Society Commons

Recommended Citation

Lamovec, Molly (2019) "What Protections Are Available to Graffiti Artists?," Cybaris®: Vol. 10 : Iss. 1 , Article 5.
Available at: https://open.mitchellhamline.edu/cybaris/vol10/iss1/5
WHAT PROTECTIONS ARE AVAILABLE TO GRAFFITI ARTISTS?

BY MOLLY LAMOVEC

TABLE OF CONTENTS

I. INTRODUCTION .......................................................................................................................... 118
II. THE HISTORY OF GRAFFITI ........................................................................................................ 118
   A. WHERE IT STARTED .............................................................................................................. 118
   B. DIFFERENT STYLES OF GRAFFITI .................................................................................. 119
   C. STREET ART V. GRAFFITI .............................................................................................. 121
III. WHAT ART IS COPYRIGHTABLE? .............................................................................................. 122
IV. WHAT REMEDIES ARE AVAILABLE? .......................................................................................... 123
   A. VISUAL ARTISTS RIGHTS ACT .................................................................................... 123
V. DO ARTISTS NEED COPYRIGHT WITH VARA? ........................................................................ 131
VI. CONCLUSION ............................................................................................................................ 133

1 This author is a student at Mitchell Hamline School of Law. Her biographical information can be found on Linkedin at: https://www.linkedin.com/in/molly-lamovec-722830162/.
I. INTRODUCTION

Art is defined as the expression or application of human creative skill and imagination, typically in a visual form such as painting, or sculpture, producing works to be appreciated primarily for their beauty or emotional power. Art can be found in many forms. It contains unique characteristics depending on the artist creating it. For example, Claude Monet was a French painter who was known for developing the impressionism painting technique. Due to the originality and distinctive nature of works of art, they are offered a significant form of protection and copyrightability. Artists are able to apply for the registration of their art to be a copyrighted work if it is an original work of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Looking at the list of which authorships apply; one does not see graffiti. As of now the courts have yet to decide whether or not artists should be afforded graffiti protection. The following paper will discuss the history of graffiti, the current courts discussion of graffiti and copyright law, and the available remedies for artists who have their works infringed on.

II. THE HISTORY OF GRAFFITI

A. WHERE IT STARTED

When googling graffiti, many of the images that show up feature bright colors and detailed illustrations that seem to be featured in large cities. Looking at these images, the graffiti and street

---

2 Art, OXFORD DICTIONARY (2019)
5 Id.
6 Id.
art that is seen nowadays on the streets of New York City or in the subway stations of Chicago may seem like a newer art form. However, graffiti dates back to as early as the ancient Greeks, Italians, and Pompeiians. The Greeks used it to write and express themselves graphically and the Italians preserved different forms of Pompeian graffiti in their artwork. When graffiti first came to colonial America, it was largely centered around defecating, politicking, and drinking and was featured mostly in subway stations of large cities.

Nowadays, graffiti has transformed into a legitimate art form that is featured in art galleries and museums around the world. Furthermore, there are graffiti artists, like Banksy, whose graffiti art has been auctioned at $1.4 million. Looking at graffiti today, it has evolved from an obscene art form which was not recognized by the art community, into an art form that some people are willing to pay millions of dollars to own. Instead of being seen as a gang related territory marking, individuals in the art community are beginning to recognize graffiti for its stylistic aspects and creative nature.

B. DIFFERENT STYLES OF GRAFFITI

In order to understand why people are paying millions of dollars for a graffiti artist’s work, one needs to know there are different types of graffiti recognized in society. It is important to distinguish between these different types of graffiti because they hold different values. Gang

---

7 Juliane Huang, *10 places where graffiti is legal*, MATADOR NETWORK (Jan. 9, 2009), https://matadornetwork.com/trips/10-places-where-graffiti-is-legal/.


9 id.

10 id at 638.

11 id at 640.

graffiti was one of the first kinds of graffiti to emerge. Tagging and throw-ups are types of graffiti that is a work including the artists name and sometimes a symbol related to their gang or crew.\textsuperscript{13} This type of graffiti is used by its creators more for the quantity than the quality because it is usually used to mark that specific artists territory.\textsuperscript{14} Furthermore, these types of graffiti are known as “old school” and are seen a lot in New York City’s subway system.\textsuperscript{15} Artists would use these tagging and throw-up styles more as an artistic form of communications that showed their pride and recognition for their neighborhood.\textsuperscript{16}

Another similar style graffiti to these two is termed wild style graffiti and is an adaptation of the throw-up style.\textsuperscript{17} Wild style is a more elaborate version of the throw-up style graffiti and features spikes, curves, and arrows which make it difficult to decipher by people who are not graffiti professionals.\textsuperscript{18} Other styles of graffiti have a more artistic quality such as “piece” short for “masterpiece” graffiti.\textsuperscript{19} This type of graffiti involves more detail and is generally more labor


\textsuperscript{14} id.

\textsuperscript{15} Eli Anapor, Graffiti Styles You Need to Know, WIDEWALLS (February 26, 2019), https://www.widewalls.ch/graffiti-styles/old-school/.

\textsuperscript{16} id.

\textsuperscript{17} Ion Nicolae, The Seven Main Styles of Graffiti, DESIGN LIKE (March 5, 2019) https://designlike.com/the-7-main-styles-of-graffiti/.

\textsuperscript{18} Eli Anapor, Graffiti Styles You Need to Know, WIDEWALLS (February 26, 2019), https://www.widewalls.ch/graffiti-styles/old-school/.

\textsuperscript{19} Ion Nicolae, The Seven Main Styles of Graffiti, DESIGN LIKE (March 5, 2019) https://designlike.com/the-7-main-styles-of-graffiti/.
intensive than the throw-up or wild style type of graffiti. Furthermore, masterpiece graffiti generally contains three colors or more and is painted free hand.

Finally, stencil graffiti is the most popular graffiti style made popular by artists such as Banksy and Blek le Rat. This graffiti is made by artists who make stencils of their art work before hand and then spray paint it onto their desired canvas. Stencil-style graffiti is currently the most popular and has developed into a worldwide subculture. This type of graffiti usually termed as “street art” is usually the type of graffiti that breaks through to museums and is connected to recognized graffiti artists around the globe.

C. STREET ART V. GRAFFITI

It is important to distinguish between the different types of graffiti in order to decide what kinds of graffiti can be copyrighted and what kinds cannot. Looking at throw up and tagging styles of graffiti, these do not contain a lot of artistic expression as compared to the masterpiece and stencil styles. Therefore, it has been established that there are certain types of graffiti that are termed “street art,” that may be afforded a higher level of protection than other forms of graffiti. As previously stated, many types of graffiti such as tagging and throw ups are designed more for marking a property or area and do not require much skill to make. This type of graffiti generally


21 Ion Nicolae, The Seven Main Styles of Graffiti, DESIGN LIKE (March 5, 2019) https://designlike.com/the-7-main-styles-of-graffiti/.

22 Eli Anapor, Graffiti Styles You Need to Know, WIDEWALLS (February 26, 2019) https://www.widewalls.ch/graffiti-styles/old-school/.

23 Id.

24 Eli Anapor, Graffiti Styles You Need to Know, WIDEWALLS (February 26, 2019), https://www.widewalls.ch/graffiti-styles/old-school/.

also includes some type of gang or crew affiliation. Moreover, this graffiti is usually restricted to the use of aerosol cans alone. Tagging graffiti differs from the street art created by artists such as Banksy, Blet le Rat, and many others. These artists use different materials such as stickers, stencils, and wheat paste posters to enhance the visual impact of their art. From this, it is possible to conclude that street art holds higher value in the artistic community. While both forms of graffiti are seen as some form of expression, for the purposes of this article, the focus will be on street art rather than graffiti.

This leads us to the first main question of this article, should graffiti artists be allowed to copyright their creative works? Moreover, what protections are available to graffiti artists today and are those protections adequate?

III. WHAT ART IS COPYRIGHTABLE?

The Copyright Act protects various forms of art from multiple different kinds of infringement.

As previously stated, a work of art is copyrightable if it is an original work of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Furthermore, the United States Code goes on to reference several types of work that

---


27 id.


29 id.

are afforded copyright protection such as pictorial works, graphic works, and sculptural works. Since the United States Code includes “pictorial” works in its definition, it would seem that graffiti would qualify under the bare language interpretation of the code’s definition. However, the Supreme Court has failed to address whether or not graffiti art deserves copyright protection.

There have been multiple cases at the district court level that have ended with the court stating there is no remedy for an artist who claims copyright infringement due to illegality of the contended works. This presents a real problem for graffiti artists who try to prevent their work from being re-created without their consent. Furthermore, if someone attempts to destroy or mutilate a graffiti artists work, under the Copyright Act, they may not have any form of remedy because the Supreme Court has declined to afford protection to the works of graffiti artists.

IV. WHAT REMEDIES ARE AVAILABLE

Currently, the courts have declined to extend copyright protection to the work of graffiti artists, so they have to turn to other methods of restoration when attempting to protect their work. One of the most prominent examples are artists who may not have copyright protection of their works but seek moral rights in their works under the Visual Artists Rights Act.

A. VISUAL ARTISTS RIGHTS ACT

Due to the apparent lack of protection of graffiti artists work through copyright, many artists try to remedy their losses through the Visual Artists Rights Act (“VARA”). This Act exists to provide artists some type of moral rights in regard to their works of visual art. Specifically, the

31 Id.


33 Id.
act stemmed from the Berne Convention which was devoted to protecting artists’ works. The Berne Convention provided that:

“(1) Independently of the author’s economic rights, and even after the transfer of 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 any other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

Essentially, this states that if the artists work is recreated in any way that is not desirable or the artists believe will hurt its reputation, the artist can seek some sort of remedy.

Furthermore, the VARA provides specific types of protection of the artists’ visual works. Specifically, the Act protects any distortion, mutilation, or modification of the existing artwork that may compromise artists’ reputations. Additionally, the VARA provides protection for the original authors of the work regardless of whether the author owns a copyright. Moreover, the protection provided by VARA extends throughout artists’ lifetime. Most importantly, VARA includes a section completely dedicated to artwork that is fixed in the medium of a building, the Act reads:

“(d)(1) In a case in which—

(A) a work of visual art has been 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 as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of

---


35 *id.*


37 *Id.*

38 *Id.*
the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless--

(A) 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, or

(B) 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.”

This rule distinguishes between works of art that are removeable from a building and ones that are not. If the artwork can be removed without completely ruining the quality of the art, the graffiti artist has the right to attempt to salvage the art after a receipt of a 90-day notice from the building owner informing the artist of the planned destruction of the work. Furthermore, the artists rights are waived if the artist fails to remove the work or the building owner cannot notify the artist after making a good faith effort. In contrast, if the artwork cannot be removed without completely destroying the quality of the work, the artist automatically has rights under VARA unless the building owner obtains a written waiver signed by the artists and the owner that reaffirms the waiver of the artists’ rights. Furthermore, if an artist’s VARA rights are violated, the artist may be awarded the same kind of reward or retribution afforded under copyright infringement.

40 Id.
41 Id.
42 Id.
One of the most recent cases where artists have sought damages under VARA involves a multitude of graffiti artists who sought to prevent a building from being torn down that was covered in graffiti artwork.44 This building was located in Long Island City and at the time was the biggest collection of graffiti art in the United States of America.45 The artwork that decorated these commercial buildings dated as far back as 1990.46 In an attempt to control the graffiti that was being painted on the walls, Plaintiff Cohen approached Defendant Wolkoff, offering to curate and decide what art would be allowed on the walls and what wouldn’t.47 From this point forward, the graffiti artwork that was placed on the commercial buildings greatly improved which ultimately led to the fame and recognition of the buildings as “5Pointz.”48 This building became one of the most famous highlights of the Queens area. Artists performed music videos, tour buses visited, and the building was included in the scenes of movies.49 This widely publicized case became known as the “5Pointz Litigation,” named after the building that the artists were arguing against its demolition.50 This case is one of the first where the court had to determine whether or not works of aerosol art are afforded protection under the law.51 The Defendant, Wolkoff, despite

46 988 F. Supp. 2d 212 at 217.
47 Id.
48 Id.
49 Id.
50 Id.
51 988 F. Supp. 2d 212 at 213.
acknowledging the artistic quality in the buildings, had plans to tear the buildings down and build new apartment complexes.52

This case commenced all the way back in 2013 with a final verdict being issued in 2018.53 In 2013, the plaintiffs applied for a preliminary injunction prohibiting demolition of the building that was ultimately denied by the court.54 The majority of the decision issued by the court discussed whether or not the graffiti artists’ work was of “recognized stature” and thus was entitled to VARA protections.55 The court went on to discuss that VARA amended copyright right to provide the right of attribution and integrity to artists.56 Most importantly, the court defined what is necessary for a work of art to achieve recognized stature. The plaintiff is required to show “(1) that the visual art in question has ‘stature,’ i.e. is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”57 Under this, the court is allowed to look at the opinions of various experts in the art field, artists opinions, and art collectors to establish whether or not these two tiers are fulfilled.58 Here, the court listened to various expert testimony by both the defendant’s and the plaintiff’s side and ultimately concluded that the question of what qualifies as “recognized stature” is too deep a topic to be decided in the preliminary stages of the case.59

52 Id. at 220.
55 988 F. Supp. 2d 212 at 215.
56 Id.
57 988 F. Supp. 2d 212 at 217.
58 Id.
59 988 F. Supp. 2d 212 at 226.
A determination on what qualifies as recognized stature was heavily influenced by the plaintiff’s and defendant’s expert testimony. The defendant’s brought in Erin. Thompson, an art history professor with extensive credentials. In Thompson’s opinion, the terms of recognition and stature should have an extremely restrictive view. Thompson stated that that stature should be defined as how the public views the work of art, not the particular quality of the art. Furthermore, she stated even if the art was unique and innovative, this does not matter if scholars do not agree that the particular artists’ work is changing the history of art itself. Moreover, in discussing the recognition of art, Thompson placed the most importance on whether or not the art had been mentioned in any sort of academic publication on the internet. Thompson believed the only artwork that met the standard of recognition is artwork that turned up after a simple Google search. In Thompson’s opinion, the 5Pointz artwork as a whole had achieved recognition, however the only way individual artists work could achieve this is if people showed up to see their specific pieces.

On the contrary, plaintiffs brought expert Daniel Simmons, Jr., who is the head of the Rush Philanthropic Arts Foundation and owner of two well-known art galleries in New York City. Simmons’ testimony focused more on the quality of the artwork like its design, color, shape, and

60 Id. at 221.
61 Id.
62 988 F. Supp. 2d 212 at 221.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id. at 222.
Furthermore, Simmons defined what qualifies as “recognized stature” as having the artwork on display where a large amount of people would see it. This is a much looser definition that the one offered by defendant’s expert Thomas. Additionally, Simmons went on to explain that the Brooklyn Museum had recently had a show on graffiti artwork that contained artwork by the artists who also had works of art at 5Pointz which amounts to even more exposure and recognition. Much of Simmons testimony centered on the fact that multiple artists which had work displayed at 5Pointz had earned substantial reputations as graffiti artists and that 5Pointz is one of the only places where one could go to see all these artists’ work combined.

After hearing this testimony, the court quoted Picasso, stating “[t]he purpose of art is washing the dust of daily life off our souls.” Following this, the court concluded that VARA protection should extend to protect the work of graffiti artists. Moreover, the court stated

“As Congress recognized, whether a particular work falls within the definition of visual art, “should not depend on the medium or materials used,” since “[a]rtists may work in a variety of media, and use any number of materials in creating their work.” See H.R. REP. NO. 514 at 11 (quoted in Carter, 71 F.3d at 84). This fits the aerosol artist to a “T,” and our souls owe a debt of gratitude to the plaintiffs for having brought the dusty walls of defendants’ buildings to life.”

The court also distinguished between the ownership of a copyright itself, and the ownership of the materials that the artwork is placed on. The court stated that it did not have

68 Id.
69 Id.
70 Id.
71 988 F. Supp. 2d 212. at 223.
72 988 F. Supp. 2d 212 at 225.
73 Id.
74 Id.
75 Id.
any authority to protect against the destruction of the art because that determination ultimately was left to the city. 76 The only thing the court was allowed to decide was whether the art was considered “recognized stature” and if it was, the amount of damages that should be awarded to the artists whose artwork was destroyed. 77 Additionally, the court suggested that the plaintiff’s art could live on through photographs of the art, which would be copyright protected because they are considered a reproduction of their work. 78 Finally, the court stated that the artwork did qualify as visual art, however it determined that the question of whether or not the works qualified as recognized stature is matter that is better left for a trial where there are less time constraints. 79

This leads to the present day case which was decided on February 12, 2018. 80 This action commenced after the defendant whitewashed all of the plaintiff’s art, destroying their work. 81 As previously stated, the court ultimately awarded the plaintiffs $6.75-million dollars for total damages stating that their artwork was wrongfully and willfully destroyed. 82 In reaching its decision, the court again discussed whether or not the graffiti artists work was one of recognized stature. 83 First, the court placed an importance on the fact that Jonathan Cohan had selected only a few graffiti pieces on the walls to be permanent which suggests the pieces had achieved

76 Id.
77 Id.
81 988 F. Supp. 2d 212 at 227.
79 Id. at 226.
82 320 F. Supp. 3d 421 at 421.
78 Id. at 427.
83 Id. at 440.
recognized stature.\textsuperscript{84} Some of the pieces on display at 5Pointz had been there for many years and were seen by millions of people every single day.\textsuperscript{85} Furthermore, the court agreed with plaintiff’s expert witness and agreed that 5Pointz had become almost a mecca for aerosol art.\textsuperscript{86} Moreover, the court disagreed with defendant’s expert witness’s restrictive view of recognized stature.\textsuperscript{87} If the court agreed with the expert’s approach, the remedies available under VARA would only be available to pieces of art that are considered true masterpieces, which the court concluded would be very few.\textsuperscript{88} As a result, 45 out of the 49 works that were contested achieved recognized stature.\textsuperscript{89} Therefore, each of the artists’ artwork that earned recognized stature was awarded a percentage of the total statutory damages awarded by the court.\textsuperscript{90}

**V. DO ARTISTS NEED COPYRIGHT WITH VARA?**

Looking at the 5Pointz litigation, it seems as the affected graffiti artists had a pretty good outcome. Even though their artwork was destroyed, the minimum amount of statutory damages awarded to a single artist was $75,000.00.\textsuperscript{91} As previously stated, it is possible for an artist to pursue an action under VARA even if they do not hold a copyright for the work at issue. Does this mean that graffiti artists may not need to seek out copyright at all if they are able to be cured

\textsuperscript{84} 320 F. Supp. 3d 421 at 438.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 439.
\textsuperscript{87} Id.
\textsuperscript{88} 320 F. Supp. 3d 421 at 439.
\textsuperscript{89} Id. at 440.
\textsuperscript{90} Id. at 447.
\textsuperscript{91} Id. at 448.
through VARA? Not necessarily. While the court here decided that the artists deserved compensation for the loss of their artwork, this was done through the extensive presentation of expert witness’s by both the Plaintiff’s and Defendant’s.\textsuperscript{92} This suggests that in order for a graffiti artist to be afforded protection under VARA, they need access to qualified art experts that are willing to testify about the recognized stature of their artwork. Without this, the artist would not be able to seek a remedy if their work was destroyed or mutilated.

This was a collection of worldwide, renowned artists who also had some of their work displayed in museums around the world. While this type of recognition and stature may be seen in some graffiti artists, it cannot be said that every artist who seeks a remedy under VARA would be able to establish this level of credibility. Therefore, it seems as if VARA protections only extend to those individuals who are able to prove their significance in the art community. Does this seem like a workable amount of protection for graffiti artist’s work? Given the circumstances, it does not seem like it does.

Street art is an up and coming art form that is just beginning its entrance into the art world. It has evolved from gang-related vandalism into a culture that is featured in museums and other art collectives.\textsuperscript{93} It makes logical sense that artwork that receives so much attention and recognition should be afforded more protection. However, this protection will likely not be extended to artists who are lesser known in the art community. In order to receive the protection that VARA offers, artists need to be extremely recognized in the art community and their artwork has to achieve a high level of stature. This high standard likely does not offer protection to artists who are only locally known or that have not had the privilege or opportunity to have their artwork

\textsuperscript{92} 988 F. Supp. 2d 212 at 221-223.

showcased in a gallery or a museum. If society is to place such a high value in the protection of people’s artistic works, it also needs to pay attention to how many and what kinds of people this protection is available to. The courts will need to adopt a more inclusive protection to ensure that graffiti artists everywhere are able to protect their artwork.

VI. CONCLUSION

The courts have declined to afford protection under federal copyright laws to graffiti artists. As of now, VARA seems to be one of the only remedies available for protection to artists. The aforementioned case is an example of the court recognizing the artistic value of graffiti art. While this is a good start for graffiti artists’ rights, it is nowhere near the end. This is an important step in the courts recognizing graffiti as a true art form. However, the courts will need to take even larger steps to protect the rights of artists whose artwork may not be in the mainstream.
Cybaris®, an Intellectual Property Law Review, publishes non-student articles and student comments on all areas of intellectual property law, including patents, copyrights, trademarks, licensing, and related transactional matters.
mitchellhamline.edu/cybaris

Intellectual Property Institute
Cybaris® is a publication of the Intellectual Property Institute at Mitchell Hamline School of Law.
mitchellhamline.edu/ip